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Are Foreigners' Human Rights Protected if Foreigners are Employed under the Polish Facilitated Access to Labor Market Scheme?*

Czy uproszczony system zatrudniania cudzoziemców w Polsce należycie chroni prawa cudzoziemców?

ABSTRACT

Civil-law non-employment contracts are abused when employing Polish citizens and foreigners. Contrary to Poles, non-Polish citizens are exposed to linguistic difficulties (the law does not specify a standard of a translation of their contracts), and an application for Polish short-term simplified immigration employment system (a declaration on entrusting work to a foreigner in the territory of the Republic of Poland) does not contain information about differences between civil law and employment contracts. Based on a synthetic theoretical-conceptual analysis the author claims that Polish law exposes foreigners to a higher risk of discrimination. The article aims to prove that mismatch between excessively long court proceedings and short validity of residence permits, as well as linking validity of a visa with employment in a specific employer deprive foreigners from a possibility to effectively personally participate in court proceeding in their employment case. Previous analysis related to seasonal works performed by foreigners had not focused on the nature of the contracts. This article is, therefore, innovative research. It verifies if Polish law discourages employers from abusing civil contracts with such foreigners, if it is in line with the ILO Recommendation No. 198, and if it meets Polish constitutional standard regarding legal clarity. The innovativeness of the research theme can also be derived from the fact that although declarations are the most popular foreigner's employment scheme in Poland and in the European Union, previous research have not focused on human rights of beneficiaries of the declaration scheme.

Keywords: the employer's declaration on entrusting work to a foreigner on the territory of the Republic of Poland; visa; employment contract; civil law contracts; employee's rights

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INTRODUCTION

In an on-demand economy[1] the popularity of non-standard forms of employment comprising "different employment arrangements (…) that deviate from the 'standard employment relationship', understood as work that is full time, indefinite, as well as part of a subordinate relationship between an employee and an employer"[2] is increasing. This widespread "on-demand work" results from, e.g., demographic changes, labor market regulations and macroeconomic fluctuations.[3]

Polish law indicates that a foreigner, so a person who is not a Polish citizen,[4] should have a residence and a work permit if he wishes to work in Poland.[5] Rules on issuance of work permit are prescribed in the Act of 20 April 2004 on employment promotion and labor market institutions.[6] However, the majority of foreigners employed in Poland and the EU benefit from the employer's declaration on entrusting work to a foreigner on the territory of the Republic of Poland (hereinafter: the declaration). This permit is regulated by the Regulation of the Minister of Family, Labor and Social Policy of 7 December 2017 regarding the issue of work permits for a foreigner and the entry of a statement on entrusting work to a foreigner to the register of declarations.[7] This by-law provides a possibility to conclude a contract of employment or a civil law contract, i.e. a mandate contract (*umowa zlecenia*) or a specific work contract (*umowa o dzieło*). These institutions differ. The Act of 26 June 1974 – Labor Code[8] explicitly indicates that relations between the employer

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[1] Also called a gig economy. Cf. International Labour Organization, *ILO Live: Ask the experts – Is the gig economy the future of work?*, 7.6.2018, https://www.youtube.com/watch?v=n4A_Y77Ebqs (access: 11.1.2022).

[2] Internationale Arbeitsorganisation, *Non-standard Employment around the World: Understanding Challenges, Shaping Prospects*, Geneva 2016, p. xxi.

[3] M. Gersdorf, *Nowe trendy gospodarcze a reguła domniemania zawarcia umowy o pracę*, "Acta Universitatis Lodziensis. Folia Iuridica" 2019, vol. 88; A. Ludera-Ruszel, *Umowy prawa cywilnego jako podstawa zatrudnienia – wybrane zagadnienia*, "Acta Universitatis Lodziensis. Folia Iuridica" 2019, vol. 88, p. 25.

[4] Articles 2 and 3 of the Act of 12 December 2013 on foreigners (consolidated text, Journal of Laws 2018, item 2094), hereinafter: AOF. However, according to the Act of 14 July 2006 on the entry into the territory of the Republic of Poland, stay and departure from this territory of citizens of European Union Member States and their family members (consolidated text, Journal of Laws 2021, item 1697) the law does not consider as foreigners i.e. citizens of: the EU Member States, the European Free Trade Association Member States – parties to the EEA Agreement, the Swiss Confederation, the United Kingdom of Great Britain and Northern Ireland, as well as their family members.

[5] A work permit is not needed by law in case of, e.g., foreigners who have received international protection in Poland, holders of the Pole's Card and foreigners-graduates of Polish universities are exempt from the requirement of a work permit (pursuant to the Act).

[6] Consolidated text, Journal of Laws 2019, item 986.

[7] Journal of Laws 2017, item 2345. An application for a declaration is attached to the Regulation.

[8] Consolidated text, Journal of Laws 2019, item 1040.

and the employee (the Labor Code defines both terms) must take the form of a work contract, appointment (*mianowanie*), nomination (*powołanie*) or selection (*wybór*). The term "work" appears in a full name of the declaration permit. Nevertheless, under this scheme, civil law contracts exceed employment contracts.

Obviously, abuses of civil law contracts occur not only in foreigners' cases[9] and not only in Poland.[10] However, this article is devoted to a short-term employment of foreigners who benefit from declarations (so to persons who can stay in Poland up to 6 months in 12 consecutive months), because this system of employing third country citizens is the most popular mechanism in Poland and in the EU. The analysis confirmed that due to a very limited validity of a permit those foreigners are more exposed to insecurity of employment (because their right to work depends on a validity of the declaration[11]), and to economic discrimination[12] than Polish citizens. Divagations focus on impossibility of the third countries citizens' to effectively and personally claim in Polish courts, e.g. an existence of an employment relationship. Lengths of validity of residence permits to participate in a court proceeding related to labor matters and of the actual proceedings vary significantly.[13] Additionally, a new residence permit is required if a foreigner changes an employer. These issues may discourage foreigners from bringing their employment cases to courts.

