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## **Power of attorney in administrative procedures: General principles and credibility assessment**

A party's proxy often plays a very important role in administrative proceedings, including in the course of applying for international protection. The institution of a proxy is closely related to the need to strengthen the position of a party to proceedings vis-à-vis the public administration. One has to fully agree with the statement that 'the right to support and representation is recognised as one of the canons of administrative proceedings in view of European standards',<sup>5</sup> and the right to appoint an attorney guarantees 'a fuller realisation of the principle of active participation of a party in administrative proceedings'.<sup>6</sup>

[The Act on granting protection to foreigners within the territory of the Republic of Poland](#) (hereinafter: the Protection Act) specifies that, as a rule, asylum proceedings are governed by the provisions of the [Code of Administrative Procedure](#) (hereinafter: the [Code of Administrative Procedure](#)). It follows from these regulations that a party may act through an attorney unless the nature of the proceedings requires the party to act in person (Art. 32 of the Code of Administrative Procedure). The power of attorney for litigation in the administrative procedure is less formal, and its basic limit is the steps that a party must take in person.

Sometimes the nature of the factual acts requires direct contact between the administrative body and the party to the proceedings, as the procedure requires the party to appear in person in order to undergo a medical examination, take part in a hearing,<sup>7</sup> or in a status interview in proceedings for granting international protection. As follows from the Act on Protection, a foreigner must submit the application for granting international protection in person (Art. 26 (1)), collect the travel document after the proceedings have been completed (Art. 31 (6)) or the travel document provided for in the [Geneva Convention](#) (Art. 89ib). The wording of these provisions does not, however, rule out the assistance of the party's attorney in the above-mentioned actions.<sup>8</sup>

According to Art. 33 §1 of the Code of Administrative Procedure, a party's attorney may be a natural person who has the capacity to perform legal acts, regardless of whether they are a Polish citizen and whether they have any professional qualifications or experience. What is important is that the attorney should be trusted by the party. The power of attorney must include the name of the attorney, as well as the name of the person granting the power of attorney, it should be signed by the party, and should clearly indicate the limits of authority.<sup>9</sup> As Przybysz explains, 'it should be clear from the wording of the power of attorney in what actions (all or some of them), in what proceedings (the entire proceedings or a specific stage), and before what authority the proxy may act on behalf of the authoriser.'<sup>10</sup> The power of attorney should be granted in writing (recorded in paper or electronic form) or filed on record. The attorney must attach the original or an officially certified copy of the power of attorney to the file (if the

5 H. Knysiak-Molczyk (2013). 'Konstrukcja prawna pełnomocnictwa procesowego' [Legal structure of the power of attorney]. In: K. Knysiak-Molczyk (ed.). *Czynności procesowe zawodowego pełnomocnika w sprawach administracyjnych i sądowo-administracyjnych* [Procedural acts of a professional representative in administrative and judicial-administrative cases]. Warsaw: Wolters Kluwer, p. 17.

6 H. Knysiak-Sudyka (ed.) (2020). *Pełnomocnik strony w postępowaniu administracyjnym i sądowo administracyjnym* [Proxy in administrative and administrative court proceedings]. Warsaw: Wolters Kluwer, p. 19.

7 M. Szubiakowski In: M. Wierzbowski (ed.) (2017). *Postępowanie administracyjne - ogólne, podatkowe, egzekucyjne i przed sądami administracyjnymi* [Administrative procedure: General, tax, enforcement and administrative courts]. Warsaw: C.H. Beck, p. 58.

8 J. Chlebny In: J. Chlebny, W. Chróścielewski, P. Dańczak, P. Dąbrowski, A. Liszewska, R. Rogala (2020). *Prawo o cudzoziemcach: komentarz* [Law on Foreigners: Commentary]. Warsaw: CH Beck, p. 1030.

9 Judgment of the Supreme Administrative Court in Warsaw of 29 April 1998, IV SA 1044/96, LEX 45639.

10 See commentary to Art. 33: P.M. Przybysz In: *Code of Administrative Procedure. Commentary updated*, LEX/el. 2021.

attorney is a barrister or a legal counsellor, they may certify a copy of the power of attorney themselves).

The legislation provides that:

“a party who does not have a domicile or habitual residence or a seat in the Republic of Poland, another Member State of the European Union, the Swiss Confederation or a Member State of the European Free Trade Association (EFTA), a party to the Agreement on the European Economic Area, if he or she has not appointed an attorney residing in the Republic of Poland to represent the case and does not act through a consul of the Republic of Poland, shall be obliged to appoint a proxy for service in the Republic of Poland, unless service is effected by means of registered electronic delivery’ (Art. 40 § 4 of the Code of Civil Procedure).”

If he or she fails to do so, all letters will remain on file, but they will have the legal effect as if they had been served.

