

Challenges related to the reception of unaccompanied children from Ukraine in Poland – legal representation issues

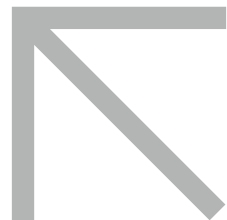
Adam Chmura

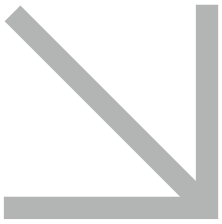




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Spis treści

Introduction 4

**Institution of temporary guardian for
unaccompanied children 6**

**Institution of legal guardian for unaccompanied
children enjoying temporary protection 13**

**Institution of guardian ad litem for unaccompanied
children in refugee proceedings 15**

**Comparing existing solutions
- advantages and disadvantages 16**

Summary 22

Introduction

The Russian aggression against Ukraine, which began on 24 February 2022, triggered migration movements of millions of Ukrainians (including citizens of other countries that the war had caught in Ukraine) who - fearing for their lives and health and fleeing the war - decided to leave the country, seeking refuge in Romania and Moldova, Hungary and Slovakia, and other countries, but above all in Poland. Mothers with children and the elderly predominated among the tens of thousands of people who flocked to the Polish border every day and especially in the days and weeks immediately following the onset of the aggression.

However, one cannot fail to notice that a large (unprecedented in the history of the Polish migration and asylum system) group of unaccompanied minors also left Ukraine - children who found themselves in the territory of Poland without their parents or legal guardians¹, traveling, for example, with their grandparents, with older siblings, with distant relatives, or even just with family friends or neighbors as their actual guardians.

Consequently, the Polish authorities suddenly faced a huge logistical and legal challenge, as they had to, on the one hand,

¹ Act of 13 June 2003 on granting protection to foreigners within the territory of the Republic of Poland (i.e.: Journal of Laws of 2022 item 1264 as amended [hereinafter: Act on Granting Protection to Foreigners – AOGPF]), Art. 2.9a: “Notions used in this Act shall mean: [...] 9a) unaccompanied minor – a minor foreigner who arrives into the territory of the Republic of Poland or is staying within this territory unaccompanied by an adult responsible for him or her in accordance with the laws in force in the Republic of Poland.

provide shelter and humanitarian assistance to those fleeing Ukraine quickly and effectively, and on the other hand, decide how to coordinate this assistance and other forms of support and what legal framework it should be given. Whether to rely in this regard on the solutions already existing in the Polish migration and asylum law (especially in the Act on Granting Protection to Foreigners in the Territory of the Republic of Poland and the Act on Foreigners²), or to explore special solutions, more tailored to the scale and nature of the forced migration from Ukraine and the needs of the people forced to leave the country, including unaccompanied minors.

The Polish legislator chose the latter option, the result of which is the law - the Act on Assistance to Citizens of Ukraine in Connection with the Armed Conflict in the Territory of that State³, passed and then published in the Journal of Laws in the first half of March 2022, and therefore just less than three weeks after the onset of Russian aggression.

The scope of this study, focusing on the mechanisms of legal representation of unaccompanied minors from Ukraine, unfortunately does not allow us to address in detail also other interesting solutions introduced into the Polish legal regime in order to secure to the fullest the welfare of this particularly vulnerable group of children, including the registry of minor Ukrainian citizens who arrived into the territory of Poland without actual guardians or who were in foster care in Ukraine⁴. Similarly, the following analysis does not focus on the problems of the legal framework of foster care institutions wholly evacuated, along with their wards, from Ukraine - still operating under Ukrainian law.

The main purpose of this paper is to present the models of legal representation of unaccompanied children that are currently functioning under the Polish law - with all their advantages and disadvantages, as well as to consider whether the older of these models have survived or would survive the test of the unprecedented

² Act of 12 December 2013 on Foreigners (i.e.: Journal of Laws of 2023 item 519 as amended [hereinafter: Act on Foreigners – AOF]).

³ Act of 12 March 2023 on Assistance to Citizens of Ukraine in Connection with the Armed Conflict in the Territory of that State (i.e.: Journal of Laws of 2023 item 103 as amended [hereinafter: Act on Assistance to Citizens of Ukraine – AACU.]).

⁴ Art. 25a of AACU.

migratory situation brought about by the Russian aggression against Ukraine. Consequently - whether it was really justified to create new legal institutions, among which the most important one is certainly the institution of a temporary guardian for unaccompanied minor Ukrainian citizens⁵.