The research part of the study presents the social and economic context for the establishment and evolution of the claim system based on the analysis of amendments introduced to the declaration scheme. Statistical information indicates that

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[9] Cf. Rzecznik Praw Obywatelskich, *Zastępowanie umów o pracę umowami cywilnoprawnymi – argumenty prawne RPO*, 2017, https://www.rpo.gov.pl/sites/default/files/Zast%C4%99powanie%20um%C3%B3w%20o%20prac%C4%99%20umowami%20cywilnoprawnymi%20-%20argumenty%20prawne%20RPO.pdf (access: 11.1.2022); A. Ludera-Ruszel, *op. cit.*, p. 28.

[10] See International Labour Organization, *Report of the Director-General: Decent Work*, Geneva 1999; International Labour Organization, *R198 – Employment Relationship Recommendation, 2006 (No. 198): Recommendation concerning the employment relationship*, adopted in Geneva, 15.6.2006, https://www.ilo.org/legacy/english/inwork/cb-policy-guide/employmentrelationshiprecommendation-no198.pdf (access: 11.1.2022). Examples from other countries in K. Kotulovski, S. Laleta, *The Abuse and Exploitation of Foreign Seasonal Workers: Did the Coronavirus Emergency Worsen Already Precarious Working Conditions in the Agricultural Sector*, "EU and Comparative Law Issues and Challenges Series (ECLIC)" 2021, vol. 5, pp. 327–328.

[11] Risks faced by seasonal workers were analyzed in International Labour Organization, Food and Agriculture Organization of the United Nations, International Union of Food and Allied Workers' Associations, *Agricultural Workers and Their Contribution to Sustainable Agriculture and Rural Development*, Geneva 2007, p. 39.

[12] Such discrimination is referred to in Motive 43 of Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers (OJ L 94/375, 28.3.2014).

[13] Rzecznik Praw Obywatelskich, *Trzy lata postępowania o zgodę na pracę w Polsce na trzy lata. Interwencja RPO*, 1.3.2021, https://bip.brpo.gov.pl/pl/content/trzy-lata-zgoda-na-prace-w-polsce-cudzoziemiec-interwencja-rpo (access: 11.1.2022).

most beneficiaries concluded mandate contracts for a period close to the maximum visa validity period, although Polish law does not prevent them from concluding employment contracts. In addition, it highlights the main differences between employment contracts and civil contracts, and provides a review of the literature on positive obligations of a state to ensure freedom of work. It was emphasized, i.a., an obligation to ensure that an employer is aware of his/her responsibilities and rights. In Poland, this guarantee is not ensured in practice because a non-citizen may sign a contract that is unprofessionally translated into the language he merely understands. The author also stresses significant differences between the legal position of Poles and foreigners who have to have a valid visa or a residence permit to effectively personally participate in court proceeding. A critical analysis of the law and Polish courts' practice shows that long court proceedings and impossibility to prolong a permit to stay in Poland to participate in proceedings may in practice deprive foreigners of a fair trial. Hence, Polish law does not discourage employers from abusing civil contracts with foreigners, what contradicts with i.e. the ILO Recommendation No. 198.

RESEARCH

1. Social and economic context of declarations

The transformation which took place in Poland in the 1990s exposed many challenges. Regulation of labor market was one of the priorities to subsequent Polish governments. A registered unemployment in Poland varied. In 1993 it reached 16.3% and raised to about 20% in 2002–2004. Hence, Polish law protected access to the Polish labor market. After the accession of Poland to the EU in 2004 protective rules have applied to persons whose rights are the same as rights of Poles, e.g. the EU citizens and recognized refugees.

Since the accession, many Poles have taken better paid jobs in other EU countries. To overcome labor shortages Polish government facilitated access to the labor market.[14] New by-law applied to citizens of the neighboring countries who intended to work for 6 months in 12 consecutive months in farming and horticulture. Law still favored employment of Poles,[15] but new rules were quicker and cheaper than those

[14] Regulation of the Minister of Family, Labor and Social Policy of 30 August 2006 regarding performing work by foreigners without a need to obtain a work permit (Journal of Laws 2006, no. 156, item 1116).

[15] Judgment of the Voivodeship Administrative Court in Poznań of 24 July 2019, II SAB/Po 32/19, Legalis 2204630; I. Florczak, *Zatrudnianie cudzoziemców z krajów trzecich z perspektywy prawa krajowego i realiów rynku pracy – panorama zjawiska*, "Praca i Zabezpieczenie Społeczne" 2019, no. 2, pp. 2–5.

on work permits. This was a breakthrough in foreigners' employment, in particular in low-skilled jobs. Still, labor shortages continued in Poland,[16] although not all Poles work and have been working in their expected jobs, and according to their qualifications. An amendment to the by-law introduced a new residency period in Poland[17] to respond to employers' needs (3 months in 6 consecutive months, previous rule was restored in 2008), and removed an enumeration of sectors of the economy in which the declaration scheme applies. Subsequent changes to the by-law:

- expanded its subjective scope to citizens of Georgia, Armenia and Moldova,[18]
- lifted an obligation of an employer to register an intention of employing a foreigner,
- obliged an employer to sign a statement confirming that he is aware of the consequences of illegal employment of foreigners,
- granted authorities a right to reject a registration of an employer's declaration if they consider it as a circumvention of law (e.g., to use a declaration to legally cross Polish border and illegally work in other EU Member State).

