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STABILISING OR DYNAMISING APPROACH—CHANGES IN THE EMPLOYMENT SYSTEM FOR FOREIGNERS

Abstract

Since Poland started the transformation from a country of emigration to a country of immigration, the legal environment related to the employment of foreigners has been constantly changing. These changes seem to be of a bumpy nature, although they implement in a relatively consistent manner certain assumptions that can be called systemic. This article will analyse main directions of legal changes related to the employment of foreigners in Poland, specifying at the same time the objectives that the legislator intended to achieve when introducing them. This will make it possible to show the organisational priorities of labour market regulation and the values that the national legislator aims to protect. Such an analysis, in turn, will make it possible to assess legislative actions and (in the case of their approval) to indicate further necessary improvements made in the spirit of the existing ones or (in the case of their criticism) to set new directions of actions.

Słowa kluczowe: zatrudnianie cudzoziemców, polityka migracyjna, migracje zarobkowe, cudzoziemcy

Keywords: employment of foreigners, migration policy, labour migration, foreigners

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Introductory issues. Foreigners on the Polish labour market

The presence of foreigners in the domestic labour market has to be measured by various coefficients. Simply comparing the growth of one of them over the years may lead to erroneous conclusions if, in addition, it is done without taking into account the other coefficients and the wider context. Therefore, in order to determine the degree of increase in the presence of foreigners on the labour market, it is necessary to carry out a multi-level analysis. For this purpose one should use data related to: 1) work permits (18,022 were issued to foreigners in 2008; 365,490 in 2022)¹; 2) declarations of intention to entrust

¹ Data based on statistics available at <https://psz.praca.gov.pl/web/urzed-pracy/-/8180075-zezwolenia-na-prace-cudzoziemcow>. It should be borne in mind that the legislation enacted in connection with COVID-19 extended

work to a foreigner or declaration of entrusting work to a foreigner² (in 2007—21,797 such declarations were registered, in 2022—1,038,316 declarations were entered into the register of declarations)³.

Even a cursory analysis of the above data together with a general reference to the accompanying legal context leaves no doubt that foreigners are increasingly present on the Polish labour market. This entails changes to the law. These changes can take two forms, which I adopt after Maria Borucka-Arctowa (1982, p. 14). Firstly, they can be dynamising, proactive, of a systemic scope, which aim to shape the employment of foreigners in a specific way. Changes may also be reactive in nature (stabilising). This is the case when the reason to make a change in the law is a social process that has already taken place and requires the intervention of the legislator.

The following part of the text will present selected changes related to the legislation regulating the employment of foreigners, classified according to the reasons justifying their introduction. Describing these changes will make it possible to assess them and, consequently, to propose further directions for legislative interference.

Selected changes of an improving nature

On 29 January 2022 the new regulations based on Act of 17 December 2021, Amending the Act on Foreigners and Certain Other Laws (Dz.U. 2022, item 91) came into force (Florczak 2022b, pp. 6–7). As indicated in the justification of the draft of this amendment, the streamlining of proceedings⁴ concerning the granting of temporary residence permits to foreigners on the territory of the Republic of Poland, in particular temporary residence and work permits, which are the most frequently granted type of temporary residence permits in Poland (Sejm 2021, p. 1). According to statistical data, the number of persons who were granted temporary residence permits in 2010 was 30 740, while in 2022 it was 303 596.⁵ This number refers to all types of temporary residence permits. For years, the largest number among them has been, as indicated in the parliamentary explanatory memorandum, permits issued in connection with work.

the possibility to work on the basis of a work permit, and therefore the data given do not materialise the real scale of the phenomenon of work by foreigners on the basis of permits.

² The name change took place from 2018.

³ When analysing the data provided, several factors should be borne in mind: 1) the widening, over the years, of the circle of countries whose nationals may use the indicated procedure (more on this topic: Florczak 2018, pp. 84–85); 2) the provisions enacted in connection with COVID-19 prolonged the possibility to work on the basis of a statement on entrusting work to a foreigner; 3) the possibility to enter the declaration in the register of declarations more than once for the same foreigner; 4) the introduction in 2022 of a procedure for making a notification of employment of a foreigner, which, due to its subjective scope, had the effect of reducing the number of declarations entered in the register of declarations.

⁴ As research shows—the complexity of procedures is one of the main factors hindering the employment of foreigners (Kubiciel-Lodzińska 2013, p. 107).

⁵ Data based on migracje.gov.pl.

The fact that improvements were necessary does not need convincing—the inefficiency of the Polish system for serving foreigners has been known about for years—thanks to, among other things, the report of the Supreme Audit Office (Florczak 2022a, p. 166).