In view of the rather sparse and unelaborated provisions referring to the institution of a power of attorney, the rules expressed in the Civil Code and the Code of Civil Procedure should be applied alternatively when granting such a power of attorney.<sup>11</sup> It is worth emphasising that not allowing an attorney to participate in administrative proceedings is tantamount to not allowing a party to the proceedings<sup>12</sup> and affects the implementation of the principle of active participation of a party in administrative proceedings. Each authority conducting the proceedings is obliged to ensure the participation of the attorney in the proceedings until the revocation of his or her power of attorney<sup>13</sup> and his or her absence or refusal to admit him or her may result in reopening of the proceedings pursuant to Art. 145 § 1 (4) of the Code of Administrative Procedure.<sup>14</sup>

In practice, there is some doubt as to the language in which the power of attorney should be drafted. The starting point for further analysis of the matter is the [principle of the official status of the Polish language as set out in the Constitution of the Republic of Poland, which also applies to proceedings to which foreigners are parties](#). The Polish language is the official language of constitutional state bodies as well as bodies, institutions and offices. Additionally, ‘entities performing public tasks on the territory of the Republic of Poland shall perform all official acts and make declarations of intent in Polish, unless specific provisions provide otherwise’ (Art. 4 of the [Act on the Polish Language](#)).

The power of attorney may be drawn up in Polish or in a foreign language. In the latter case, however, the document should be submitted together with its translation into Polish. However, the Act does not impose any form of translation or qualifications of the translator. It is worth emphasising that the Act on Protection (Art. 11) obliges the authority to provide a translation of documents drawn up in a foreign language admitted as evidence in proceedings. However, this does not apply to the power of attorney.

In practice, there is doubt as to whether an administrative authority may question the legitimacy of a power of attorney submitted in administrative proceedings and whether the power of attorney can be subject to assessment at all. We must agree with the statement that ‘the administrative authority examines the validity of the power of attorney... *ex officio* and should not allow a person who does not hold a valid power of attorney to participate in the case<sup>15</sup>. According to the [resolution of the Supreme Court](#), which

11 Z. Janowicz (1999). *Kodeks postępowania administracyjnego. Komentarz* [Code of Administrative Procedure: Commentary]. Warsaw: Wydawnictwo Prawnicze PWN, p. 150.

12 Judgment of the NSA in Warsaw of 16 June 1998, III SA 1597/96, LEX 35482; Judgment of the NSA of 29 July 2016, II FSK 87/16, LEX 2101631; A. Wróbel In: M. Jaśkowska, M. Wilbrandt-Gotowicz, A. Wróbel (2020). *Kodeks postępowania administracyjnego. Komentarz* [Code of Administrative Procedure: Commentary]. Warsaw: Wolters Kluwer, LEX – Art. 32; A. Gołęba In: H. Knysiak-Sudyka (ed.) (2019). *Kodeks postępowania administracyjnego. Komentarz* [Code of Administrative Procedure: Commentary]. Warsaw: Wolters Kluwer, LEX – Art. 40.

13 Judgment of the Supreme Administrative Court of 29 July 2016, II FSK 87/16, LEX 2101631.

14 P. Przybysz, Warsaw (2021) – Art. 32.

15 A. Wróbel In: M. Jaśkowska, M. Wilbrandt-Gotowicz, A. Wróbel (2020) – Art. 33.

may be relevant to administrative proceedings, ‘when a person who cannot be a proxy in fact acts as a legal representative, there is a lack of proper authorisation which causes the proceedings to be invalid’. Therefore, due to the consequences of a wrongly appointed proxy or an inability to be a proxy, the competent authority should verify the submitted power of attorney. Verifying the power of attorney is therefore justified also with a view to protecting the interest of the party to the proceedings. This brings to light one of the basic roles of a public administration body, which is related to the principle of information (Art. 9 of the Code of Administrative Procedure). A public administration body is ‘obliged to duly and comprehensively inform the parties of the factual and legal circumstances which may affect the determination of their rights and obligations being the subject of administrative proceedings’. In addition, the administrative body should ensure ‘that the parties and other persons involved in the proceedings do not suffer prejudice due to ignorance of the law, and shall give them the necessary explanations and guidance to this end.’ However, the procedural authority may not interfere in the choice of an attorney, as this is within the autonomous will of the party to the proceedings,<sup>16</sup> nor should it persuade him or her to give up his or her proxy. The right to grant a power of attorney, to withdraw a power of attorney, and to temporarily exclude his or her participation from the proceedings is within the exclusive jurisdiction of the authoriser and not of the authority conducting the proceedings. The applicant, in view of the possible consequences of the actions and negligence of the proxy, should therefore choose his or her representative with extreme care.

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16 P.M. Przybysz (2021) – Art. 33.