Under the declaration scheme, foreigners can be employed (this term is used in the by-law) on a basis of an employment contract, as well as a mandate contract, and a specific work contract. However, they cannot conclude "on-call" work or "zero-hours" contracts. Hence, foreigners are aware of minimum working hours and wage or salary. The refusal rate in work permits was/is below 1%, although a total number of an issued work permits (Figure 1) and registered employer declarations of entrusting work to a foreigner (Figure 2) has been raised.

Polish declaration scheme and rules on employing seasonal foreign workers complement each other since Poland adopted Directive 2014/36/EU. This is because the Directive applies also to stays that are longer than 3 months. The EU law does not establish any subjective limitations, so it is used in all non-EU citizens' cases.

The majority of foreigners employed in Poland come from Ukraine (Figure 3), benefit from the declaration system, and conclude a mandate contract. The number of a specific work contract is close to the number of employment contracts (Figure 4). Hence, civil law contracts outnumber employment contracts, although the overwhelming majority of foreigners work in Poland for more than 90 days, even though the costs of work permits were decreased in 2007.

[16] Similar problem was noticed in Croatia. See K. Kotulovski, S. Laleta, *op. cit.*, p. 328.

[17] Regulation of the Minister of Family, Labor and Social Policy of 27 June 2007 amending the regulation regarding performing work by foreigners without a need to obtain a work permit (Journal of Laws 2007, no. 120, item 824). It meets the criteria of "codification" of law referred to in M. Chmieliński, M. Rupniewski, *In Search for a Model of Neutrality*, "Studia Iuridica Lublinensia" 2021, vol. 30(5), pp. 130–131.

[18] Regulation of the Minister of Family, Labor and Social Policy of 2 February 2009 amending the regulation regarding performing work by foreigners without a need to obtain a work permit (Journal of Laws 2009, no. 21, item 114).

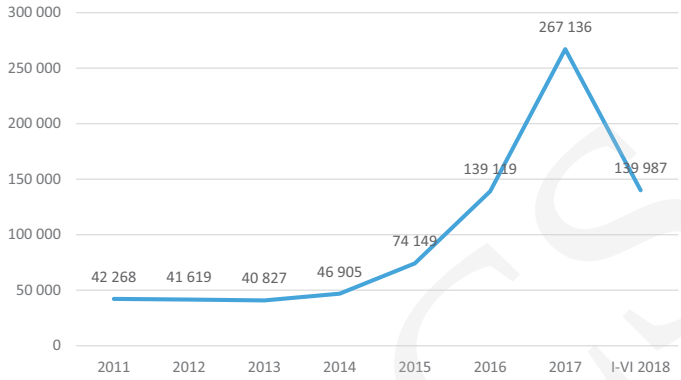


Figure 1. Total number of applications for a work permit in Poland

Source: own research.

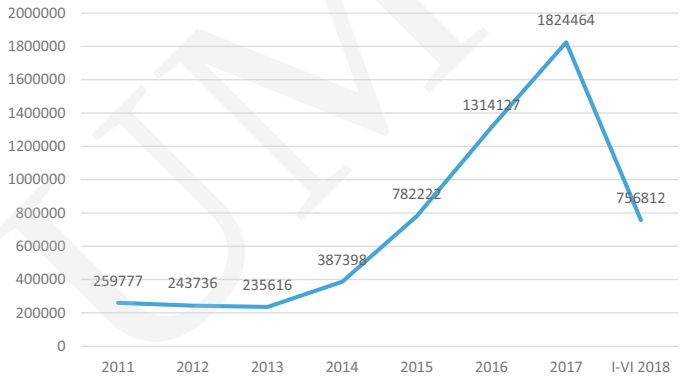


Figure 2. Registered declarations in Poland

Source: own research.

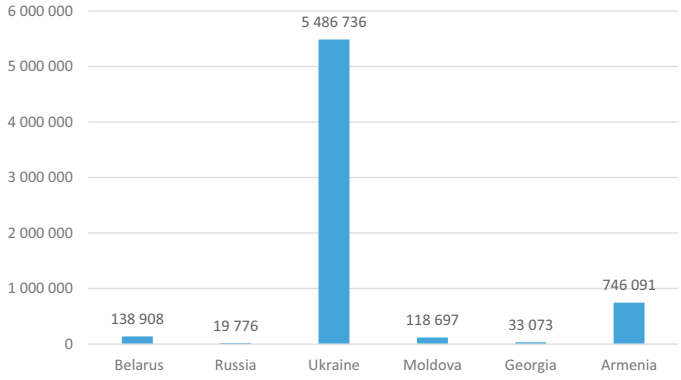
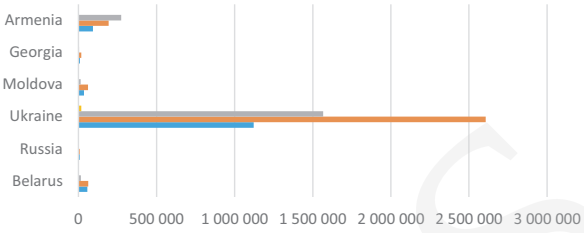


Figure 3. Countries of origin of foreigners-beneficiaries of declarations

Source: own research.



	Belarus	Russia	Ukraine	Moldova	Georgia	Armenia
Other	521	155	18 832	301	111	2 289
Specific work contract	15 866	3 077	1 566 549	13 997	3 499	273 283
Mandate contract	63 240	8 364	2 606 290	61 346	18 433	192 787
Employment contract	56 842	7 607	1 121 807	35 330	9 801	92 507

Figure 4. Total numbers of contracts concluded under the declarations scheme

Source: own research.