Institution of temporary guardian for unaccompanied children

Among the various solutions adopted in the Act on Assistance to Citizens of Ukraine, a new institution of temporary guardian, hitherto unknown to Polish law, raises particular interest. Indeed, it is this institution - its place in the system of the Polish family and guardianship law, as well as its relationship (possibly competition) with existing instruments of legal representation of unaccompanied foreign children - that will, to a large extent, be the subject of the following part of this analysis.

However, already at this point it is worth emphasizing that the need to introduce this institution into Polish law in response to the arrival in our country of a significant number of unaccompanied minors - direct or indirect victims of the armed conflict in Ukraine - as well as the form of temporary guardianship proposed by the Ministry of Internal Affairs and Administration have generally received the support of both the public institutions involved (at the stage of government deliberations: the Ministry of Justice⁶ and the Ministry of Family and Social Policy⁷, at the stage

⁵ Art. 25 AACU.

⁶ Comments of the Ministry of Justice on the government draft Act on assistance to citizens of Ukraine in connection with the armed conflict in the territory of that state, file ref. DLPK-V.454.153. 2022.

⁷ Comments of the Ministry of Family and Social Policy on the government draft Act on assistance to citizens of Ukraine in connection with the armed conflict in the territory of that state, file ref. DP-I.0220.283. 2022.MM/ZS.

of parliamentary proceedings: the Supreme Court⁸), as well as non-governmental organizations⁹.

As indicated in the explanatory memorandum to the draft Act on Assistance to Citizens of Ukraine in connection with the armed conflict on the territory of this state, there was a need to introduce solutions to secure the welfare of minors who crossed the border without parents or legal guardians, and often without any adult care. Indeed, Polish family courts do not have the ability to appoint a legal guardian in a situation where a minor is unaccompanied simply because the parents are in the territory of another country. It is necessary to create such legal regulations that will effectively protect the comprehensive interests of such a child. [...] In view of the above, the draft introduces solutions for temporary guardianship [...]. It should be emphasized that the proposed solutions are unknown to the existing family and guardianship law, and the need for their construction arose in connection with the emergency situation that occurred as a result of the armed conflict in Ukraine, in the context of the need to secure, without delay, the welfare of minor citizens of that country¹⁰.

The legislator's motivations presented in this way should, of course, be viewed positively, as corresponding to constitutional¹¹ and convention (Article 3.1 of the Convention on the Rights of the

⁸ Comments of the First President of the Supreme Court on the government draft Act on assistance to citizens of Ukraine in connection with the armed conflict in the territory of that state, file ref. BSA I.021.17.2022.

⁹ Comments on the government draft Act on assistance to citizens of Ukraine prepared by HFPC, the Association for Legal Intervention and the "NOMADA" Association of 22 March 2022, letter L.Dz. 25/2022 – no objections were formulated therein with regard to Article 25 of the AACU and to the institution of a temporary guardian established by this provision.

¹⁰ Government draft Act on assistance to citizens of Ukraine in connection with the armed conflict in the territory of that state, letter of the Prime Minister, file ref. RM-0610-25-22, Sejm Paper No. 2069.

¹¹ Constitution of the Republic of Poland dated 2 April 1997 (Journal of Laws of 1997 No. 78, item 483 as amended), Art. 72. 1: "The Republic of Poland shall ensure protection of the rights of the child. Everyone shall have the right to demand of organs of public authority that they defend children against violence, cruelty, exploitation and actions which undermine their moral sense".

Child¹²) legal principles, which mandate that the protection of children's rights be ensured and that the best interests of the child be considered, considered as paramount, including by the legislator.

Furthermore - by introducing (for the reasons indicated above) the institution of a temporary guardian into the Polish family and guardianship law, the legislator also tried to properly implement further guidelines of the Constitution¹³ and the Convention on the Rights of the Child¹⁴, guidelines of a more specific nature - requiring that a child deprived of parental care (stable family environment) be surrounded by special protection and care of public authorities.

Yet, in the above-cited explanatory memorandum to the current Article 25 of the Act on Assistance to Citizens of Ukraine, the proponent of the Act at the time also touched on two formal-legal issues (one directly, the other only indirectly) that had considerable impact on the final decision to implement into the Polish legal system the new institution of a temporary guardian for minor Ukrainian citizens who arrived in Poland in connection with the Russian aggression against Ukraine.

