Naczelny Sąd Administracyjny
[Supreme Administrative Court]
00-011 Warszawa, ul. G. Boduena 3/5
Izba Ogólnoadministracyjna
[General Administrative Chamber]
WYDZIAŁ II
[2ND DIVISION]

January 23, 2022
File no. II OSK 2603/21

The response must indicate the file number of the Court

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The Secretariat of the Supreme Administrative Court, the General Administrative Chamber, hereby sends a copy of the judgement of December 5, 2022, case no. II OSK 2603/21 on the cassation appeal case of Lyudmyla Kozlovska against the judgement of the Voivodeship Administrative Court in Warsaw of July 7, 2021, case no. IV SA/Wa 530/21 on the complaint case of Lyudmyla Kozlovska.

Head of the Secretariat
Under the authority Elżbieta Maik
[SIGNATURE]
Senior Judicial Inspector

Appendix:

- copy of the Supreme Administrative Court’s decision.

JUDGEMENT

IN THE NAME OF THE REPUBLIC OF POLAND

December 5, 2022

The Supreme Administrative Court composed (NSA) of:

Presiding Judge NSA Judge Zdzisław Kostka

Judges NSA Judge Małgorzata Miron (rapporteur)

WSA Delegated judge Grzegorz Rząsa

Court reporter: Senior Judicial Assistant Anita Lewińska-Karwecka

after hearing on November 23, 2022 at the General Administrative Chamber the cassation appeal case by Lyudmyla Kozlovska against the judgement of the Voivodeship Administrative Court (WSA) in Warsaw of July 7, 2021, case no. IV SA/Wa 530/21 on the complaint by Lyudmyla Kozlovska against the decision of the Head of the Office for Foreigners of January 29, 2021, no. DL.WIP0.410.1552.2020/JPP regarding the refusal to grant a long-term EU residence permit,

1. repeals the judgement under appeal and the contested decision and the decision of the Mazovian Voivode of October 6, 2020, no. WSC-II-E.6153.339.2018, which was upheld by it,
2. orders the Head of the Office for Foreigners to pay Lyudmyla Kozlovska the amount of PLN 1407 (one thousand four hundred and seven) for the reimbursement of the costs of legal proceedings.

[STAMP AND SIGNATURE]

JUSTIFICATION

The Voivodeship Administrative Court in Warsaw, by the judgement of July 7, 2021, case no. IV SA/Wa 530/21, dismissed the complaint by Lyudmyla Kozlovska against the decision of the Head of the Office for Foreigners of January 29, 2021, no. DLWIP0.410.1552.2020/JPP regarding the refusal to grant a long-term EU residence permit.

This judgement was given in the following factual and legal status of the case.

On March 1, 2018, Lyudmyla Kozlovska applied to the Mazovian Voivodeship (hereinafter: the Voivode) for a long-term EU residence permit. She pointed out in its justification that she has been living in Poland permanently since 2007, first as a student and working since 2009.

By decision of October 4, 2018, no. WSC-II-F.6153.339.2018, the Voivode refused to grant the permit to the foreigner, citing the Article 214 (1) (2) of the Act of December 12, 2013 on Foreigners (Journal of Laws of 2017, item 2206 as amended) as the legal basis for the decision . The Voivode determined that on July 31, 2017, the details of the foreigner were entered in the list of foreigners whose stay in the territory of the Republic of Poland is undesirable and placed in the Schengen Information System for the purposes of refusing entry with a deadline of July 31, 2021. The body concluded – after analysing the material of an operational nature, i.e. information on the foreigner covered by the *"secret"* clause – that for reasons of security and legal order protection, the issue of the permit should be refused. Pursuant to Article 6 (1) of the Act on Foreigners, the body waived the preparation of the justification for the decision in the part concerning the factual justification.

This decision was upheld by the Head of the Office for Foreigners (hereinafter: the Head of the Office) by the decision of February 15, 2019 No. DL.WIP0.410.1079.2018.JPP. He pointed out that the material containing classified information with the *"secret"* clause justifies the refusal to grant the requested permit to the party on the grounds of state security.

By a final judgement of September 5, 2019, case no. IV SA/Wa 1311/19, the Voivodeship Administrative Court in Warsaw overruled the above-mentioned decision of the Head of the Office and the decision of the Voivode preceding it. The C ourt considered that the material collected in the case, including documents with a classification clause, is too vague and insufficient to accept that the stay of the foreigner on the territory of Poland poses a threat to the state security.

In the course of reconsidering the case, the Voivode supplemented the evidence with

current information referred to in Article 207 (1) of the Act of December 12, 2013 on Foreigners (Journal of Laws of 2020, item 35, as amended; hereinafter: the Act on Foreigners). As a result of the actions taken, the Voivode also received a letter from the Head of the Internal Security Agency (hereinafter: the Head of the Internal Security Agency) containing classified information with the *"secret"* clause.