Data presented in Figures 1–4 should be referred to the EU context. In 2017–2019 Poland issued the biggest number of work permits for foreigners (328,000 permits in 2018, and 724,000 in 2019)[19]. In 2018, 37% of all permits issued for employment reasons in the EU were granted in Poland, but in 2019 it was already 86.3% of all permits.[20]

2. Employment contract and civil contracts in Polish law

The right to freely choose the type of a performed work is secured, among others, in Article 65 (1) of the Polish Constitution.[21] It can also be found in international law, e.g.:

- the Universal Declaration of Human Rights of 10 December 1948,[22]
- Article 6 of the International Covenant on Economic, Social and Cultural Rights of 19 December 1966,[23]
- Article 1 of the European Social Charter of 18 October 1961,[24]
- Article 15 § 1 of the Charter of Fundamental Rights of the European Union.[25]

[19] Eurostat, *Residence permits for non-EU citizens*, "Eurostat News Release" 2019, no. 164, p. 2; Eurostat, *Residence permits – statistics on first permits issued during the year*, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Residence_permits_-_statistics_on_first_permits_issued_during_the_year&oldid=541659#First_residence_permits_.E2.80.94_an_overview (access: 11.1.2022).

[20] *Ibidem*.

[21] Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws 1997, no. 78, item 483, as amended).

[22] United Nations, Universal Declaration of Human Rights, https://www.un.org/en/universal-declaration-human-rights (access: 11.1.2022).

[23] Journal of Laws 1977, no. 38, item 169.

[24] Journal of Laws 1999, no. 8, item 67, as amended.

[25] OJ C 115, 9.12.2008.

It is worth to emphasize that these guarantees apply also to foreigners.

In Poland "the basic employment relationship is the employment contract relationship".[26] However, the Act of 23 April 1964 – Civil Code[27] provides the possibility of concluding other types of contracts, e.g., a specific work contract and a mandate contract. Freedom prescribed in Article 65 (1) of the Constitution applies also to civil law non-employment contracts. Parties to these contracts are, however, a mandate and a mandatary (Article 734 § 1 of the CC), and in case of a specific work contract: a contracting authority and a recipient of an order (Article 627 of the CC). They cannot be described as an "employer" and an "employee", because "unlike (…) an employment relationship for which the subject of the employee's obligation is work",[28] civil law contracts focus on due diligence (contract of mandate) or result (contract for specific work). Hence, the scope of the parties' liability differs. In employment relationships, work is defined by indicating the type of work, and the employee is obliged to follow instructions of his superior, if they are not against the law or against the employment contract. Thus, the employee "puts himself at the disposal of the employer, who may use the employee's person within the limits set by the agreed type of work, as well as by the provisions of labor law".[29] However, as A. Śledzińska-Simon rightly points out, it is rather a sale of work than a use of a person by an employee, because "a person cannot be treated by anyone as a thing or a means of production".[30]

In case of an employment contract, the employment is not defined "in the sense of the result as in the case of a specific work contract, but in the functional sense".[31] Hence, the employer bears the "personal, economic, technical and social"[32] risk of setting goals and its ongoing coordination.[33] He is also obliged to ensure safe and hygienic working conditions, as indicated several times in the Labor Code. In civil law contracts the above-described subordination "is small, because the narrowly [quite precisely] defined subject of the obligation excludes the possibility of issuing

[26] A. Rycak, *Charakterystyka stosunku pracy*, [in:] *Prawo pracy*, ed. J. Stelina, Warszawa 2016, p. 113.

[27] Consolidated text, Journal of Laws 2019, item 1145, hereinafter: the CC.

[28] A. Rycak, *op. cit.*, p. 119.

[29] B. Wagner, *Stosunek pracy i jego treść*, [in:] *Prawo pracy RP w obliczu przemian*, eds. M. Matey-Tyrowicz, T. Zieliński, Warszawa 2006, p. 150.

[30] A. Śledzińska-Simon, *Wolność pracy*, [in:] *Realizacja i ochrona konstytucyjnych wolności i praw jednostki w polskim porządku prawnym*, ed. M. Jabłoński, Wrocław 2014, p. 574.

[31] A. Świątkowski, *Komentarz do art. 25*, [in:] *Kodeks pracy. Komentarz*, Legalis 2018, marginal number 5.

[32] *Ibidem*.

[33] A. Rycak, *op. cit.*, p. 117; W. Muszalski, *Art. 22 KP*, [in:] *Kodeks pracy. Komentarz*, ed. G. Goździewicz, Warszawa 2019.

instructions and freely disposing of the person who performs certain activities".[34] Responsibility for an ill-performance rests in principle with a person that accepted the order. Therefore, civil law contracts transfer responsibility, e.g., for complying with the principles of health and safety at work, but in natural persons cases – to the extent that they are specified by the employer or other entity organizing work – the obligation to protect life or health does not depend on the basis of employment,[35] possessing professional tools, evaluating properly costs and the amount of work needed to perform the contract, and performing a contract to the person that accepted the order and the mandatary. Thus, in high risk of ill-performance and high injury rates works overuses of civil law non-employment contracts are more frequent[36]. This includes, e.g., health care services (liability for errors in care can result in a need to, i.a., cover the costs of compensations or treatments of the supervised person), and construction, transport or agriculture (due to the number of accidents at work and often changes of prices of building materials). These sectors of the economy are popular among foreigners working in Poland.