The first issue (mentioned directly) is the lack of possibility to establish legal guardianship within the meaning of the Family and Guardianship Code (FGC)¹⁵ unless the Polish court is certain that the child's parents are dead, unknown, deprived of parental responsibility¹⁶, suspended in the exercise of parental responsibility¹⁷, or previously deprived of this authority by a Polish court¹⁸.

¹² Convention on the Rights of the Child adopted by the General Assembly of the United Nations Organization on 20 November 1989 (Journal of Laws of 199, No. 120, item 526).

¹³ Art. 72.2 of the constitution: "A child deprived of parental care shall have the right to care and assistance provided by public authorities".

¹⁴ Art. 20.1 of the Convention on the rights of the Child: "A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State."

¹⁵ Act of 25 February 1964 – Family and Guardianship Code (i.e.: Journal of Laws of 2020 item 1359 as amended [hereinafter FGC.]), Art. 145 and other articles.

¹⁶ Art. 94 FGC.

¹⁷ Art. 110.1 FGC.

¹⁸ Art. 111 FGC.

The problem, however, is that in a situation of ongoing armed conflict, information about the child's actual legal and factual situation can, unfortunately, be very difficult to obtain, and if it has already been obtained, it may not necessarily correspond to the current state of affairs (for example, when the minor's parents have been missing, but it is not certain whether they have died when they have not been declared dead). On the other hand, as the proponent of the law explicitly pointed out, we may also have to deal with situations when the minor (but also the Polish authorities) may even have daily, regular contact with the child's parent, so that there are no circumstances justifying the deprivation of parental responsibility (leaving aside at this point the fact that the parent would have to be properly notified of such proceedings, and the proceedings without his or her participation would suffer from a serious procedural defect). Thus, we are talking about situations where the parent of the minor was simply forced to stay in Ukraine, but did not want to endanger his or her child and decided that he/she should leave the country (usually under someone else's actual care).

In both of these cases (lack of certainty as to the legal situation of the parents and, consequently, of the child, and lack of grounds for deprivation of parental responsibility), Polish courts could, admittedly, decide to suspend parental responsibility, recognizing that a circumstance has occurred that should (so to speak, „at least”) be considered a transient obstacle to exercising such responsibility. However, it should also be noted that this would result in „splitting” the adjudication on the legal situation of the unaccompanied minor into two separate guardianship proceedings (the first - for the suspension of parental responsibility of the child's parents, the other - for the appointment of a legal guardian). Each of these proceedings would require time, and as for the proceedings for the suspension of parental responsibility - also a hearing, to which the court would have to attempt to summon the child's parents. Moreover, any ruling on the suspension of their parental responsibility would become effective and enforceable

(clearing the way for launching the proceedings for the appointment of a legal guardian for the minor) only after becoming final¹⁹.

During all this time, the child would be deprived of a legitimate representative who could not only take steps to regulate his/her legal situation, but also defend his/her rights in other judicial or administrative proceedings and make the necessary decisions regarding, for example, medical treatment or education.

As we can see, the successive application of the provisions of the Family and Guardianship Code on the suspension of parental responsibility and then on legal guardianship, even if theoretically possible (when viewed only from the perspective of the domestic law), would in practice have to face a number of difficulties, and would always entail a significant extension of the period during which the child would be waiting for the resolution of his/her legal situation. This would certainly not be consistent not only with the general principle of seeking solutions that secure the best interests of the child²⁰, but also with the specific guideline of Directive 2001/55²¹ pertaining to the urgency of proceedings in the cases of unaccompanied children - beneficiaries of temporary protection (it has eventually covered Ukrainian citizens and relatively wide groups of third-country nationals with the right of residence in Ukraine, who were forced to leave the country after 24 February 2022).

Nevertheless, it is also worth considering in general the possibility of Polish courts applying permanent domestic solutions (here: suspension of parental responsibility and establishing legal guardianship) to this group of children. The proponents of the law, not without reason, in the explanatory memorandum to the government draft Act on Assistance to Citizens of Ukraine, drew

¹⁹ Act of 17 November 1964 – Code of Civil Procedure (i.e.: Journal of Laws of 2021, item 1805 as amended [hereinafter: CCP]), art. 579.

²⁰ Art. 3.1 of the Convention on the Rights of the Child.

²¹ Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (Official Journal L 212, 7 August 2001 [hereinafter: Directive 2001/55]), Art. 16.1: “The Member States shall as soon as possible take measures to ensure the necessary representation of unaccompanied minors enjoying temporary protection by legal guardianship [...]”.

attention to the „extraordinary nature of the situation” underpinning the creation of the institution of temporary guardianship.