The introduced changes to the Act on foreigners (later on as: AoF) will be presented limiting themselves to those that make the most significant difference to the labour market. The removal of the residence requirement and the requirement to have a source of stable and regular income for the granting of a temporary residence and work permit (Art. 114 sec. 1 point 2 and sec. 5 of AoF) aimed to reducing the length of the proceedings by reducing the circumstances that must be investigated during the proceedings by the governor examining the application. This aim has been achieved. At the same time, in the course of the procedure for granting a temporary residence and work permit, the foreigner has to prove their place of residence (Art. 106 sec. 1 point 1 in connection with Art. 13 sec. 19 of AoF) which guarantees that the foreigner has a place to live. Material security of the foreigner in place of the repealed Art. 114 sec. 2 of AoF had another amendment introduced—the necessity for a foreigner to obtain a minimum salary regardless of the type of legal relationship and working hours has been introduced (Art. 114 sec. 1 point 5 of AoF).⁶

An important change streamlining the processes related to the employment of foreigners was also the introduction of greater flexibility in terms of the possibility to change the conditions of work without changing the temporary residence and work permit. The catalogue of circumstances that do not require such a change was expanded in Art. 119 of AoF to include a change of the name of the position in which the foreigner performs work while maintaining the scope of their duties or an increase in the working hours with a proportional increase in remuneration. The correlate of this change was the introduction of a special procedure related to the amendment of the temporary residence and work permit (regulated i.e. in Art. 120a and 120b of AoF). There has also been a broadening of the catalogue of circumstances in which such a change is possible. In accordance to the Art. 120 sec. 1 point 2 of AoF if the foreigner intends to work for another entity entrusting the work or under conditions of exemption from the work permit they do not then have to apply for a new temporary residence and work permit—it is sufficient to amend the permit.

As the Supreme Audit Office pointed out in its report (NIK 2019, p. 11), one of the main problems related to the conduct of administrative proceedings involving foreigners was the untimely handling of applications for the influx of and employment of foreigners. The amendment to Act on foreigners from 2019 sought to make improvements in this regard by introducing a deadline for handling the case. The introduced Art. 112a of AoF stipulates that a decision on granting a temporary residence permit to a foreigner shall be issued within 60 days. There are, however, two aspects that are relevant here, which in practice did not achieve the

⁶ In my opinion, the change adversely affects the organisation of the labour market by making it economically unviable to employ foreigners on a part-time basis (which may consequently lead to their employment without the necessary legalisation). In addition, according to my experience, it causes a belief among entities employing foreigners that it is necessary to look for (not always lawful) solutions to limit the mobility of foreigners on the labour market in order to avoid paying them for work not performed.

purpose of this amendment. Firstly, according to Art. 112a sec. 2 of AoF, the commencement of the indicated time limit starts after a factual examination of the circumstances of the case. In addition, shortly after the entry into force of this provision, as will be discussed further on, a regulation was introduced according to which the course of time limits for the handling of cases by voivodes (including cases related to the issuance and modification of temporary residence and work permits) does not commence and the one started is suspended.

An extremely important change introduced by the Act of 17 December 2021 was the extension of the possibility to enter a declaration of entrusting work to a foreigner in the register of declarations made in the Act on Promotion of Employment and Labour Market Institutions (Art. 88z sec. 2 point 3). The extension of work on the basis of a declaration is not a comprehensive response to the needs of the labour market—it gives the possibility to work for 24 months (not 6 months within the next 12 months, as before the change), but from the point of view of stabilising the foreigner's stay, it does not have a sufficiently positive impact on their situation. On the basis of such a statement a foreigner will receive a visa for a maximum period (one year), but they must legalise stay for a further period. The basis that gives foreigners working in Poland a relative sense of stability is the temporary residence and work permit, not the use of work under the procedure of declaration and stay on the basis of a visa.

Changes related to the extraordinary states

While the changes discussed above seem to be of a relatively stabilising nature (they are imbued with an element of willingness to change reality rather than create it anew), the solutions described in this section should be regarded as a model example of measures of this nature. In past years, the legislator has had to react extremely quickly to the occurrence of states of emergency: a worldwide pandemic and a war just across a state's border. Both of these emergencies have significantly affected the functioning of foreigners in the labour market.