Parties to civil contracts do not have paid holidays and a remuneration of a terminated contract is limited. A mandatary bears responsibility for the risk he takes, not for his culpability. These features of civil law contracts increase flexibility of management of tasks. Nevertheless, they ignore a link between the employment of a foreigner under declarations scheme and a validity of his visa, which will be presented in point 3.2 of this article.

3. The declaration scheme and human rights of foreigners

3.1. Positive obligations of a state

J. Żołyński notes that a transformation in Roman times of the lease of services into an employment contract "was a consequence of a lack of equality of the parties and a need to protect the weaker side of an employment relationship, which is the employee (…). This process continues to this day".[37] A right to work, referred to in the Constitution, is the second generation right of human rights, so it is state's obligation to act diligently to provide a possibility of taking a job for which the employee receives a decent remuneration. However, a right to work is not a sub-

[34] A. Rycak, *op. cit.*, p. 115. Cf. U. Brońska-Matula, *Umowa o dzieło jako podstawa zatrudnienia*, "Polityka Społeczna" 2011, no. 10, p. 13.

[35] Judgment of the Supreme Administrative Court of 4 April 2017, I OSK 1558/15, Legalis. More in a commentary to Article 304^1 in K. Walczak, *Art. 296–305*, [in:] *Kodeks pracy. Komentarz*, eds. W. Muszalski, K. Walczak, Legalis 2021.

[36] Internationale Arbeitsorganisation, *op. cit.*, p. xxiii.

[37] J. Żołyński, *Prawo pracy – prawo prywatne czy prawo publiczne. Rozważania na tle charakteru umowy o pracę*, "Studia z Zakresu Prawa Pracy i Polityki Społecznej" 2016, no. 23, p. 401.

jective right, so an employee cannot demand a job of his choice, an employment contract (if a civil contract is legal) or a salary that he considers decent (exceeding the minimum established by law).

Parties to the contract have equal rights. However, in a free market economy a selection of a type of a negotiated contract is mainly at a discretion of the economically stronger entity which may try to impose unfavorable conditions of work on new employees.[38] Since "freedom of work is in practice a fiction when people without a job are forced to take any employment and agree to conditions dictated unilaterally by employers",[39] the law which provides a possibility of concluding an employment contract and civil law contracts may be misleading to foreigners. This is because Polish employer has greater knowledge of Polish law and the practice of its application, and knows the Polish language better than non-Poles.[40]

Foreigners' insufficient knowledge of the Polish language and law is making it difficult for them to identify differences between the analyzed contracts. According to Article 8 of the Act of 7 November 1999 on the Polish language[41] employment contract is concluded in Polish. It can also be drafted in another language upon the foreigner's request. To ensure that foreigners and consumers are aware of this option, the Act imposes an obligation to inform employers and parties to consumer contracts about this right. However, a translation to a language known by a foreigner does not have to be a sworn translation, so a quality of translation may vary. This also does not have to be a foreigner's native language. Proficiency in this language is unspecified by law. Also, a level of required knowledge of Polish language is (as a rule) undeclared. Therefore, some beneficiaries of the declaration system may have limited knowledge of their obligations and rights. Legal terminology differs from everyday language, so even people fluent in Polish and those supposed to understand a translated contract may have difficulties with its interpretation.

According to § 5 of the ILO Recommendation No. 198 a state should take a "particular account in [its] national policy to ensure effective protection to workers especially affected by the uncertainty as to the existence of an employment relationship, including (…) migrant workers". This is a commitment to act diligently. Similar protective guarantees stem from Recital 43 and Articles 6 and 25 of Directive 2004/36/EU. Hence, Poland should take steps to limit a possibility of claiming

[38] J. Piątkowski, *Umowa o pracę na czas określony w kodeksie pracy – nowa jakość czy powolny zmierzch tożsamości?*, "Studia z Zakresu Prawa Pracy i Polityki Społecznej" 2016, vol. 23, p. 10; A. Ludera-Ruszel, *op. cit.*, p. 28. This issue is closely related to the protective function of labor law, although its scope is subject to disputes. See M. Wieczorek, *Some Aspects of Labour Law's Protective Function at the Time of COVID-19*, "Studia Iuridica Lublinensia" 2021, vol. 30(1), pp. 340–341.

[39] T. Zieliński, *Problemy części ogólnej prawa pracy*, [in:] *Prawo pracy RP…*, pp. 45–46. Similarly M. Wieczorek, *op. cit.*, p. 341.

[40] Similar findings in Croatian context: K. Kotulovski, S. Laleta, *op. cit.*, pp. 330–331.

[41] Consolidated text, Journal of Laws 2019, item 1480.

that civil law and employment contracts grant similar rights and impose similar obligations. If it was assumed that an employer may be unaware of the criminal law consequences of registering a declaration to overuse legalization of a stay of foreigners (this can be derived from recalling this responsibility in the declaration application), then indicating fundamental rights of employees in the declaration application seems to be even more justified, because it protects the weaker side. Protective approach is in line with Article 2 of the Constitution, which requires limiting legal uncertainty by ensuring proper wording of the law.[42]

Moreover, T. Zieliński correctly stressed that "protection of freedom of work cannot be understood in terms of exclusively negative freedom (no forced labor). It should be seen as a positive feature – the possibility of exercising the right to work freely chosen thanks to state guarantees".[43] This claim is particularly accurate if the right is executed by socially disadvantaged groups like foreigners.[44] As A. Śledzińska-Simon points out, "protection against economic exploitation in private relations is often illusory, and labor camps organized mainly for illegal immigrants (…) are also established in Poland".[45] Support to people requiring special treatment allows for reconciling social goals with requirements of the economy in the conducted activity.[46] This standard can also be deduced from the Constitution. Thus, it should be emphasized that "the parties may (…) arrange the legal relationship between them at their own discretion, as long as its content or purpose does not contradict the properties (nature) of the relationship, the law or the principles of social coexistence (Article 353^1 of the CC)".[47] Restrictions concern a choice of a type of contract. For protective reasons, such a legal structure limits a practice of sham civil law contracts.[48] Reducing the scale of the abuse is the Polish government's priority, what was explicitly mentioned in § 4.1 of the National Action Plan for Employment for 2019.[49]

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[42] Judgment of the Constitutional Tribunal of 19 June 2012, P 41/10, OTK-A ZU 2012, no. 6, item 65. This provision also emphasizes the importance of justice (mainly social) for the Polish legal system. See M. Kordela, *Wewnętrzna i zewnętrzna aksjologia prawna*, "Studia Iuridica Lublinensia" 2020, vol. 29(5), p. 32.

[43] T. Zieliński, *op. cit.*, pp. 45–46. Similarly J. Żołyński, *op. cit.*, p. 411.

[44] Foreigners are generally considered as a vulnerable group, e.g., by Inter-American Court of Human Rights in Advisory Opinion OC-18/03 of 17 September 2003, requested by the United Mexican States, Juridical Condition and Rights of Undocumented Migrants.

[45] A. Śledzińska-Simon, *op. cit.*, p. 574. However, the author incorrectly uses a term "illegal immigrants". See P. Sadowski, *Prawne, polityczne i społeczne konsekwencje rozdźwięku między uzusem a definicjami zawartymi w tekstach prawnych dotyczących imigracji*, "Ius Novum" 2016, no. 4.

[46] J. Żołyński, *op. cit.*, p. 403.

[47] B. Wagner, *op. cit.*, p. 147.

[48] See W. Muszalski, *op. cit*.

[49] Ministerstwo Rodziny, Pracy i Polityki Społecznej, *Krajowy Planu Działań na rzecz Zatrudnienia na rok 2019*, 6.6.2019, https://www.gov.pl/attachment/233d0d65-50eb-46a3-ac74-9a789cb7c5d5 (access: 11.1.2022).

Bearing in mind that two-thirds of the beneficiaries of the declarations conclude a contract for a specific task or a mandate contract, it should be emphasized that "the compulsiveness of the situation of a person stems from a fact that his current living conditions are so unfavorable that his and his family basic needs are directly threatened with great harm or inability to be met, and that in order to avoid this, he is willing to take on himself – in order to improve his situation – obligations even disproportionately greater than the desired mutual benefits of another person".[50] A declaration is registered by an employer before a foreigner submits his visa application. The employer also ensures that the foreigner knows the terms of employment before leaving the country. These steps intend to limit a scale of illegal immigration to Poland. It is obvious, however, that the number of Polish employers who are ready to register the declaration is limited, and not all of them have representatives abroad. Thus, foreigners have only a marginal alternative to concluding a civil contract, if the employer interested in their employment imposes it.

3.2. A limited validity of a visa

A sovereign state may regulate terms and conditions of foreigners' employment. This does not contradict the UE law if national law secures rights of the EU Member States citizens and persons whose rights are equal.[51] Hence, a state can decide that non-EU nationals must have a residence and a work permit to legally work in that country. Still, the period of validity of a residence permit cannot be shorter than the period of validity of a work permit.

Residence and work permit systems do not release employers from an obligation to conclude employment contracts in employment relations. Pursuant to Article 25 of the Labor Code, an employment contract may be concluded for a definite period (which may be extended) or for an indefinite period. A contract for an indefinite period is a typical form of employment, unless the parties have stipulated otherwise,[52] and a fixed-term contract is considered an atypical form of employment. Contracts concluded for the duration of a specific job were removed from Article 25 § 1 of the Labor Code, but this "does not mean (…) [that] the legislator resigned from specifying the final date of a contract concluded for a definite period".[53] An employment contract may be terminated after an expiry of a visa if a work permit

[50] Judgment of the Supreme Administrative Court of 31 October 1966, Rw 904/66, OSNKW 1967, no. 1, item 6, as cited in *Kodeks karny. Komentarz*, red. R. Stefański, Warszawa 2019, Article 304 of the Penal Code, § 13.

[51] See Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (OJ C 306/1, 17.12.2007).

[52] Resolution of the Supreme Court of 16 April 1998, III ZP 52/97, OSNAPiUS 1998, no. 19, item 558.

[53] A. Świątkowski, *op. cit.*, marginal number 4.

is denied, so when circumstances terminate the employment contract occurs. Thus, law promotes employment contracts with foreigners, despite the fact that contracts for a specific task are also possible "for a specified period [during which] (…) the contractor will perform a given work periodically, e.g., once a month".[54] Hence, a limited validity of a visa is not an obstacle to conclude an employment contract with a foreigner.

Extension of stay over 6 months in the consecutive 12 months requires obtaining a residence and work permit. An application for the permit can be submitted when a visa is valid. If the decision is not issued on time, the foreigner may legally work in Poland (Article 87 (1) (12) (b) of the Act on employment promotion and labor market institutions in conjunction with Article 108 (1) AOF). This protects the employee and the employer against possible damages caused by prolonged actions of the administration. Pursuant to Article 25^1 of the Labor Code, the fourth extension of the contract results in the conclusion of a contract for an indefinite period. The total duration of the contracts between the same parties may not exceed 33 months, which is therefore well above the period allowed by the declaration. This provision will not be used in case of foreigners employed to, i.e., perform occasional or seasonal work. Additionally, an employer may terminate an employment contract in the future and uncertain works (e.g., fruit picking).