In this, it is difficult not to see an unspoken reference to the Polish-Ukrainian Agreement on Legal Assistance and its Article 31.5²², which abolishes the general jurisdiction - in the field of care and guardianship - of the courts of the state whose citizen the child is (here: Ukraine)²³ only in urgent situations. It is worth noting here that this Agreement, even though Poland had become bound by it before the adoption of the Constitution of 1997, is considered an agreement ratified with prior consent expressed in a statute and takes precedence over the provisions of domestic law²⁴ (here: the Family and Guardianship Code). And although the legal literature indicates that the provisions of the Hague Convention on Jurisdiction and Applicable Law²⁵ should take precedence over the provisions of the Polish-Ukrainian Agreement²⁶, granting Polish courts jurisdiction over the cases of unaccompanied children arriving from Ukraine after 24 February 2022 and the possibility to apply Polish law in these cases, it is difficult to resist the impression that the current shape of the institution of a temporary guardian stems from the concerns

22 Agreement between the Republic of Poland and Ukraine on legal assistance and legal relations in civil and criminal matters, done on 24 May 1993 in Kiev (Journal of Laws of 1994 No. 96, item. 465 [hereinafter: Polish-Ukrainian Agreement]), art. 31.5: “In cases of urgency, the authority of the other Contracting Party shall take the necessary measures in accordance with its own law [...]”.

23 Art. 31.1 of the Polish-Ukrainian Agreement.

24 The mechanism provided for in Art. 241.1 in connection with Art. 89.1, in connection with Art. 91 of the Constitution.

25 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children (Journal of Laws of 2010 No. 172, item 1158 [hereinafter: The Hague Convention]). Particular attention should be paid to Art. 6.1, which provides: “For refugee children and children who, due to disturbances occurring in their country, are internationally displaced, the authorities of the Contracting State on the territory of which these children are present as a result of their displacement have the jurisdiction [...]”.

26 *Polsko-ukraińska umowa o pomocy prawnej i stosunkach prawnych w sprawach cywilnych i karnych. Komentarz do przepisów o sprawach cywilnych*, [Agreement between the Republic of Poland and Ukraine on legal assistance and legal relations in civil and criminal matters. Commentary to provisions concerning civil matters] ed. M. Pilich, Wolters Kluwer, Warsaw 2023, commentary to Art. 31, proposition 2.

of the Polish legislator as to whether, without this institution, Polish courts could act in such cases at all.

For here has been created an institution of substantive law, which objectively does not differ in principle from legal guardianship, present, after all, for years in the Family and Guardianship Code²⁷, but which retains the word „temporary” in its name, as if alluding in this way to the case of urgency from the Polish-Ukrainian Agreement. At the same time, this „temporary” nature, it should be emphasized, is not defined anywhere in Article 25 of the AACU. On the contrary, the premise of this regulation is to establish a temporary guardian for an unspecified period of time (thus, just like a legal guardian).

There are more similarities: a candidate for a child’s temporary guardian is required to submit an affidavit stating that he or she has not been deprived of parental responsibility in the past and that he or she has no criminal record of any offenses listed in Article 148.1 of the Family and Guardianship Code²⁸ (just like a legal guardian), and in more important matters concerning the child he or she must obtain permission from the guardianship court²⁹ (again - just like a legal guardian).

What is, therefore, the real difference between the two legal institutions? The provisions of the Act on Assistance to Citizens of Ukraine have specified (something that is lacking in the FGC regulation on legal guardianship), for example, that the supervision over the exercising of the rights and obligations of the temporary guardian shall be carried out by the social welfare center³⁰, with the support of the poviats center for family assistance in this regard³¹, whereas the temporary guardian himself/herself may use legal support³² and - if he/she has more than one child under

27 The scope of authority of a temporary guardian as specified in Article 25. of the AACU is the same as that of a legal guardian as indicated, inter alia, in Article 155.1 of the Family and Guardianship Code - legal representation of a minor in all proceedings and all acts in law, as well as custody of the minor’s person and property.

28 Art. 25.10a AACU

29 Art. 25.2 2nd sentence AACU.

30 Art. 25.3 AACU.

31 Art. 25.3a AACU.

32 Art. 25.3aa AACU

his/her care - also psychological support³³ and the assistance of volunteers and translators³⁴.

However, essentially, the difference between the institutions of legal guardian and temporary guardian is the lack of necessity for prior deprivation or suspension of parental responsibility over the child and the use of a name that gives the new institution the air of temporariness (emergency), perhaps to avoid the allegations of violating the Polish-Ukrainian Agreement.

Institution of legal guardian for unaccompanied children enjoying temporary protection

What is noteworthy, however, is that apparently the legislator could have achieved virtually the same result by applying the provision of Article 113 of the Act on Granting Protection to Foreigners³⁵, present in the Polish asylum law for years, which allows the appointment of a legal guardian within the meaning of the Family and Guardianship Code for unaccompanied minors under temporary protection, but liberalizing, a point of crucial importance, the adjudication on this subject.

Pursuant to Article 113.3 of the Act on Granting Protection to Foreigners, a sufficient basis for the establishment of guardianship for a child under temporary protection is the determination that the child is not accompanied in Poland by his/her legal representative (and thus, no prior suspension of parental responsibility

³³ Art. 25 . 3b AACU

³⁴ Art. 25.3ba AACU

³⁵ Art. 113.1 AOGPF.: “Upon the request of the President of the Office, the court competent with respect to the place of stay of the unaccompanied minor enjoying temporary protection shall establish custody.”

or deprivation of parental responsibility is necessary here, which, as pointed out earlier, could raise significant doubts about jurisdiction, and in their absence - could pose practical problems and significantly lengthen the process of adjudication).

If this is the case, the question arises as to why the legislator decided to introduce the new institution of a temporary guardian - possibly, the intention to distribute the responsibility for requesting the establishment of guardianship (here: temporary) was a significant factor. The idea may have simply been to prevent overburdening of the Head of the Office for Foreigners³⁶ with completely new duties of applying for the establishment of guardianship for minors receiving temporary protection. The legislator may have reasonably feared that this specialized body, but with a relatively small administrative apparatus, might not be able to cope with the implementation of such tasks (and on such a scale). It seems, moreover, that the same thought guided the general idea of the need to transfer the task of confirming that Ukrainian citizens are entitled to temporary protection to local authorities³⁷.

It should, however, be emphasized here that tasks related to the temporary protection of unaccompanied children who came to Poland in connection with the Russian aggression against Ukraine and applying for the establishment of a legal guardian for them under Article 113 of the Act on Granting Protection to Foreigners (and therefore not a temporary guardian) can still be carried out by the Head of the Office for Foreigners (probably only in a few cases) with regard to children who do not have Ukrainian citizenship, but who are covered by the Council Implementing Decision³⁸. This will include, for example, children who enjoyed international protection in Ukraine, national protection from expulsion or had the right of permanent residence, and who were not covered by the Act on Assistance to

³⁶ Under Art. 113 AOGPF – the only entity with the right to bring action before the court in such cases.

³⁷ Art. 2.8 AACU – excluding the application of Chapter 3 Section III of AOGPF.

³⁸ Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection (OJEU L 71/1 of 4 March 2022 [hereinafter: Council Implementing Decision]).

Citizens of Ukraine, despite the fact that - in accordance with the Council Decision - they were granted temporary protection.

This fact alone means that we may have to deal in Polish law with a certain dualism of legal representation of unaccompanied minors arriving after 24 February 2022 from Ukraine. The majority (citizens of Ukraine) will be represented by temporary guardians, the clear minority (children without Ukrainian citizenship, but covered by the Council Implementing Decision) should be represented by legal guardians established under the provisions of the Act on Granting Protection to Foreigners.

Institution of guardian ad litem for unaccompanied children in refugee proceedings

Finally, it should not be forgotten that unaccompanied minors who have left Ukraine because of the war can declare to the Polish authorities their intention to apply for international protection. There is no doubt that this kind of protection (in the form of subsidiary protection³⁹) would be granted to them, since the entire territory of Ukraine is still affected by rocket and air attacks, as a result of which the civilian population suffers, and the authorities of this country are not able to protect all its citizens from such threats⁴⁰.

However, coming back to the legal consequences of applying for international protection, it is worth noting that in such

39 Art. 15. 3 AOGPF: "A foreigner [...] is granted a subsidiary protection if his/her return to the country of origin may constitute a real risk of harm being inflicted through [...] 3) serious and individual threat to his/her life or health arising from common use of abuse against civil persons in a situation of international or internal armed conflict".