Changes in the law which extended until the expiry of the 30th day following the date of revocation of that of the states declared in relation to SARS-CoV-2 virus infections which was last in force,⁷ *inter alia*: 1) the time for submitting applications for residency (including residency due to work); 2) considering the stay as legal; 3) the period of validity of documents legalising residence (including for reasons of work); 4) the period of validity of the work permit; 5) the possibility to work on the basis of a statement entered in the register started to be introduced into Act of 2 March 2020 on specific solutions related to the preventing, counteracting and combating COVID-19, other infectious diseases and emergencies caused by them the by virtue of its successive amendments, starting with the Act of 31 March 2020 amending the

⁷ By the Act of 13 January 2023 amending the Act on Assistance to Citizens of Ukraine in Connection with the Armed Conflict on the Territory of Ukraine and Certain Other Acts, a regulation was introduced according to which the provisions relating to certain extensions with respect to foreigners (except for extensions regarding work) are repealed as of 24 August 2023. In practice, the above has become irrelevant due to the cancellation on 1 July of the epidemic emergency state that conditioned the extensions described.

Act on special solutions related to preventing, counteracting and combating COVID-19, other infectious diseases and emergencies caused by them, and some other acts (Pietrzak, Lubański 2022, pp. 25–28). The purpose of the changes introduced was primarily to respond to the difficulties in being able to conduct individual proceedings due to the reduction/shutdown of the work of the offices and the post office (Sejm 2020, pp. 30, 55).

The war in Ukraine forced an immediate legislative response, resulting in the Act of 12 March 2022 on Assistance to Ukrainian Citizens in Connection with the Armed Conflict on the Territory of Ukraine (later on as: WarAct). Significantly, in the sphere related to the labour market and employment of foreigners, it does not apply only to persons directly affected by the war. Article 22 sec. 1 point 2 allows for the recognition of entitlement to work in Poland of any Ukrainian citizen, provided that: 1) their stay in Poland is legal and 2) the entity entrusting work to them notifies, within 14 days from the date of taking up employment by a Ukrainian citizen, the district employment office competent for the seat or place of residence of the entity of the entrustment of work to that citizen, and the work is entrusted with a working time of not less than that indicated in the notification or a number of hours not less than that indicated in the notification and for a remuneration not less than that determined according to the rate specified in the notification, proportionally increased in case of an increase in the working time or the number of working hours. In the justification to the bill introducing this solution, there is no explanation as to why it was extended to Ukrainian citizens whose stay in Poland is not related to the war.

From the point of view of the system of employment of foreigners in Poland, it is worth pointing out other solutions related to the broadly understood functioning of the labour market adopted in the WarAct. The first was introduced in Art. 39, which gave the right to work to persons falling within the subject scope of Art. 2 sec. 1 of WarAct, who had the right (under Art. 38 of WarAct) to apply for residence permit after nine months of their arrival (Ciszek 2022, p. 34; Uścińska 2022, p. 11). This provision was repealed by the Act of 13 January 2023 Amending the Law on Assistance to Citizens of Ukraine in Connection with the Armed Conflict on the Territory of Ukraine and Certain Other Laws. As indicated in the justification to abovementioned statute, with regard to the abrogation of the possibility to use the Art. 38 of WarAct application procedure, the successful outcome of which gave the right to work: “Even the greatest procedural simplification and the most far-reaching automation and electronicisation of the process will not allow the voivodes, with the maximum involvement of the potential of the offices they manage, to ensure efficient performance of the task of conducting, in view of such a large number of applicants, proceedings on the granting of a temporary residence permit, while ensuring the performance of other tasks” (Sejm 2022b, p. 18). Thus, inefficiencies in the system have influenced the abandonment of previously adopted labour market access facilities.

The corollary of this amendment was the introduction of paragraph 13 in Art. 42 of WarAct, which allows persons falling within the scope of Art. 2 sec. 1⁸ to apply for temporary residence

⁸ For such persons (as beneficiaries of temporary protection), the initiate the procedure granting a temporary residence permit shall be refused (Art. 99 sec. 1 point 4 of AoF).

if it is work-related.⁹ The introduced change has partially fulfilled the demand made by the Confederation of Employers Lewiatan (Sejm 2022c, p. 2) during legislative work, however, it has not systematically solved the problem related to the necessity of ensuring residence stability for persons who, although they want to stay in Poland longer due to work, have children in their care. Studies conducted on Ukrainian citizens fleeing war leave no doubt that such a situation occurs on a massive scale (Uścińska 2022, p. 4; NBP 2023, pp. 9–10). And since this is the case, it should not remain systemically indifferent to regulating the access of this group of foreigners to the labour market.

From the point of view of the implementation of plans related to foreigners' access to the labour market, a regulation whose validity has already been signalled is important. On the basis of Art. 100c and 100d of WarAct course of time limits for the handling of cases by voivodes (including cases related to the issuance and modification of temporary residence and work permits) does not commence and the one started is suspended. The suspension was initially in force from 15 April 2022 until 31 December 2022,¹⁰ then (retroactively) from 1 January 2023 until 24 August 2023.¹¹ A following novelisation extended the suspension until 4 March 2024 [Act of 14 April 2023 on changing the names of state service academies supervised by the minister responsible for internal affairs, amending the Act on the Police, the Act on the Border Guard, the Act on the State Fire Service and some other acts (Dz.U. 2023, item 1088)]. The legislator has not indicated the justification for the introduction of this regulation (Sejm 2023). The Confederation Lewiatan gave its opinion as well in this legislative process, demonstrating the lack of grounds for the introduction of the suspension of the time limits for the conduct of all proceedings indicated in Art. 100c of WarAct (Sejm 2022a, pp. 3–4) (and subsequently Art. 100d of WarAct).¹²

Changes resulting from foreign policy

The geopolitical situation is forcing changes in the law related to foreigners' access to the labour market. This is not only related to the described regulations directly concerning Ukrainian citizens. Relevant changes in the law are taking place with regard to citizens of Russia and Belarus, with a very discernible trajectory. The mechanisms organising the labour market with

⁹ This applies to the temporary residence and work permit; the temporary residence permit for highly qualified employment and the business residence permit.

¹⁰ On the basis of Act of 8 April 2022 amending the Law on Assistance to Citizens of Ukraine in Connection with the Armed Conflict on the Territory of Ukraine and Certain Other Laws (Dz.U. 2022, item 830).

¹¹ On the basis of Act of 13 January 2023 amending the Act on Assistance to Citizens of Ukraine in Connection with the Armed Conflict on the Territory of Ukraine and Certain Other Acts.

¹² Courts deciding cases concerning the lengthiness of the conduct of proceedings that were subject to Art. 100c and are now subject to Art. 100d overwhelmingly agree that this provision applies only to persons covered by the WarAct, and not to all foreigners. The Provincial Offices do not support such an interpretation, taking the view that they do not have to issue decisions in compliance with the statutory deadlines.

respect to Russian citizens result in a worsening of their situation, in contrast to the mechanisms applied with respect to Belarusian citizens.

In the List of Legislative Work of the Minister of Family and Social Policy, it is stated that “Russia’s military actions in Ukraine increase the fear of a Russian hybrid attack on the territory of the Republic of Poland. Restrictions have been introduced by the Ministry of Internal Affairs and Administration on the crossing of the border of the Republic of Poland by Russian citizens. Therefore, the facilitation of access of Russian citizens to the Polish labour market should be lifted” (MRiPS 2022, pp. 98–99). A relevant amendment was made in October 2022¹³ to the Regulation of the Minister of Labour and Social Policy of 29 January 2009 on determining cases in which a work permit for foreigners is issued regardless of the detailed conditions for issuing work permits for foreigners by removing the Russian Federation from the list of countries whose nationals may be employed on the basis of a declaration of entrusting work to a foreigner.

At the same time, by amending the Regulation of the Minister of Family, Labour and Social Policy of 8 December 2017 on countries to whose nationals certain provisions concerning the seasonal work permit and provisions concerning the declaration of entrustment of work to a foreigner apply, Russia was removed from the list of countries whose nationals may perform seasonal work on a simplified basis.¹⁴

Data from the Office for Foreigners (Urząd do Spraw Cudzoziemców 2022) on the inflow of Belarusian nationals to Poland leaves no doubt that this is an increasingly numerous and active group on the labour market. Among the recently introduced measures for their inclusion in the facilitation of access to the labour market, the following should be mentioned: 1) the possibility to legalise by the citizens of Belarus the stay and work of IT specialists in the Poland Business Harbour programme; 2) the possibility, existing from 30 August 2022 to 31 March 2023, to legalise by the citizens of Belarus stay on the basis of a visa issued in Poland. This possibility could have been used by Belarusian citizens applying for a visa issued in order to perform work on the basis of a statement on entrusting work to a foreigner entered in the register, or to perform work if they were to perform work as a driver in international road transport within the meaning of Art. 4 point 2 of the Act of 6 September 2001 on Road Transport (Dz.U. 2022, item 2201 consolidated text as amended) or in non-commercial international road transport within the meaning of Art. 4 point 6 of this Act.¹⁵

¹³ On the basis of Ordinance of the Minister of the Family and Social Policy of 25 October 2022 amending the Ordinance on determining cases in which work permits for foreigners are issued without regard to detailed conditions for issuing work permits for foreigners (Dz.U. 2022, item 2203).

¹⁴ On the basis of Regulation of the Minister of the Family and Social Policy of 25 October 2022 amending the Ordinance on countries to whose nationals certain provisions concerning the seasonal work permit and provisions concerning the declaration on entrusting work to a foreigner apply (Dz.U. 2022, item 2204).

¹⁵ On the basis of Regulation of the Minister of Foreign Affairs of 18 August 2022 on the issue of national visas to foreigners staying on the territory of the Republic of Poland (Dz.U. 2022, item 1809 as amended). In addition, it is worth pointing out that Belarusian citizens are covered by the Regulation, which (under Art. 186 sec. 1 point 9 of AoF) entitles Belarusian citizens to apply for a temporary residence permit in connection with their stay in Poland immediately prior to submitting the relevant application on the basis of a humanitarian visa (Regulation of the Minister of Internal Affairs and Administration of 14 June 2022 on the nationalities

Conclusions and *de lege ferenda* proposals

The lack of directions of the state's migration policy in the context of the labour market makes it necessary to search for them in the changes introduced (Florczak 2022a, pp. 161–167; Florczak 2022b, pp. 5–6). The above analysis, by its very nature referring only to selected issues, allows one to conclude that the recent actions taken by the legislator relating to the presence of foreigners on the labour market: 1) to certain extent have been forced by extraordinary circumstances, which have necessitated the introduction of extra-coordinated solutions; 2) are often the aftermath of a disastrously organised, inefficient system of handling administrative proceedings in which foreigners themselves or cases concerning them are the subject matter; 3) in the face of commonly identified needs of the employing entities—prove the necessity to apply and introduce mechanisms aimed at simplifying the procedures; 4) are often characterised by a short-sighted, incomplete approach to the issue regulated.

In the current situation while, in the framework of stabilisation measures, trying to achieve a certain effect, another effect is achieved (or can be achieved) in parallel, which was not foreseen. The following examples can be given in this respect:

- 1) the necessity to provide foreigners with full minimum remuneration irrespective of the working time and type of legal relationship in case their stay and work are legal on the basis of a uniform temporary residence and work permit raises concerns of employers related to the necessity to pay for work not performed, which may result in unlawful actions limiting the freedom of foreigners to change employment;
- 2) the extension of the possibility of carrying out work on the basis of a declaration on the assignment of work to a foreigner does not correlate with the stabilisation of the foreigner's residence, since on the basis of such a declaration the foreigner may obtain a visa for a maximum period of one year, which is a half of the maximum duration of the period of declaration. Such a state of affairs does not minimise the administrative burden associated with applications for residence permits to be submitted by foreigners after their visas have expired;
- 3) the introduction of the possibility for economically active persons covered by the Art. 2 sec. 1 of WarAct to apply for a temporary residence permit does not stabilise their life situation, as most of them came to Poland with children who cannot benefit from a similar legislation. Such uncertainty may consequently lead them to abandon their intention to settle in Poland.

Formulating *de lege ferenda* proposals of a general nature, the necessity to rebuild the organisation of the system of servicing foreigners' cases (including those concerning employment) should be pointed out. Such a rebuild should be preceded by diagnosis of the reasons for systems' inefficiency. Subsequently, it is necessary to analyse the necessary scope of implementation of the complementarity principle (see: Florczak 2019). In view of the current

which entitle foreigners to apply for a temporary residence permit referred to in Art. 186(1)(9) of the Act of 12 December 2013 on foreigners (Dz.U. 2022, item 1335 consolidated text).

scale of employment of foreigners entering the labour market, which does not negatively affect the possibility of employing persons already active on it—there is no doubt that the limits of this principle may be loosened.

To conclude the considerations, it is necessary to refer to the draft law on the employment of foreigners (<https://legislacja.rcl.gov.pl/projekt/12364052/katalog/12910620#12910620>) and to assess the changes it introduces in terms of their stabilising or dynamising approach. The justification to the draft of this Act states that it aims at streamlining the procedures for employing foreigners, reducing the backlog of cases handled by offices and limiting the occurrence of abuses, as well as full electronicisation of proceedings. These are therefore solutions of a fundamentally stabilising, corrective nature. An analysis of the successively presented versions of the Act leaves no doubt that it is not a legal act which is to model future phenomena—such as climate migration (Baer, Singer 2020, pp. 12–14). The draft, analysis of which deserves a separate study, is a response to current irregularities in the system of employing foreigners.

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