Nevertheless, termination of civil contracts is easier than termination of labor contracts. An orderer and a mandat are not bound by any notice periods, and they do not have to know a reason to the termination. Moreover, Article 644 of the CC indicates that until the specific work has been completed, the contracting authority may withdraw from the contract at any time by paying the agreed remuneration. The withdrawing party may also deduct what the person that accepted the order saved due to the not completing the work. A mandat should receive only expenses he has incurred or remuneration reduced by the costs saved due to non-performance of the work. The contracting authority may terminate it at any time and should reimburse the expenses which the recipient of the order has incurred in order to properly execute the order. In the event of a paid order, the authority is obliged to pay the accepting order part of the remuneration corresponding to his previous activities, and if the termination took place without valid reason, he should also repair the damage. The above-discussed aspects of terminating civil contracts are beneficial for employers. However, they are a source of a risk for the rights of foreigners due to a strict connection between residence and work permits. Obviously, employees can claim their rights in court, but the effectiveness of court proceedings is limited in foreigners' cases.

[54] U. Brońska-Matula, *op. cit.*, p. 12.

3.3. A *de facto* limited availability of legal remedies

Individuals may claim at Polish courts rights stemming from employment relations if they fall within the court's jurisdiction. As M. Muszalski emphasizes "the finding that a mandate contract has, in fact, created an employment relationship (…) serves to protect a person who, while providing work under the terms of an employment contract, has been deprived of employee status as a result of abuse of the economic and organizational advantage of her employer".[55] The same conclusion applies to an overuse of a specific work contract.

Employment relationship cases are heard by common courts (labor and social security courts, and in smaller district courts – labor courts) acting as a part of separate civil proceedings. These cases are, among others:

- on claims arising from employment or related to it like standard wage claims,
- on establishing the existence of an employment relationship if the legal relationship between the parties has the characteristics of an employment relationship, contrary to the contract concluded between them,
- on claims stemming from other legal relationships to which, under separate provisions, labor law applies,
- on compensation for accidents at work and occupational diseases.

Foreigners have to rely on Polish general rules because there are no special court procedures for foreigner's employment. This is in line with international law. Yet, Polish law fails to notice that under the declaration scheme foreigners have short--term residence permits, so speediness of court procedures is essential for them.[56] According to Article 181 (1) of the AOF a temporary residence permit due to circumstances requiring a short-term stay of a foreigner in Poland may be granted if the foreigner is obliged to appear in person before Polish public authority. The Act also contains a closed list of reasons for refusing this permit. The wording of the law respects, i.a., Article 6 of the Convention on Human Rights and Fundamental Freedoms of 4 November 1950.[57] The decision on granting the permit depends on an assessment if the foreigner is obliged to appear before the Polish authority. The voivode must, therefore, determine, among others, if a foreigner may commission his case, e.g., to a professional representative, and if a foreigner can provide evidence and explanations to Polish authorities in a form of written pleadings.

The decision cannot be arbitrary, so it must contain a reference to an individual situation of the applicant. Voivode's decision can be appealed to the Head of the

[55] W. Muszalski, *op. cit*.

[56] Croatian doctrine recommends shortening time limits in Croatian court proceedings. See K. Kotulovski, S. Laleta, *op. cit.*, p. 43. A requirement to ensure effective mechanisms allowing seasonal workers to file complaints against employers is also provided for in Article 25 of Directive 2014/36/EU.

[57] Journal of Laws 1993, no. 61, item 284, hereinafter: the ECHR.

Office for Foreigners – a central government administration body competent for matters concerning, i.a., entry of foreigners into Poland, transit through this territory, stay there, and departure from it.

A residence permit may be granted only for the period necessary to achieve the purpose for which it is granted, but not longer than 6 months (Article 181 (2) of the AOF). It is not possible to extend the validity of the permit if the case is not completed within this time. However, "the average duration of a labor law case before the district court in 2018 was 8.7 months, and before the regional court – 12.4 months".[58] Thus, foreigners have to apply for a permit of a different type, demonstrate a need to participate personally in the proceeding, and stay in Poland longer than planned. Moreover, a remuneration for a specific work is, as a rule, paid once upon completion of the specific work. Hence, due to the expiry of the visa, a foreigner may not be able to appoint a representative and refer the case to court.

Lengthy court procedures may discourage foreigners from claiming their rights. Polish law, therefore, does not meet the standard of § 4 of the ILO Recommendation No. 198 which specifies that "National policy should at least include measures to: (…) (e) provide effective access of those concerned, in particular employers and workers, to (…) speedy (…), fair and efficient procedures and mechanisms for settling disputes regarding the existence and terms of an employment relationship". It is also contrary to Article 6 of the ECHR as regards a fair procedure. This standard includes a right of all parties to access a court, and to present arguments in favor of their argumentation including by speaking to the court, submitting relevant documents, and to be represented by a professional legal representative.[59] Polish law, however, meets the standard regarding court costs, as it is the court in individual proceedings that decides if high costs of court proceedings would not deprive the applicant of a right to a fair trial.[60]

In Poland a professional legal representation is guaranteed to foreigners by a reference to general regulations on an expertise of an advocate or a barrister. As a rule, foreigners and Poles will have to pay for this service, unless the court (acting in response to their request) would decide on granting a free-of-charge legal service to

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[58] Ł. Gruza, *Rewolucja w zwolnieniach z pracy*, 5.8.2019, https://serwisy.gazetaprawna.pl/praca-i-kariera/artykuly/1424810,zmiany-w-zwolnieniach-z-pracy-i-przywrocenia-do-pracy.html (access: 11.1.2022).