40 Excluding the possibility of the so called internal flight alternative – Art. 18 in connection with Art. 16.1.3 AOGPF.

a situation, the only legal representative of the minor could be the guardian ad litem established under the provisions of the Act on Granting Protection to Foreigners⁴¹. This is because even if the child initially enjoyed temporary protection and a temporary guardian was established for him/her, the minor's declaration of intent to apply for international protection results in the child's losing this status, and consequently - losing the rights granted to him/her under the Act on Assistance to Citizens of Ukraine, part of which should also be considered the appointment of a temporary guardian. In other words, the person who previously represented the child as a temporary guardian (since this guardianship ceases by operation of law) could continue their mission and continue to act on behalf of the minor, (but to a narrower extent, as discussed further below) only if the guardianship court appointed them not as temporary guardian anymore, but as a guardian ad litem of such a child.

A more detailed description of the institution of a guardian ad litem appointed for an unaccompanied child in refugee proceedings will be presented below - in a kind of juxtaposition with the new solution, which the temporary guardian still is in Polish law.

Comparing existing solutions – advantages and disadvantages

In summary, in the identical factual situation of an unaccompanied minor who left Ukraine after 24 February 2022, and depending only on the child's citizenship and his/her possible declaration of intent to apply for international protection, we can deal with three types of legal representation of the minor:

⁴¹ Art. 61 AOGPF.

- by a temporary guardian,
 - in the full scope: all proceedings, issues related to education or medical treatment,
BUT only children with Ukrainian citizenship,

- by a legal guardian,
 - in the full scope: all proceedings, issues related to education or medical treatment,
BUT only children who do not have Ukrainian citizenship, although they enjoy temporary protection in Poland due to the fact that they have been granted, for example, permanent residence or international protection in Ukraine,

- by a guardian ad litem,
 - ONLY in refugee and related proceedings - without the right to represent the minor in other proceedings, on issues concerning medical treatment or education,
– both of the above-mentioned groups of children, BUT only if they declare to the Polish authorities the need for international protection.

This is a highly undesirable situation, causing the risk of undermining the child's legal security (when changing his/her basis of residence, for instance, from temporary protection to international protection - decisions to which, after all, both the minor himself/herself and his/her representative, acting out of concern for the child's welfare and best interests, are entitled). Moreover, this situation is also definitely not encouraging the formation of a uniform jurisprudence practice of the guardianship courts in these cases, which is something that should be strongly pursued.

In assessing each of these three forms of representation of unaccompanied foreign minors in Poland (in the case of a temporary guardian - only citizens of Ukraine), and in considering the advantages and possible drawbacks of each of them, it is certainly worth noting the undoubted merit of the guardianship established under Article 113 of AOGPF and the institution of a temporary guardian, which is the broad subject-matter scope of the powers

of the legal representative of the child established in this manner. Both of these forms of representation are not confined to enumeratively indicated administrative proceedings, as is the case in Article 61.1.3 of the AOGPF, where the guardian ad litem's right to represent the child applies only to proceedings for international protection and related proceedings⁴².

Let the following example illustrate the serious consequences and difficulties this shape of guardianship ad litem in refugee proceedings can entail:

- the proceedings for granting international protection end with a final decision,
- the decision is delivered to the child's guardian ad litem,
- if the decision is POSITIVE (granting international protection):
 - the 60-day period for submitting an application for an individual integration program for the child by the competent poviast family assistance center begins to run, BUT there is no one who can submit such an application (the guardian ad litem has never been authorized to do so, in addition, all his powers have expired with the termination of the proceedings),
- if the decision is NEGATIVE (refusing to grant international protection):
 - the 30-day period for filing a complaint on behalf of the child against the decision with the Voivodship Administrative Court in Warsaw begins to run, BUT there is no one who can file such a complaint (the guardian ad litem has never been authorized to do so,

⁴² Proceedings for transfer [of the minor] to another country (so called Dublin III Regulation), proceedings to provide a minor with social assistance or assistance in voluntary return.

moreover, all his powers have expired with the termination of the administrative proceedings).

In both of these cases, the only solution would be for the guardianship court to appoint a new guardian ad litem for the child (no later than within the procedural time limits for either filing an application for an individual integration program or filing a complaint) - for these subsequent proceedings, and again, most likely, only for them. At the same time, such a new guardian ad litem could (and probably should) be a person who has already represented the child in the refugee proceedings, which further undermines the rationale for the narrowly drawn rules of representation of the child in the first place.

These problems can be avoided when using either temporary guardianship or legal guardianship under Article 113 of the Act on Granting Protection to Foreigners.

A positive assessment should be also given to the measures adopted in the Act on Assistance to Citizens of Ukraine concerning the adjudication on the appointment of a temporary guardian - in principle - at a court hearing⁴³, but also after interviewing the candidate for this function, the person who has hitherto exercised actual guardianship of the child and after interviewing the minor himself/herself (which, in turn, also implements the directive of Article 72.3 of the Constitution and Article 12 of the Convention on the Rights of the Child). It should be noted that the provisions of the Act on Granting Protection to Foreigners do not impose such obligations on the courts, and also the jurisprudential practice of the courts has not, unfortunately, gone in this direction.

Similarly positive should be the assessment of the extensive directory of entities that can apply for the establishment of a temporary guardian⁴⁴, which, on the one hand, seems to correspond

⁴³ Art. 25.12 AACU.

⁴⁴ Art. 25.11 AACU.: “The following are authorized to submit an application: 1) the Border Guard, 2) the head of the village (wojt), the mayor, the president of the city, the head of the poviast (starost), the head of the voivodship (marshal), 3) the public prosecutor, 4) the Police, 5) the heads of organizational units of welfare assistance [...], 4) representatives of international organizations or non-governmental organizations involved in providing assistance to foreigners, 7) the person who has actual custody

to the guideline of Article 3 of the Convention on the Rights of the Child and the general rules of the Code of Civil Procedure⁴⁵, and on the other hand, contrasts sharply with the rules governing the right to bring action before the court with respect to applying for the establishment of guardianship for children under temporary protection (only the Head of the Office for Foreigners has such right) and applying for the establishment of a guardian ad litem (only a Border Guard unit has such right).

Finally, it should be noted that the person appointed temporary guardian of the child or his/her legal guardian (in the case of minors with temporary protection who are not citizens of Ukraine) undertakes not only to legally represent the unaccompanied minor, but also to provide care for them. In other words, the legislator assumed that the child will remain with his/her guardian, who will take care of the minor, help him/her with daily activities, contact the school, take to the doctor, that is, there will be no need for a separate ruling on the placement of the child in foster care. With legal representation by a guardian ad litem, on the other hand, the latter is the rule⁴⁶.

Although for the issue of the child's legal representation, which is the focus of this analysis, it seems to be of little importance, being with the minor on a daily basis, caring for him/her, supporting him/her (not only legally) can be very important for developing a bond, a relationship between the child and the representative. The lack of this can negatively affect, for example, the trust a child will or will not place in his or her legal representative, which, in turn, can have an adverse effect on the outcome of the proceedings for granting the minor international protection.

of the minor, 8) the person who has assumed actual custody of the minor after the minor has entered the territory of the Republic of Poland and is exercising it on the day the application is submitted, 9) other persons or entities, within the framework of their responsibilities”.

⁴⁵ Art. 572 CCP.: „§ 1. Whoever is aware of an event justifying the initiation of ex officio proceedings is obliged to notify the guardianship court of the event. § 2. The obligation mentioned in § 1 is primarily incumbent on civil registry offices, courts, prosecutors, notaries, bailiffs, local and government administration bodies, the police authorities, educational institutions, social guardians, and organizations and establishments involved in the care of children or mentally ill persons.”.

⁴⁶ Art. 61.3.3.b AOGPF.

Interestingly, most of the problems signalled above concerning the institution of a guardian ad litem for unaccompanied minors residing in Poland and seeking international protection have been raised for years by the Commissioner for Children’s Rights in his successive statements addressed to the Minister of Justice⁴⁷. The Commissioner drew particular attention to the disadvantages of the narrowly defined scope of the child’s legal representation (only in proceedings for international protection and related proceedings), pointing to the dangers arising therefrom. At the same time, being aware of legal assistance agreements, such as the Polish-Ukrainian Agreement, the Commissioner proposed that the new institution be named „custodian [Polish: kurator] for an unaccompanied foreign minor residing in the territory of the Republic of Poland” (not: „guardian,” [Polish: opiekun] i.e., emphasizing its temporary and extraordinary nature), at the same time equipping the custodian with powers equal in essence to legal guardianship. This proposal was last made in the draft of the Family Code prepared by the Family Law Codification Committee of the Commissioner for Children’s Rights in the proposed Article 276.2⁴⁸.

The Minister of Justice was critical of the above proposals, seeing no need to implement them and justifying it by, on the one hand, the small number of unaccompanied minors who arrived in the territory of Poland each year, and, on the other hand (according to the Minister), the ineffectiveness of regulating the institutions under Polish domestic law which, due to international agreements

⁴⁷ General Statement of the Commissioner for Children’s Rights to the Minister of Justice of November 6, 2017 on the introduction of the institution of a custodian for unaccompanied foreign minors residing in Poland, file no. ZSM.422.14.2017.AC; Renewed General Statement of the Commissioner for Children’s Rights to the Minister of Justice of July 2, 2018 to consider introducing the institution of a custodian for unaccompanied foreign minors residing in Poland, file no. ZSM.422.11.2018.AC.