Then, by decision of October 6, 2020, no. WSC-II- E.6153.339.2018, the Voivode again decided to refuse to grant a long-term EU residence permit to the foreigner. The basis for the refusal was the existence of a condition referred to in Article 214 (1) (2) of the Act on Foreigners, according to which the foreigner shall be refused a long-term EU residence permit if it is necessary for state defence or security or protection of public safety and order. The Voivode considered that the materials provided by the Head of the Internal Security Agency with the "secret" clause contained information that justified the application of the above-mentioned provision. At the same time, due to the content of Article 6 (1) of the Act on Foreigners, the body waived the preparation of the justification for the factual decision in the part concerning the specific reasons for the refusal, because they were related to the defence or security of the state or the protection of security and public order.

After considering the appeal of the foreigner, the Head of the Office, by decision of January 29, 2021, no. DL.WIP0.410.1552.2020/JPP, upheld the above-mentioned decision of the Voivode of October 6, 2020. The decision was issued on the basis of Article 214 (1) (2) of the Act on Foreigners and Article 127 (2) and Article 138 (1) (1) of the Act of June 14, 1960, Code of Administrative Procedure (Journal of Laws of 2020, item 256, as amended; hereinafter: the Code of Administrative Procedure).

In the justification, the authority of the second instance indicated that the only basis for refusal to grant a party a long-term EU residence permit is the condition set out in Article 214 (1) (2) of the Act on Foreigners. New information obtained by the Voivode indicates that granting a party the permit requested by it and its further stay in the territory of the Republic of Poland may pose a threat to state security. The erroneous factual finding concerning the inclusion of the foreigner's details in the Schengen Information System for the purpose of refusing entry was corrected.

Referring to the allegations of the appeal, the Head of the Office indicated that during the reconsideration of the case, the Voivode complied with the guidelines contained in the judgement of the Voivodeship Administrative Court in Warsaw on September 5, 2019, case

no. IV SA/Wa 1311/19, and requested new information on the foreigner. The decision was therefore taken on the basis of supplementary evidence, which was different from that which the General Court had assessed when examining the complaint against the decision previously issued.

Referring to the issue of preventing the foreigner and her representatives from accessing the files on the basis of which the contested decision was issued, the Head of the Office emphasised that it results from the classified nature of the documents in question and their *"secret"* clause. The decision of the Voivode of October 6, 2020, issued in this regard, was the subject of an assessment by the Head of the Office, who, after examining the complaint of the party, upheld it with his decision of December 28, 2020. He shared the view that the non-disclosure of the document containing classified information in relation to a party on the basis of Article 74 (1) of the Code of Administrative Procedure was obligatory. Also, the Voivodeship Administrative Court in Warsaw, both in the cited judgement of September 5, 2019, and in the judgement of April 11, 2019, case no. IV SA/Wa 11/19 regarding the decision refusing to provide access to classified files issued during the first examination of the foreigner's application, did not question the correctness of such action by the administrative bodies.

The authority of the second instance emphasised that providing the party with materials with the *"secret"* clause would be a violation of the legal order in force in Poland. Although for a party to the proceedings such a limitation in the knowledge of the motives and reasons for the decision constitutes an obvious inconvenience, in the opinion of the Head of the Office, the prevention of access to classified information to unauthorised persons results from the need to protect the state security and public interest. For the same reason, it was justified to apply Article 6 (1) of the Act on Foreigners and to limit the content of the justification for the contested decision of the Voivode. At the same time, it was emphasised that both the authorities of both instances and, above all, the Court reviewing the contested decisions, have access to classified materials and assess them individually each time – as in the judgement of September 5, 2019. Therefore, restricting a party's access to these materials does not preclude it from asserting its rights by way of appeal or complaint to the administrative court.

The Head of the Office noted that the proceedings took into account the party's long-term legal stay in Poland and the lack of doubt on the part of the administrative authorities as to the legitimacy of the party's stay on the territory of Poland and her activities, which has

been subject to multiple verifications in the past. However, he pointed out that the previous lack of knowledge of the authorities as to the circumstances indicating the legitimacy of the refusal to grant residence permits did not undermine the credibility of the currently obtained classified information. In comparison, the currently established facts, in the opinion of the authority, indicate that the foreigner poses a threat to the state security.