[59] As in the judgment of the ECtHR of 10 March 2009 in *Bykov v. Russia*, Application no. 4378/02.

[60] As in the judgment of the ECtHR of 19 June 2001 in *Kreuz v. Poland*, Application no. 282249/95. T. Demendecki correctly stresses that "The appropriate system of reimbursement of the costs of proceedings and the institution of exemption from such costs both guarantee the real implementation of the right to court" (T. Demendecki, *Kilka uwag o zwolnieniu z opłaty od skargi na przewlekłość postępowania skarżącego w sprawach z zakresu prawa pracy i ubezpieczeń społecznych. Glosa do uchwały Sądu Najwyższego z dnia 6 września 2006 r. (III SPZP 2/06)*, "Studia Iuridica Lublinensia" 2019, vol. 28(4), p. 155).

them. Owing to this individualized assessment Polish law is in line with Article 6 of the ECHR. Additionally, a foreigner may benefit from an expertise of non-governmental organizations (NGOs) which are professionally dealing with foreigners' cases. Services provided by these organizations may be particularly useful to foreigners from culturally different countries, and those who are not fluent in Polish. Nevertheless, a so-called "criminalization of solidarity" is increasingly popular,[61] what limits the NGOs' support. States execute a wide margin of appreciation in regulating these issues. However, their actions cannot be arbitrary, and they should respect fundamental values of a democratic society. Hence, if the NGOs' actions are limited, it is for the state to ensure that this does not lead to the inefficiency of an execution of rights of others, e.g., foreigners who had been supported by these organizations.[62] The state is responsible for the failure to provide effective mechanisms for the protection of human rights, including access to court proceedings.

CONCLUSIONS

Civil law and employment contracts are not alternative contracts. This was emphasized in the Labor Code and, i.a., in the position of the Polish government, as well as in the doctrine. Nevertheless, Polish law expressly grants a right to employ foreigners under civil law contracts. The term "work" is even used in the name of the regulation.

Additionally, the popularity of concluding short-term civil law contracts with foreigners limits the number of employers offering employment contracts to them. This increases the dominant position of employers in the labor market. This analysis proved that employers' business calculations model may be, therefore, affected by a low probability of being found to abuse civil law contracts in foreigners' cases. A short validity of a declaration and lower knowledge of the Polish language make it difficult for foreigners to claim an existence of an employment relationship before Polish courts, and to assert their rights arising from such a relationship. Court procedures are lengthy, a residence permit for participation in these proceedings can be obtained only once, and its validity is short, what does not ensure the proper effectiveness of the Labor Code. Thus, although civil contracts are abused not only under the declaration system, Polish regulations make it particularly difficult for foreigners to assert their rights, what contradicts with the ECHR and the ILO laws.

[61] These are government's measures implemented to discourage non-governmental actors from supporting foreigners. See W. Klaus, *Karanie za pomoc – jak rządy zniechęcają organizacje społeczne wspierające migrantów i ich aktywistów do działania*, "Trzeci Sektor" 2018, vol. 4, pp. 13–14.

[62] P. Sadowski, *Wspólny Europejski System Azylowy – historia, stan obecny i perspektywy rozwoju*, Toruń 2019, pp. 172–173.

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ABSTRAKT

Niepracownicze stosunki zatrudnienia cywilnoprawnego są nadużywane podczas zatrudniania obywateli polskich i cudzoziemców. W przeciwieństwie do Polaków obywatele państw pozaunijnych eksponowani są na trudności językowe (prawo nie określa standardu tłumaczenia ich umów), a wniosek o zezwolenie na pobyt w ramach polskiego krótkoterminowego uproszczonego systemu zatrudnienia cudzoziemców (oświadczenie o powierzeniu pracy cudzoziemcowi na terytorium Rze-

czypospolitej Polskiej) nie zawiera informacji o różnicach między umowami cywilnymi i umowami o pracę. Opierając się na wynikach syntetycznej analizy teoretyczno-koncepcyjnej, autor stwierdza, że polskie prawo naraża cudzoziemców na podwyższone ryzyko dyskryminacji. Celem artykułu jest wykazanie, że różnica między długotrwałymi postępowaniami sądowymi i krótką ważnością zezwoleń na pobyt, a także powiązanie ważności wizy z zatrudnieniem u konkretnego pracodawcy pozbawiają cudzoziemców możliwości skutecznego osobistego udziału w postępowaniu sądowym w sprawach pracowniczych. Dotychczas w analizach dotyczących prac sezonowych wykonywanych przez cudzoziemców nie skupiano się na badaniu charakteru umów zawieranych z cudzoziemcami. Nowatorskim celem badania jest ustalenie, czy prawo polskie zniechęca pracodawców do nadużywania umów cywilnoprawnych zawieranych z cudzoziemcami czy też jest zgodne z Zaleceniem Międzynarodowej Organizacji Pracy nr 198, a także czy spełnia konstytucyjny standard dotyczący jasności prawa. Nowatorstwo poruszonej w artykule problematyki podkreśla fakt, że choć oświadczenia są najpopularniejszym mechanizmem zatrudniania cudzoziemców w Polsce i w Unii Europejskiej, to w dotychczasowych badaniach nie koncentrowano się na prawach człowieka beneficjentów tego systemu.

Słowa kluczowe: oświadczenie o powierzeniu wykonywania pracy cudzoziemcowi na terytorium Rzeczypospolitej Polskiej; wiza; umowa o pracę; umowy cywilne; prawo polskie