⁴⁸ Letter from the Commissioner for Children’s Rights to the President of the Republic of Poland, the Speaker of the Sejm of the Republic of Poland, the Speaker of the Senate of the Republic of Poland, the President of the Council of Ministers and the chairpersons of parliamentary clubs, deputies and parliamentary groups, file no. GAB.422.7.2018.BS; draft Family Code, Art. 276.2, explanatory memorandum p. 114–115.

stipulating the jurisdiction of the courts of the child's nationality, could not find practical application, anyway⁴⁹.

As it turned out after the outbreak of the war in Ukraine and in connection with the influx of a large group of unaccompanied minors from the territory of that country, the institution once proposed by the Commissioner for Children's Rights, except under a new name (now: the temporary guardian), turned out to be not only possible to introduce, but - in the unanimous opinion of the Council of Ministers - necessary to safeguard the best interests of this group of children.

Summary

In conclusion, the issues of legal representation of unaccompanied minors who were forced to leave Ukraine after 24 February 2022, although centered around the newly established institution of a temporary guardian, are definitely not confined within the framework of this regulation. Indeed, one must not forget about legal guardianship, with its distinctive nature under Article 113 of the Act on Granting Protection to Foreigners [AOGPF], as well as the guardianship ad litem under Article 61 of the AOGPF, addressed to unaccompanied minors applying for international protection in Poland.

As for the latter institution, it is probably safe to say that despite acknowledging its many flaws, it is only by comparing the guardianship ad litem for unaccompanied refugee children with the new institution of a temporary guardian and the procedure for appointing such a guardian that it became fully apparent how, for many years, no one questioned, for example, adjudicating guardianship

⁴⁹ Response of the Minister of Justice dated 7 February 2018 to the General Statement of the Commissioner for Children's Rights dated 6 November 2017, file no. DL-I-053-15/17; Response of the Minister of Justice dated 7 September 2018 to the General Statement of the Commissioner for Children's Rights dated 2 July 2018, file no. DLPC-I-053-1/18.

cases in closed sessions, relying by the courts only on documents, failing to interview the child, failing to interview the candidate for the role of guardian, or even failing to take statements from him/her regarding his/her criminal record.

At the same time, it should be emphasized at this point that when appointing a temporary guardian the court may choose to omit some of the above elements, for example, refrain from interviewing the child and the candidate for his/her guardian if the documents presented indicate that they are related. However, the courts should resort to these facilitations, instruments that expedite the processing of the case, only exceptionally. After all, we must all be aware, on the one hand, of how sensitive the group of children affected by the decisions made in this area is and on the other - of the great risks involved in entrusting not only the legal representation of a child (as in the case of guardianship *ad litem*), but (in the case of temporary guardianship) also the custody of a minor to a person who could potentially abuse or harm the child. Awareness of these dangers, naturally, increases if one takes into account the scale of migration from Ukraine and the enforced speed of the border checks carried out in conditions of ongoing airstrikes nearby, which made it much more difficult to detect possible problems in the child-factual guardian relationship already at the state border.

As for suggestions to the legislator for the future, one should certainly seek a single model of legal representation for unaccompanied foreign minors arriving in the territory of Poland, without differentiating it according to the criterion of the children's citizenship or the date they crossed the border of the Republic of Poland. The experience of using the institution of a temporary guardian, the jurisprudential practice of the courts, the developed forms of supervision over guardians will provide invaluable help in this regard, as will the awareness of the shortcomings of the institution of guardianship *ad litem* for this group of minors.

It also seems that the right place to situate possibly a completely new form of legal representation for unaccompanied foreign minors, perhaps transferred from the Act on Assistance to Citizens of Ukraine, or maybe modeled on Article 113 of the AOG-PF, but most importantly - even better than the forms currently in place, is the Family and Guardianship Code, and not any *lex specialis*. A regulation with a rank of a code statute could be applied

universally, regardless of the migration and asylum background of the child's arrival in our country, fully complying with the Convention principle of always being guided first by the best interests of the child and the constitutional principle of equal treatment of similar subjects (Article 31 of the Constitution).

KOMPLEKS. Comprehensive Support for People in a Vulnerable Situation in the Polish Migration Management System

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