The foreigner filed a complaint against this decision, demanding its repeal and the repeal of the previous decision of the Voivode. The complaint alleges the violations of:

1. Article 7, Article 77 (1) and Article 80 of the Code of Administrative Procedure, in conjunction with Article 153 of the Act of August 30, 2002, Law on Proceedings before Administrative Courts (currently: Journal of Laws of 2003, item 329, as amended, hereinafter: the Law on Proceedings before Administrative Courts), by the lack of an exhaustive collection and consideration of all the evidence and its incorrect assessment, in a manner inconsistent with the legal assessment and indications contained in the judgement of the Voivodeship Administrative Court in Warsaw of September 5, 2019, case no. IV SA/Wa 1311/19, carried out in violation of the public interest and the legitimate interest of citizens, consisting in the incorrect acceptance, and reproduction in this respect of the incorrect findings contained in the decision of the Voivodeship of October 6, that the further stay of the appellant on the territory of the Republic of Poland would constitute a threat to the state security, in a situation where the appellant does not pose such a threat and the overwhelming part of the evidence gathered in the case has already been critically assessed by the Court as *"not justifying the issuance of a negative decision"* and, moreover, the appellant has submitted a number of new requests for evidence in the case, which have not been duly considered and assessed by the authority, despite the fact that the circumstances resulting therefrom justify the issue of the long-term EU residence permit on the territory of the Republic of Poland to the appellant;

2. Article 8 (1), Article 11 and Article 107 (3) of the Code of Administrative Procedure by completely failing to explain what new information collected during the administrative proceedings was the basis for both decisions, since the Voivodeship Administrative Court in Warsaw considered the evidence collected so far in the case to be insufficient to refuse the appellant the right to a long-term EU residence permit on the territory of the Republic of Poland and what was the result of the analysis by the

authority of the evidence requests submitted by the appellant to the case file, which the authority allegedly had in mind, but did not refer to their content in any respect, which prevents the appellant from carrying out the instance control, as well as testifies to the conduct of the proceedings in a way that violates confidence in public authority;

3. Article 138 (1) (1) of the Code of Administrative Procedure by unjustified maintenance of the Voivode's decision, in a situation where it should be have been repealed in its entirety, because the Voivode not only did not collect evidence in the case in an exhaustive manner or consider it, but also completely mistakenly considered that the appellant's details were included in the Schengen Information System for the purposes of refusing entry, despite the fact that they were deleted from it, as well as, unlike the Head of the Office, considered that the basis for the negative decision was *"security and public order reasons"*, and not *"state security reasons"*;

4. Article 214 (1) (2) of the Act on Foreigners through its improper application and refusal to grant the appellant a long-term EU residence permit on the territory of the Republic of Poland, despite the lack of statutory grounds for this, because her stay on the territory of Poland does not pose a threat to the state security;

5. Article 211 (1) of the Act on Foreigners through its improper application and refusal to grant the appellant a long-term EU residence permit on the territory of the Republic of Poland despite the appellant meeting all the conditions required by the Act.

In response to the complaint, the Head of the Office requested that the complaint be dismissed, upholding in its entirety the position taken so far in the case.

By the letter of June 30, 2021 (date of receipt by the adjudicating division: July 5, 2021), the appellant requested that supplementary evidence be taken from the documents annexed to this letter. The Voivodeship Administrative Court in Warsaw, by the judgement of July 7, 2021, case no. IV SA/Wa 530/21, dismissed the complaint.

The Court recalled that the issue of allowing the appellant access to the files, including the review of documents, making notes, copies or extracts thereof, containing classified information, which was assigned the *"secret"* clause, had been denied in the course of the proceedings by the decision of the Voivode of October 6, 2020, no. WSC-II-E.6153.339.2018, subsequently upheld by the decision of the Head of the Office of December 28, 2020, no. DL.WIP0.410.1495.2020/JPP. This decision was the subject of a judicial and administrative review, as a result of which the Voivodeship Administrative Court in Warsaw, by the

judgement of May 26, 2021, case no. IV SA/Wa 349/21 dismissed the complaint. In the statement of reasons for that judgement, the Court stated unequivocally that the authorities were entitled, under the applicable provisions of the administrative procedure and the Act on the Protection of Classified Information, to restrict the appellant's access to documents from the case file, which were classified as *"secret"*, and that this did not infringe her rights as a party to the administrative procedure. It was pointed out that Polish legal regulations in this matter do not conflict with the provisions of Article 42 and Article 47 of the Charter of Fundamental Rights of the European Union (Journal of Laws of the European Union C. of 2007 No. 303, p. 1, as amended; hereinafter: the Charter of Fundamental Rights), Article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms, drawn up in Rome on November 4, 1950 (as subsequently amended by Protocols no. 3, 5 and 8 and supplemented by Protocol no. 2, Journal of Laws of 1993, no. 61, item 284, as amended; hereinafter: the Convention) or Article 30 (2) in conjunction with Article 31 of Directive 2004/38/EC of the European Parliament and of the Council of April 29, 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (Official Journal of the European Union L. of 2004. No 158, p. 77; hereinafter: Directive 2004/38/EC), referred to in the complaint. The state must be able to protect its security and there is no obligation in this respect to provide information, the disclosure of which it considers contrary to its essential interests.

Moving to the examination of the pleas in law relating to the infringement of Article 153 of the Law on Proceedings before Administrative Courts, the Court pointed out that steps had been taken in the case to comply with the obligations imposed in the judgement of September 5, 2019. By letter of August 7, 2020, the Voivode asked the Head of the Internal Security Agency to provide information whether the appellant's entry and stay in the territory of the Republic of Poland pose a threat to the defence or security of the state or protection of security and public order. In response, he received the classified material concerning the appellant. Therefore, it cannot be argued that the authority of first instance did not comply with the Court's indications, as it obtained new evidence and assessed it. The allegation of reliance on the same evidence was found by the Court to be entirely incorrect.

Regarding the allegation of violation of Article 7, Article 8 (1), Article 11, Article 107 (3) of the Code of Administrative Procedure, the Court stated that the new information collected during the administrative proceedings, which was the basis for both decisions, were

still covered by the classification clause, so the authorities could not have indicated them directly in the justification of the decision – Article 6 (1) of the Act on Foreigners was invoked in this respect. Although the party does not have the opportunity to read classified materials, this does not exclude the possibility of effective appeal against decisions made on the basis of such evidence. Indeed, the very structure of the review of decisions made in the course of administrative proceedings, based each time on the examination of the case with taking into account all possible violations and based on the reassessment of the established facts, including classified materials, is a guarantee of recognising the party's remedies without indicating specific violations related to the facts of the case.

Referring to the alleged restrictions on access to part of the evidence in the proceedings, which the party and her representative have faced, the Court emphasised that the authorities of both instances were familiar with the evidence containing also classified information with the *"secret"* clause. As a result of the analysis, they concluded that it is consistent and reliable and that the information contained therein testifies to the activities of the foreigner threatening the security of the Republic of Poland. The court has shared this assessment. After reviewing these documents, the Court considered that the information contained therein could in fact constitute a basis for the administrative authorities to consider that the appellant's further stay on the territory of Poland could be detrimental to the state security. The Court also did not find that they could have been obtained, prepared or used in a manner inconsistent with applicable laws, including the Act on the Internal Security Agency and the Intelligence Agency. The Court also did not consider that the clause given to this information could have been overstated. The Court considered unfounded the allegation of failure to address the issues raised in the appeal concerning the information alleged by the appellant's representative contained in the materials provided by the Head of the Internal Security Agency. In responding in any way to these issues, the authority could expose itself to the charge of disclosing classified information, which it could not do.

Referring to the allegation of violation of Article 138 (1) (1) of the Code of Administrative Procedure, the Court shared the position expressed in the response to the complaint and stated that the reclassification of the refusal to grant a long-term EU residence permit on grounds of protection of public security and public order for reasons of state security, as shown by the wording of the grounds of the contested decision, does not constitute, in the circumstances of this case, a ground for revoking the decision. Both of these

conditions are listed in Article 214 (1) (2) of the Act on Foreigners, so there was no change in the legal basis of the issued decision. A different assessment of the established factual state of the case and the resulting change in qualifications carried out in the form in which it took place in the present case, in the opinion of the Court, falls within the powers of the appeal body provided for in Article 138 (1) (1) of the Code of Administrative Procedure and did not constitute an effective basis for the repeal of the Voivode's decision.

Moving to the assessment of the allegation of violation of Article 214 (1) (2) and Article 211 (1) of the Act on Foreigners, the Court found it indisputable that the previous proceedings conducted against the foreigner did not indicate any obstacles to obtaining residence rights on the territory of Poland. In the present proceedings, too, she has shown that the statutory conditions have been met. However, it pointed out that the absolute nature of the negative condition listed in Article 214 (1) (2) of the Act on Foreigners cannot be omitted. Therefore, even if the appellant fulfils the positive conditions, the recognition that the case was necessary to protect state security makes it necessary to refuse to grant a permit.

Lyudmyla Kozlovska brought an appeal in cassation against the above judgement, challenging it in its entirety. She alleged that the Court of First Instance had:

I. issued a judgement by an improperly appointed Court, which consisted of persons appointed to the position of a judge in a procedure inconsistent with Article 179 of the Constitution of the Republic of Poland, i.e. appointed by the President of the Republic of Poland without an effective request of an authorised body, i.e. at the request of the National Council of the Judiciary, shaped in accordance with the provisions of the Act of December 8, 2017 amending the Act on the National Council of the Judiciary and certain other acts (Journal of Laws of 2018, item 3) and selected in a way that did not guarantee its independence from the executive and legislative authorities, which violated the appellant's right to have her case heard by an independent, impartial and unbiased court, resulting from Article 45 (1) of the Constitution, