

mgr Monika Szulecka

Zakład Kryminologii, Instytut Nauk Prawnych PAN

Paradoxes of formal social control. Criminological aspects of foreigners' access to the polish territory and the labour market ¹

ABSTRAKT

Celem artykułu jest przedstawienie wybranych wniosków z analizy skutków polityki migracyjnej w kontekście rozwoju takich zjawisk przestępczych jak organizowanie nielegalnej migracji oraz związane z tym fałszowanie i wyłudzenie dokumentów. Jednym z elementów analizy była identyfikacja mechanizmów formalnej kontroli społecznej na przykładzie funkcjonowania uproszczonej procedury dopuszczania cudzoziemców do rynku pracy w Polsce. System ten w praktyce przyniósł też skutki w postaci naruszeń prawa karnego. Paradoksalnie, w polskich warunkach to nie większe restrykcje, ale ułatwienia w zakresie dostępu cudzoziemców do rynku pracy determinowały w ostatnich latach obraz nielegalnej migracji. Z uwagi na charakter obserwowanych naruszeń prawa (administracyjnego i karnego) zjawiska te można nazywać raczej quasi-nielegalną czy półlegalną migracją, gdyż jej cechą charakterystyczną jest pozorne przestrzeganie zasad wjazdu, pobytu czy pracy cudzoziemców, czemu służyć może właśnie uproszczony system dostępu cudzoziemców do rynku pracy. Pogłębiona refleksja pozwala jednak na identyfikację naruszeń prawa w ramach tych działań, czemu sprzyjają niejednoznaczne czy niekompletne normy prawne. Zidentyfikowane w badaniu jakościowym różnice w postrzeganiu nadużyć uproszczonego systemu zatrudniania cudzoziemców i w reagowaniu na nie prowadzą do wniosku, że formalna kontrola społeczna przyczynia się czasem do rozwoju negatywnych zjawisk, mimo że jej spodziewanym rezultatem jest zapobieganie im.

Main concept and data sources

The paradoxes described in this article are linked to the implementation of two kinds of migration policies, namely policy of preventing irregular migration and policy of admitting foreigners to the Polish labour market. In theory, goals of these policies should be complementary, not colliding. Obviously, their implementation should not facilitate criminal activities, but if they happen to appear, there should be adequate response tackling the unwanted consequences. Was it the case in Poland with regard to introducing facilitations in accessing the Polish labour market? The answer to this question requires the knowledge of the general facts about such phenomena as manifestations of irregular migration in Poland, mechanisms of migration control and preventing criminality linked to migratory processes. This should allow for determining what is seen as law infringement and why. According to the labelling theory, there are several conditions determining

¹ The text is based on a paper titled 'Paradoxes of implementing policies aimed at preventing irregular migration and granting access to the labour market in Poland – criminal implications' presented at the 16th Annual Conference of the European Society of Criminology in Muenster on September 23rd, 2016.

the reaction to certain acts and thus leading to defining these acts as deviance². In the context of this analysis, of particular importance is making the knowledge about the infringement public, as well as the envisaged benefits from the reaction to the infringement. It can be assumed that the criminal implications of the way how the administrative rules are abused are the consequences of the specificity of immigration law, which implementation is rather not a form of punishment³, but a form of controlling whether the rules of entry, stay and work of foreigners are obeyed. This causes that preventing further abuses may be difficult. This issue becomes more complex if the abuses are reported in the context of inconsistent norms in the areas of preventing irregular migration and allowing for foreigners' work in Poland.

In the presented analysis, particularly the reaction of the agents of formal social control is worth in-depth analysis, due to the fact that the topic concerns migrants, which means people leaving their communities and joining the new ones. And this, in turn, may translate into weaker impact of informal social control on their behaviour. In the case of foreigners informal social control may be less significant than the formal social control due to the fact that foreigners are often outside social groups and informal communities, especially if they adapt individually and are not so much dependent on the ethnic communities they belong to. However, the studied abuses are not only the result of migrants' actions. As it is indicated below, they are also the effects of activity of informal networks ready to break the rules if they envisage profits. This, however, does not change the expected higher importance of the functioning of formal social control.

The paper refers to opinions shared with the author in the qualitative study conducted in 2015, based on 36 qualitative interviews with experts representing the key agency of formal social control responsible for combating irregular migration, namely the Polish Border Guard. The interviews were carried out in different BG units in Poland (in approx. 1/3 of BG units) within the project focused on criminality of foreigners⁴. The study aimed at investigating the features, reasons and consequences of irregular migration in Poland as well as crime-related phenomena linked to migratory processes. The paper also refers to other data sources, mostly of qualitative character, including interviews with immigrants in Poland focused on their experience of crossing borders and economic adaptation⁵, official reports and selected cases of formal reaction to observed abuses⁶.

² See. H.S. Becker, *Outsiders. Studies in the Sociology of Deviance*. The Free Press, New York 1963, pp. 11 et seq.

³ See B. Bowling, *Epilogue: The borders of punishment: Towards a criminology of mobility* [in:] K.F. Aas, M. Bosworth (eds.), *Borders of punishment: Migration, citizenship, and social exclusion*, Oxford University Press, Oxford 2013, pp. 291-306.

⁴ The project „SIC – Modułowy wielozadaniowy System Identyfikacji Cudzoziemców wraz z modułem analizy ryzyka ofiar przestępstwa handlu ludźmi” [‘SIC – Module Multi-task System of Identification of Foreigners with a Module on risk analysis of victims of trafficking’] conducted between 2014 and 2016 by the Institute of Law Studies, Polish Academy of Sciences with the Law Faculty of University in Białystok and Medcore company, financed by National Centre of Research and Development.

⁵ The interviews have been conducted in several projects. For some of the results, see for example, R. Stefańska, M. Szulecka, „Bezpieczny status prawny jako determinanta awansu ekonomiczno-zawodowego odmiennych grup imigrantów w Polsce” [‘Secure legal status as a determinant of the economic and professional advancement’], *Central and Eastern European Migration Review* 2013, Vol. 2 (1), pp. 91–115; M. Kindler, A. Kordasiewicz, M. Szulecka, *Care needs and migration for domestic work: Ukraine-Poland*, International Labour Organisation, Geneva 2016.

⁶ The data has been gathered and analysed within the project titled ‘Criminal context of the functioning of simplified procedure of foreigners’ employment in Poland’ conducted in 2016 in the Institute of Law Studies, Polish Academy of Sciences, financed by the Ministry of Science.

General remarks

Foreigners' access to the Polish territory and the labour market is restricted by national and European Union law. This stems from the Polish geopolitical position and its membership in the European Union and the Schengen zone. The restrictions apply mostly to third country nationals, since EU citizens enjoy freedom of mobility and work performance in other EU countries. Although legal provisions and thus restrictions are addressed to third country nationals in general, there are some exceptions having facilitating character, based on international agreements, laws or on administrative practice. They are shaped by migratory context in Poland, and especially the demand for foreign labour and openness towards migrants' presence on the Polish territory and in the economy. Also security concerns play a role, but their domination may rather create new barriers than waive restrictions.

According to a number of studies, restrictive migration policy is one of the factors contributing to irregular migration⁷ and thus to the development of informal criminal networks involved in organising it or in other forms of criminality, such as human smuggling or document fraud⁸. The more restrictive is the policy and its implementation, the wider the scope of behaviours that may be recognised as irregular migration. Simultaneously, however, policy interventions, being often a manifestation of restrictive policy, may also have a preventing character. Much depends on the type of these interventions as well as their assumed goals and potential side effects. Importantly, the migratory processes are very complex and policy as well as law enforcement are only examples of factors determining the scale and structure of migration. Economic factors, including the volume of the informal economy and the capacity of labour inspection in the host country, remain other important (or even more important than the political and legal ones) determinants of irregular migration or mobility including behaviour non-compliant with the immigration laws.

In general, facilitations should lead to reduction of the mentioned non-compliant or even criminal activities. If legal possibilities for mobility are offered, the potential migrants would rather use these channels instead of using informal services that often involve law infringements. Benefitting from the legal opportunities needs, however, good orientation in the legal framework of mobility and possibility to meet the requirements provided for in the law. If due to any reasons the requirements cannot be met or the activity of informal intermediaries is much more visible than the official policy on mobility, any facilitations may not serve the intended goals, which is the decrease of the scale of irregularity. A lot depends, however, on the type of these facilitations and potential profits they bring to different parties (the sending and receiving states, migrants, formal and informal agencies involved organising migration).

The facilitations may concern, among others, access to the territory or to the labour market. In practice, regulations rather address both elements, since official participation in the labour market by foreigners requires their lawful presence in the host country. Privileges may be addressed to certain categories of migrants, such as migrant students, highly skilled, or family members of the EU long-term residents, or to nationals of particular countries. In this article, the example of a

⁷ See, for instance, F. Duvell, 'Paths into irregularity: The legal and political construction of irregular migration' [in:] *European Journal of Migration and Law* 2011, Vol. 13 (3), pp. 275-295; M. Czaika, M. Hobolth, 'Do restrictive asylum and visa policies increase irregular migration into Europe?' [in:] *European Union Politics* 2016, Vol. 17 (3), pp. 345-365.

⁸ See for instance Europol-INTERPOL Report on Migrant Smuggling Networks, 2015; <https://www.europol.europa.eu/category/press-release-category/reports> [accessed on 20 October 2016].

system facilitating access to the labour market in Poland for nationals of six third countries, either neighbouring Poland (the Russian Federation, Belarus, Ukraine), or being a part of the Eastern Partnership Programme (Moldova, Georgia, Armenia)⁹ have been studied.

Foreigners' access to the labour market as a subject of criminological reflection?

Not ignoring the good aspects of the simplified procedure, this paper is aimed at studying the unintended consequences of its functioning and the link with irregular migration and criminal phenomena. In general, the provisions regarding foreigners' access to the Polish territory and the labour market are part of the administrative law. Also, migration policy is actually separate from criminal policy. However, functioning of some instruments of the policies may have criminal implications. It is worth noting that the topic of migration, and in particular irregular migration or undocumented migrants, has not been a new subject of criminological reflection¹⁰. Migrants often represent 'others', who are quite frequently studied by criminologists. Although immigration control is a parallel system to the system of crime control, some points of contact may be found, especially if one takes into account such measures applied in immigration control as detention.

Abuses of administrative law are unintended, but rather easy to predict aspects of functioning of regulations linked to allowing for foreigners' entrance to Poland or presence on its labour market. If the scale of abuses is recognised as significant and contradictory measures are seen as absent, the question about the reaction to law infringements becomes inevitable. And this constitutes one of the main problems analysed by criminologists: what are the actions non-compliant with the law in force and whether they are followed by any reaction. This in turn, leads to the question about the type and role of reaction, and thus about the role of social control in preventing or escalating behaviours not compliant with the laws. At first, however, such behaviours must be identified, which may be not always easy, especially if they are observed in the context of incomplete or conflicting norms.

Main features of the studied procedure of admitting foreigners to the labour market

The simplified system of employing foreigners is an example of migration management tool aimed at reducing the scale of informal foreign work and satisfying the demand for seasonal workers, as well as simplifying the procedure of employing foreigners. The general rule of employing foreigners in Poland is based on the obligation to obtain a work permit for foreigner. Till 2007 the process was seen as time-consuming and costly. Despite significant reduction of the cost of the procedure as well as simplifying it, still employing foreigners in Poland has been regarded as

⁹ The procedure is based on the regulation included in the *Ordinance of the Minister of Labour and Social Policy of 21 April 2015 on the cases when entrusting the work to a foreigner on the territory of the Republic of Poland is permissible without an obligation to obtain a work permit*, Journal of Laws of 2015, item 588 [*Rozporządzenie Ministra Pracy i Polityki Społecznej z dnia 21 kwietnia 2015 r. w sprawie przypadków, w których powierzenie wykonywania pracy cudzoziemcowi na terytorium Rzeczypospolitej Polskiej jest dopuszczalne bez konieczności uzyskania zezwolenia na pracę*, Dz. U. z 2015 r. poz. 588]. This regulation is the amended regulation introduced for the first time in 2006 by the *Ordinance of the Minister of Labour and Social Policy of 30 August 2006 on performing work by foreigners without an obligation to obtain a work permit*, Journal of Laws of 2006, No 156, item 1116 [*Rozporządzenie Ministra Pracy i Polityki Społecznej z dnia 30 sierpnia 2006 r. w sprawie wykonywania pracy przez cudzoziemców bez konieczności uzyskania zezwolenia na pracę*, Dz. U. 2006 nr 156 poz. 1116].

¹⁰ See, for instance, D. Melossi, *Crime, punishment and migration*. Sage, Los Angeles, London, New Delhi, Singapore, Washington DC 2015, p. 5 et seq.; B. Bowling, *op. cit.*; B. Bowling, J. Sheptycki, *Global Policing, Mobility and Social Control* [in:] S. Pickering, J. Ham (eds.), *The Routledge Handbook on Crime and International Migration*. Routledge, Abington, New York 2015, pp. 57-74.

a complicated process, especially if work to be performed is of short-term or part-time character. The complications are linked mostly to the employment itself (signing a proper contract, paying proper contributions to different institutions), whereas access to the labour market has become wider due to simplification of the procedure of obtaining work permits and introduction of a number of circumstances waiving the obligation to possess such a work permit. One of them is the employment on a basis of employer' declaration on intention to hire a foreigner. It enables to employ a citizen of Ukraine, Russian Federation, Belarus, Moldova, Georgia and Armenia for at most 6 months within 12 consecutive months. Importantly, employers may declare intention to employ more foreigners than they really intend to employ and there are no consequences if they do not eventually employ them. Concurrently, foreigners do not face any consequences, if they do not start working for the employer who declared intention to employ them. They may work for other employers provided that they register their own declarations for these foreigners.

The system is based on good assumptions: it allows for flexibility, which is important in economic sectors based on seasonal employment. It shortens the way to obtain a work permit and thus the possibility to work for longer periods, since it eliminates the labour market test from the procedure. The easy and free of charge process of registering declarations causes that the employees are not so much dependant on the employers, because they may easily change work if they find another employer ready to register for free a declaration for them. However, the specificity of this instrument does not allow for determining the real scale of employment of foreigners, because the number of declarations does not reflect it directly. It only shows how many declarations were registered, but there are no concrete data how many were used in the way they should be used if the intention to hire concrete foreigners are still valid.

Table 1. Number of declarations of intention to hire a foreigner registered between 2007 and 2016

Citizenship	Did the foreigner possess a valid visa or a residence permit upon registering the declaration?	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
		(08–12)									
Belarus	No	1201	11910	4584	3241	3820	6974	4513	3348	4362	6511
	Yes	146	696	276	382	550	662	681	669	1237	1428
Russia	No	160	1058	597	493	812	1378	1040	982	1514	1494
	Yes	30	89	77	102	151	246	220	245	425	331
Ukraine	No	19150	134939	167271	152635	210943	194178	184 536	294640	549302	441419
	Yes	1110	8021	12862	16855	28703	29493	33035	78306	213398	172777
Moldova	No	:	:	2552	5564	12457	8988	8827	5355	7922	7467
	Yes	:	:	195	348	567	433	421	976	1653	1548
Georgia	No	:	:	:	423	1666	1241	2196	1908	1210	575
	Yes	:	:	:	30	108	143	147	195	156	104
Armenia	No	:	:	:	:	:	:	:	603	825	516
	Yes	:	:	:	:	:	:	:	171	218	151
All countries	No	20511	147907	175004	162362	229698	212759	201112	306836	565135	457982
	Yes	1286	8806	13410	17711	30079	30977	34504	80 562	217087	176339
TOTAL		21797	156713	188414	180073	259777	243736	235616	387398	782222	634 321

Source: own elaboration based on the data from the Ministry of Labour and Social Policy¹¹

If the system is simple and satisfies the demand for short-term foreign work, what caused that it has been being abused and linked also to criminal activity. The main reason is the fact that the declaration may be the basis of applying for a visa. The statistics of the registered declarations show (see table 1) that more declarations were registered for foreigners without documents authorising them to stay in Poland than for the residence permit or visa holders. This means, and it is confirmed also by qualitative information from the mentioned study as well as from other data sources, including, the official ones, that mostly foreigners who wanted to get visas in order to enter Poland lawfully benefited from the system. The intended outcomes of the system assume that foreigners not only come lawfully but they also start working lawfully for the employers, who registered declarations for them.

Why the lawful entrance matter so much? The Polish territory in December 2007 became a part of the Schengen zone, which for many foreigners meant that entering Poland means entering the EU and the Schengen zone, characterised by no control on internal borders. Joining the Schengen zone was linked to more restrictions and more complexity in the visa regime, which was

¹¹ Available at: <https://www.mpips.gov.pl/analizy-i-raporty/cudzoziemcy-pracujacy-w-polsce-statystyki/> [accessed on 5 November 2016].

noticed especially by citizens of the neighbouring third countries who enjoyed visa free mobility for a long time and since 2003, just before Poland accessed the EU, were obliged to get visas, but could do it quite easily. Thus, joining the Schengen zone by Poland meant for the citizens of such countries as Ukraine the expected higher costs and more complications in the process of obtaining documents allowing them to enter Poland. The simplified procedure of employing foreigners, introduced in 2006 but only in reference to agriculture and allowing for work for at most 3 months within 6 months was most probably the expected solution to potential problems with satisfying the labour market need with short-term foreign workers from ex-USSR republics, mostly Ukraine, who were already present in this sector but mostly informally. In the next years the procedure has been developed, widening the opportunity structures for short-term work in any sector, based on the declaration. In 2008 the period of allowed work has been lengthened to 6 months within 12 months, and in the next years citizens of other three countries than the three neighbouring ones were allowed to use this provision and work on short-term basis without a work permit. What is the most important here, they were also allowed for applying for visas basing on the registered declarations, which meant an important simplification in the context of the Schengen visa regime.

Thus, as it turned out in practice, declarations have served also other purposes than regularising the for profit activity of short-term foreign workers. Namely, it served to facilitate getting access to the Polish territory or the territory of the Schengen zone, also without any plans for work according to the declarations. And not only migrants found the declarations an attractive solution to problems with meeting the criteria for visa applicants. The role of the declarations as documents supporting the visa application processes has been also recognised by informal intermediaries or pseudo-employers, who used the system and were not willing to employ anyone. They have just been unfairly benefitting from delivering declarations which then then led to obtaining visas under false pretences. The scale of cases illustrating the instrumental approach to the system and profiting from it through activities non-compliant with the intended goals of the system is not known. In various groups (officials, law enforcement, academics) the abuses are described at least as frequent or common¹². The available – or rather unavailable – measures of controlling how the declarations are in fact used do not allow for concrete answers to the question about the scale of abuses. Answering this question would be also very complicated due to the fact that abuses may have different forms, and thus infringe different rules or even be non-compliant with the guidelines regarding the practice of registering the declarations. Also assessing to what extent the simplified system has contributed to irregular or semi-legal migration. Nevertheless, as it stems from the qualitative study referred to in this paper, the procedure is certainly linked to at least semi-legal mobility processes.

Irregular migration in Poland – well identified margin or unexplored wide sphere?

According to various sources, including the official statistics, irregular migration in the Polish context is a marginal problem, although its specificity – namely the apparent compliance with the law – causes that it is a challenge for the agencies of formal social control¹³. This marginal scale of irregular migration is directly linked to the overall scale of immigration to Poland Although

¹² See for instance the justification of a proposal for termination of the simplified procedure and replacing it with an administrative procedure of issuing short-term work permits, prepared by the Polish Ministry of Family, Labour and Social Policy in April 2016: <https://legislacja.rcl.gov.pl/docs//2/12284850/12350335/12350336/dokument251270.pdf> [accessed on 5 November 2016].

¹³ See more in M. Szulecka, „Przejawy nielegalnej migracji w Polsce” [‘Manifestations of irregular migration in Poland’], *Archiwum Kryminologii* 2016, Vol. 38.

the number of immigrants has been rising successively, especially since 2014¹⁴, Poland still remains a country with emigration rates higher than immigration ones. Nevertheless, due to the more and more numerous presence of immigrants it has also gained experiences as immigration country. This in turn contributed to the development of policies of foreigners' access to the Polish territory and the labour market. For a long time this policy has been called reactive, since instruments constituting it responded to the phenomena observed; no active policy instruments were present, such as incentives for migrant students or highly skilled. For a long time Polish migration policy (its practical dimension) was limited to border control, building the asylum system and elaborating the procedures of granting residence permits to foreigners. In the 21st century, due to the Polish accession to the EU and then to the Schengen zone, the policy tools became more diverse, since they had to serve more purposes than the border control and granting rights to reside or work in Poland. Due to rising scale of immigration and settlement, as well as diversifying migrant groups, this policy had to include also plans for migrant integration, regularisation campaigns, policy instruments addressed to co-ethnics (such as the Polish Charter).

As of 2016, immigration policy in Poland could be called again 'under construction'. The government elected in 2015 decided about annulment of the previous governmental policy document¹⁵ that indicated the key directions as far as policy towards mobility and migrants is concerned. The existence of clear vision and strategy in Poland has been questioned even after the document was accepted in 2012 and then translated into very concrete plan of implementation. However, especially in the context of migration crisis in the European Union (but not necessarily observed so much in Poland) and the 'dramatic' increase in the inflow of Ukrainian citizens led the government to conclusions that the migratory context in Poland became completely different in 2015 which requires elaboration of a new migration strategy¹⁶. The development of the Polish migration policy in the last two and half decades could be divided into three general phases: 'opening' of the borders (meaning waiving restrictions on exit and entry present before 1989), regulation of immigration (introducing more detailed rules on allowing foreigners for entry, stay and work in Poland as well as consequences of breaking the rules), and controlled openness¹⁷. Regardless of the period, preventing irregular migration and border protection have remained the

¹⁴ According to the statistics of the Office for Foreigners, in 2003 approx. 53 thousand foreigners had valid residence cards in Poland, whereas in 2014 there were approx. 175 thousand holders of valid residence cards. In 2015 this number amounted to approx. 212 thousand and further increase has been observed in 2016. These numbers indicate only foreigners with valid residence cards, which means that they usually stay in Poland more than three months. To estimate the stock of foreigners at particular moments, the number of visas should be added. Yearly about 1.5 million of visas are issued by Polish consulates. See more in the statistics published by the Office for Foreigners, available at: <http://udsc.gov.pl/statystyki> [accessed on 5 November 2016].

¹⁵ *Polityka migracyjna Polski: Stan obecny i postulowane działania* [Poland's migration policy: Current state of affairs and recommended actions], Ministry of Interior, 2012; <http://bip.msw.gov.pl/bip/polityka-migracyjna-po/19529.Polityka-migracyjna-Polski.html>. [accessed on 27 December 2016].

¹⁶ See the interview with the Secretary of State from the Ministry of Interior and Administration, responsible for migration policy in terms of border control and issuing residence permits: "<<Pragmatycznie, a nie ideologicznie>> – o polityce migracyjnej Polski" ['<<Pragmatically and not ideologically>> – about Polish migration policy', *Biuletyn Migracyjny* No 55/2016, pp. 2-4, http://www.biuletynmigracyjny.uw.edu.pl/pliki/pdf/biuletynmigracyjny55_0.pdf [accessed on 27 December 2016].

¹⁷ See more in R. Stefańska, M. Szulecka, „Rozwój polityki migracyjnej Polski: otwarcie granic – regulowanie imigracji – kontrolowane otwarcie” [The development of the Polish migration policy – opening of borders – regulation of immigration – controlled openness], *Biuletyn Migracyjny* No 50/2014, pp. 4-5; http://biuletynmigracyjny.uw.edu.pl/pliki/pdf/biuletynmigracyjny50_0.pdf [accessed on 27 December 2016)]; for the information on development of the Polish migration policy see also S. Łodziński, M. Szonert, „<<Niepolityczna polityka>>? Kształtowanie się polityki migracyjnej w Polsce w latach 1989-2016 (kwiecień)” ['<<Non-political politics>>? The formation of migration policy in Poland between 1989-2016 April'], CMR Working Papers no 90/148, Warsaw 2016;

priorities in the Polish migration policy, which is mostly caused by the fact that Poland is on the rout of mobility from the East to the West, which contributes to its transit character and risk of irregular migration through its territory. Preventing irregular migration requires efficient policy tools of admitting foreigners to the labour market in Poland. Without this combating semi-legality is impossible. And the studied simplified procedure has been an example of such instrument, although due to its unintended consequences, it is treated sometimes as a factor rather contributing to irregular migration than decreasing it.

Although the scale of irregular migration is considered very small, especially in comparison to other EU countries, such as Greece, Italy, Spain, France, United Kingdom, Germany, Austria, this is rather the specificity of the phenomenon than the numbers that attract attention of the institutions of formal social control. As it has been already said, apparent compliance of migratory activities with the laws in force leads to conclusion that there is hardly no problem of irregular migration in Poland. Moreover, migration policy for the most numerous migrants groups (especially citizens of Ukraine) in Poland includes privileges that are not enjoyed by citizens of more distant (in geographical and cultural terms) countries. This should mean that in the light of quite liberal migration policy migrants interested in arriving to Poland, among whom vast majority are Ukrainian citizens, the risk of migrating in an unlawful fashion is not very probable. And this is true for a great part of the migration stream from the neighbouring countries. In fact, most citizens of Ukraine try to make the journey to Poland and stay on its territory compliant with the law in force¹⁸. The problems appears if the purposes of the travels are concerned. The visa regime is based on a very concrete scheme of application, including the revealing of reasons why visas should be granted to the applicants and for what purposes. If visas are used for purposes other than those declared upon application for a visa, such mobility is seen as undesirable (but often tolerated). And measures applied in such cases, as for instance a refusal of entry, annulment of a visa, or issuing a return order, are the key instruments aimed at reducing the scale of irregular migration or preventing it.

The Polish borders are still more threatened by attempts of smuggling of goods than smuggling of people, although the latter issue also remains an important problem, especially in the context of lack of regular control at the internal borders within the Schengen zone. The scale and features of the phenomenon of smuggling of people through the Polish territory have changed significantly due to tighter control at external borders. They are crossed irregularly by individuals or very small groups or in apparently lawful way, as far as the irregular migration in wider terms is concerned. The yearly numbers of apprehensions for irregular border crossing (see table 2) have been rather stable, although a few exceptions may be noticed and this relates to 2008, the year after Poland joined the Schengen zone, and recent years, namely 2014 and 2015, when there were visibly more apprehension reported. Almost 7 thousand apprehensions for irregular border crossing or attempting it reported in 2015 more than doubled the respective number for 2012 (3.2 thousand)¹⁹. Due to more intensive mobility of potential asylum seekers and irregular migrants across Europe, it may be expected that higher numbers will be also observed for 2016 and the following years.

¹⁸ See more on the patterns of mobility of Ukrainian citizens to Poland in: Z. Brunarska, M. Kindler, M. Szulecka, S. Toruńczyk-Ruiz, *Ukrainian Migration to Poland: A "Local" Mobility?*, [in:] M. Kindler, O. Fedyuk (eds.), *Ukrainian Migration to the European Union. Lessons from Migration Studies*, Springer International Publishing 2016, pp. 115-132.

¹⁹ Data comes from Border Guard statistics for the first half of 2016; <https://www.strazgraniczna.pl/pl/granica/statystyki-sg/2206,Statystyki-SG.html> [accessed on 20 October 2016].

However, it should be stressed that these numbers constitute a very small share of all apprehensions reported in other EU countries²⁰. This causes that in comparison to other countries irregular migration in Poland is perceived as almost non-existent. And this would be true, if we ignore the fact that the given numbers present only the effects of work of the Polish Border Guard, which is a specialised institution responsible for border protection, and must be compared to the scale of the overall mobility of foreigners through the Polish borders. The phenomenon of irregular border crossing is supposedly much more frequent, especially with reference to internal borders. But referring to the official data, the numbers of apprehensions at both types of the border are similar (see table 2.).

Table 2. Apprehensions for irregular border crossing, incl. attempts (2011-2016)

	Total	Incl. Polish citizens	External border	Internal border	Main countries of origin (third countries)				
2004	5762	1290	1085	4592	Ukraine	Russian Federation	Moldova	China	Vietnam
2005	4526	928	1384	3007	Ukraine	Russian Federation	Moldova	Vietnam	Belarus
2006	4000	869	1464	2393	Ukraine	Moldova	Russian Federation	Vietnam	China / Belarus
2007	3222	663	1307	1913	Ukraine	Russian Federation	Moldova	Vietnam	Belarus
2008	5797	223	3452	2096	Ukraine	Russian Federation	Moldova	Belarus	Vietnam
2009	3581	116	1561	1849	Ukraine	Russian Federation	Georgia	Belarus	Vietnam
2010	2349	161	1361	988	Ukraine	Russian Federation	Belarus	Georgia	Moldova
2011	2502	189	1379	1123	Ukraine	Russian Federation	Belarus	Turkey	Georgia
2012	3248	155	1657	1591	Ukraine	Russian Federation	Belarus	Georgia	Pakistan
2013	3795	192	1858	1937	Ukraine	Russian Federation	Belarus	Georgia	Syria
2014	4911	323	2124	2787	Ukraine	Russian Federation	Belarus	Vietnam	Georgia
2015	6980	372	3365	3615	Ukraine	Russian Federation	Belarus	Vietnam	Syria
2016 (01-06)	3514	262	1671	1843	Ukraine	Russian Federation	Turkey	Belarus	Syria

Source: *Statistics of the Polish Border Guard*²¹

Other indicators of irregular migration also support the statement that irregular migration is rather a marginal problem. Although, Poland occupies high position as far as the number of refusals of entry is concerned. These numbers have also increased in recent two years, which has been caused by the higher numbers of potential asylum seekers coming to the Polish border mostly from Caucasus through Belarus. In the first half of 2016, 42.3 thousand refusal were issued, and this meant the increase by approx. 140 per cent in comparison to the first half of 2015 (17.7 thousand refusals)²². Mainly citizens of the Russian Federation, with Chechen origin, were refused entry.

²⁰ See more in M. Szulecka, *op.cit.*

²¹ Available at: <https://www.strazgraniczna.pl/pl/granica/statystyki-sg/2206,Statystyki-SG.html> [accessed on 20 October 2016].

²² Data comes from Border Guard statistics for the first half of 2016; <https://www.strazgraniczna.pl/pl/granica/statystyki-sg/2206,Statystyki-SG.html> [accessed on 20 October 2016].

Among other countries of origin of foreigners refused entry there were citizens of Ukraine, Tajikistan, Armenia and Belarus. Refusals were mostly reasoned by the lack of valid visa or residence permit, or lack of documents confirming the purpose and conditions of stay, no sufficient resources for stay or return. The structure of main countries of origin leads to the conclusion that significant share of the refusals is the effect of attempts to prevent irregular migration understood as abusing the asylum procedures²³. Some share of refusals is also noticed in the case of citizens of countries addressed by the simplified procedure of employing foreigners, especially Ukraine. In fact, during border control the verification of purposes of entry can result in uncovering that visas possessed by foreigners were issued on the basis of fraud documents or were obtained fraudulently. This is the case when foreigners actually are not going to work for employers who registered their declaration of intention to hire a foreigner or when the declarations were altered or falsified. However, determining that the real purposes of entry are different from the declared ones at the border may be very challenging, especially if there is a lack of central register of declarations of intention to employ a foreigner, accessible for the Border Guard as an authority responsible for checking whether the person should be allowed to enter Poland and if the documents possessed by him or her are authentic and confirm the reality.

Is undocumented work or obtaining visas fraudulently a threat to security or economy?

According to data published by the Polish Border Guard, fraud documents revealed by this authority are possessed mostly by Ukrainian citizens and these are usually visas or authentic documents with false stamps. There were 1.5 thousand of such documents revealed in the first half of 2016 (compared to 1.2 thousand in the first half of 2015)²⁴. Fraud visas reported by the Border Guard mean also visas obtained under false pretences, which is an offence, according to the Polish penal law. And since these visas were used to cross the borders or legalise the stay on the Polish territory, they were recognised as activities linked to irregular migration²⁵. However, determining that visas were obtained under false pretences requires treating the declaration or a visa as a document. And as it stems from the study, different understandings among the representatives of agencies of formal social control (the Border Guard, prosecutors and courts) caused that the using visas issued on the basis of a false declaration have not always been treated as an offence, and thus not always there have been a formal reaction to the reported abuses. Not surprisingly, this fact serves as an argument for informal intermediaries involved in trading in the declarations, falsifying them and thus helping foreigners in obtaining visas under false pretences. If there is almost no reaction by law enforcement, it may be interpreted that using declarations for other purposes than work for the employer intending to hire a foreigner is allowed and registering declarations without a will to employ foreigners does not cause any harm to security or economy. It just helps foreigners

²³ See more in M. Szulecka, *op. cit.*

²⁴ Data comes from Border Guard statistics for the first half of 2016; <https://www.strazgraniczna.pl/pl/granica/statystyki-sg/2206,Statystyki-SG.html> [accessed on 20 October 2016].

²⁵ As it stems from the analysis, the cases of using the simplified procedure for purposes contrary to the intended ones in legal proceedings in case of migrants were usually qualified according to the article 264(2) of the Penal Code (The act of 6 June 1997 – the Penal Code, Journal of Laws of 1997, No 88, item 533 with further amendments [Ustawa z dnia 6 czerwca 1997 r. – Kodeks karny, Dz. U. 1997 nr 88 poz. 533 z późn. zm.]), which refers to crossing the border by resort to violence, threat, deceit or in cooperation with third parties, and to article 272, referring to obtaining the attestation of an untruth under false pretences, as well as article 273 linked to using such attestation. In case of the informal intermediaries or pseudo-employers, the legal classification referred to 264a(1) – enabling, facilitating a stay in Poland, and benefitting from these activities, or to article 264(3) – organising the crossing of the border of the Republic of Poland against the law for other persons, as well as article 270(1) (counterfeiting or altering documents).

to get legally to Poland. Especially if it concerns Ukrainian citizens, who come to Poland to work, this is not perceived as harmful for the society, until there is demand for foreign labour force, also this involved in paid activities informally.

Some more light should be shed on the expression ‘almost no reaction’ used above. As it stems from the qualitative study and other data sources, there are in fact formal reactions to abuses but they are faced mostly by foreigners. These are foreigners who may have problems to cross the border and may obtain a refusal of entry, when the declarations registered for them come from pseudo-employers or informal intermediaries. And these are foreigners, not the intermediaries, who bear the administrative sanctions in case their stay on the territory of Poland is claimed unlawful due to activities performed not-compliant with the conditions included in the documents issued for them. If foreigners are conscious that false declarations may cause problems, but they still insist on using them as supporting documents in the process of visa application, they may expect administrative or criminal consequences and are ready to bear them. Concurrently, they may also expect that the probability of uncovering the real purposes of their visa applications, is very low. However, there are also foreigners who are not conscious that the declarations registered for them will not lead to any work offered if they come from unfair intermediaries. Especially in case of migrants without migratory experience and with poor orientation in legal opportunities for cross-border mobility, the more vulnerable position of such migrants causes that the sanction born by them and, simultaneously, almost no consequences for unfair intermediaries, can be seen as inappropriate response. Indeed, applying sanctions for those who use the vulnerable position of migrants appears much more challenging, as it stems from the qualitative study and official reports, because the law enforcement agents have not had relevant legal instruments at disposal or could not achieve the goals due to another understanding of this activity by other law enforcement agents. The representatives of formal social control would have to prove the profits gained by these parties in order to accuse them of supporting irregular migration. Only in cases of uncovering false stamps or documents the perspective of applying sanctions were more probable. If the fraudulently obtained visas are used only for entry and informal work, it is rather the foreign worker who is seen as the violator. Although more persons may be involved in creating the situations in which migrants workers find themselves.

Although undocumented work of foreigners is claimed to be very common in Poland²⁶, the results of control of legality of work conducted by the Border Guard²⁷ indicate also that the scale of it is marginal. In the first half of 2016 there were 1.2 thousand cases revealed, whereas in the respective period of 2015 there were approx. 900 cases²⁸. Ukrainian citizens, being the main beneficiaries of the simplified system of employing foreigners, constituted the vast majority of the persons whose work was found to be performed unlawfully (almost 1 thousand cases). Other countries of origin in this respect were: Moldova, Vietnam, Belarus, Armenia. However, these results should be analysed against the limited capacity of the control institutions as well as the scale of work permits and declarations issued for foreigners. Additionally, proving that work is performed by foreigners unlawfully is sometimes very challenging due to quite complex labour law

²⁶ See more in: A. Górny, I. Grabowska-Lusińska, M. Lesińska, M. Okólski (eds.), *Transformacja nieoczywista. Polska jako kraj imigracji* [Unobvious transformation. Poland as a country of immigration]. Wydawnictwa Uniwersytetu Warszawskiego, Warszawa 2010, pp. 272–275; A. Kicingier, W. Kloc-Nowak, ‘Combating the Illegal Employment of Foreigners in the Enlarged EU: The Case of Poland’, *CEFMR Working Papers* 2008, No. 1.

²⁷ The Border Guard is one of the agencies responsible for controlling the legality of work performed by foreigners. Also the State Labour Inspectorate is responsible for this control.

²⁸ Data comes from Border Guard statistics for the first half of 2016; <https://www.strazgraniczna.pl/pl/granica/statystyki-sg/2206,Statystyki-SG.html> [accessed on 20 October 2016].

and law on foreigners' work, as well as numerous exceptions from common obligations. Moreover, in-depth reflection leads to the conclusion that often in formal terms it is not possible to state any infringement, whereas the compliance is only apparent, since foreigners perform work under other conditions that are stated in papers (earn more or work more, but full remuneration for this is not declared). Importantly, this kind of infringement is not typical for foreign labour. Nevertheless, in case of migrant work both employers and foreign employees may be interested in decreasing the cost of work through eliminating taxes or social and health contributions and thus in maximising their profits. It should be kept in mind, however, that unlawful performance of work is not always the choice of foreign employees. It happens that they are cheated by the employers who take advantage of the weaker position of foreigners and do not sign proper contracts or do not pay the agreed remuneration.

Formal reaction (or lack of it) as a reason of further abuses

Giving the short-term foreign workers from Ukraine the possibility to work in Poland without a work permit responded to the observed demand for foreign labour and relatively easy adaptation of Ukrainian citizens on the labour market in Poland, although sometimes not in full compliance with the law. For a long time, the tacit tolerance towards undeclared employment of foreigners in Poland has characterised the attitude to migrant workers. But this is not surprising, taking into account the tolerance towards informal economy in general. The informal economy ready to absorb short-term migrants has certainly constituted a pull factor for migrants from Ukraine. And the introduction of the simplified procedure of employing foreigners has not change this to a large extent. The declarations are the tools aimed at giving authorisation to enter the labour market, and lawful employment should be the next step after getting this authorisation. However, if the reaction to omitting this step or other circumventions is perceived as scarce, not very probable, it may be supposed that the tool will not be very much effective in reducing the informal employment of foreigners or preventing irregular migration.

Due to significant increases in the numbers of Ukrainian citizens coming to Poland, the system of facilitating access to the labour market has been questioned more intensively. With time, the 'dramatically' growing numbers of registered declarations raised concerns that part of them are not in fact the truthful declarations of intentions, and they result from treating the procedure instrumentally. Nevertheless, concrete measures aimed at changing the situation have been undertaken almost 10 years after the procedure. Importantly short after the introduction the law enforcement agents reported abuses that were caused directly by the flexible and almost uncontrolled character of this instrument of admitting foreigners to the labour market and linking it with applying for documents allowing for entrance or stay in Poland.

The restrictions introduced in 2015, as a response to the perceived more and more visible scale of abuses did not fully address the basic problem, namely the fact that since the introduction of the procedure in 2006 (with its scope of addresses widened significantly in 2007) there have been no legal basis for refusal of registering the declaration. This caused that even jobless persons, with no possibilities to employ anyone, many declarations and gain profit from it. There were also reported cases of companies established only for the purposes of registering declarations for profit, without any plans for entrusting work to foreigners. In May 2015, the local labour offices, where

the declarations were registered, were instructed by the Minister of Labour and Social Policy²⁹ to verify the persons or companies interested in employing foreigners based on the simplified procedure and check whether the person or the company has any possibilities and plans to employ anyone, and whether their needs can be satisfied by local labour force (the Polish citizens). In case of companies, the history of the company had to be checked, according to the instruction. There were limits set on the number of declarations registered by natural persons. However, the instructions were general, not legally enforceable. Additionally, different local labour offices elaborated different limitations or requirements for employers interested in registered declarations. Lack of standardized and legally binding basis of refusal to register declarations, and thus prevent irregular migration or obtaining visas under false pretences, contributed to further abuses. In fact, neither restrictive, nor liberalising steps have been made to address the problem. Formal reaction to abuses depended on place, people, expected profits or losses from reaction, that was additionally not the obvious consequence of revealing violations.

There were various steps done aimed at précising the procedure and preventing the side effects of its functioning, but their non-legal, practical nature has not bring any visible changes. Maybe it complicated the process of registering declarations, but new barriers were rather easy to overcome by persons or companies misusing the procedure. Despite the changes introduced successively, especially in reference to the scope of information to be provided in the declaration, the key feature of the procedure remained the same: withdrawing from the declaration or not starting work for the employer intending to hire a foreigner was not followed by any negative consequences. The procedure was free of charge in formal terms. In practice, for some (or many) of the beneficiaries of the system it meant bearing additional, informal costs. Declarations remained treated as a paid ticket (or part) of the ticket to the Schengen zone. According to qualitative interviews, many Ukrainians travelling to Poland or through the Polish territory had visas issued based on the declarations, but were heading for other countries, where they expected better working conditions. This refers to Spain, Italy, Germany or recently also Lithuania.

Concluding remarks

The presented system, being itself a mechanism of formal social control, helped in legalising the economic performance of some categories of foreigners in Poland. However, at the same time it also led to the development of informal and even criminal practices linked to irregular migration. Importantly, from the perspective of formal social control, there were almost no mechanisms allowing for monitoring how the declarations are in fact obtained, registered and then used. Appearance of agents, who become ‘entrepreneurs’ specialising in ‘arranging’ declarations, and thus contributing to obtaining visas in a fraudulent way, seems the natural consequence of incomplete norms. Declarations have been treated as meaningless invitation to work which helps in getting documents to enter Poland and the Schengen zone. Such approach has been disadvantageous for all those who could benefit from the system, namely the seasonal workers and employers demanding labour force on flexible and short-term basis.

Lack of changes to the law in order to decrease the scale of abuses and regulate the practice of refusing registration in justified cases lead to the question, whether abuses are difficult to counteract or are simply tolerated. And this invites another doubt: if such abuses are tolerated,

²⁹ See the guidelines for the local labour offices regarding the recommended practices with regard to registration of the declarations of intention to hire a foreigner of 2015; www.pup.czestochowa.pl/download/1241.pdf [accessed on 22 December 2016].

maybe they are in fact behaviours not seen as undesirable. If yes, even this liberal instrument of controlling foreigners' admission to the labour market could be waived. However, the state activities assume rather opposite direction, to some extent forced by the obligation to implement the *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*³⁰. This contributed to elaboration of a complex proposal for amendments to the law on foreigners' work in Poland. Despite many announcements of considerable measures to be taken in order to eliminate the abuses, rather not the recognition of violations has led to proposal of legal change of the simplified system (along with correction of the general system of work permits). It seems that external factors, such as EU directive addressing similar needs as the simplified procedure, as well as the scale of Ukrainian citizens interested in work and living in Poland, contributed mostly to proposal of replacing the simplified procedure with a procedure of application for a short-term work permit. Regardless of the details of this procedure, it means a step towards restricting the mobility schemes between Poland and the neighbouring countries (which in the Polish case means most of all Ukraine). Will new restrictions regularise the short-term work in Poland or contribute again to semi-legal migration? Answer to this question has to be postponed until the new law is adopted and enforced. Thus, the question about the role of formal social control in increasing the scale of unwanted phenomena is still pending and requires further elaboration, especially in the context of the observed paradoxes of implanting various instruments of migration polices and preventing criminal activity.

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ABSTRACT

The aim of the paper is to present selected results of the analysis of the impact of migration policies in the context of development of such criminal phenomena as organising irregular migration or document fraud linked to it. One of the elements of the analysis was the identification of mechanisms of formal social control in reference to the example of functioning of a simplified system aimed at controlling foreigners' access to the labour market in Poland. In practice, the system has brought also consequences in the form of breaches of penal law. Paradoxically, in the Polish case not more restrictions, but simplifications in the area of foreigners' access to the labour market have determined in recent years the landscape of irregular migration. Due to the character of the recognised (administrative or penal) law infringements, the phenomenon may be rather called semi-legal or half-legal migration, since its specificity is the apparent compliance with the laws on entry, stay or work of foreigners, and the simplified procedure of admitting foreigners to the labour market can be helpful in this respect. However, more in-depth reflection allows for identification of law infringements within these actions, which may stem from ambiguous or incomplete legal norms. The differences in perceptions of the abuses of the simplified system of employing foreigners and in responses to them identified in the qualitative study lead to the conclusion that formal social control sometimes contributes to the development of negative phenomena, although the expected result of it is preventing them.

Słowa kluczowe: formalna kontrola społeczna, dostęp cudzoziemców do rynku pracy, nielegalna migracja, wyludzanie dokumentów, nadużycia prawa migracyjnego

Key words: formal social control, foreigners' access to the labour market, irregular migration, document fraud, abuses of immigration rules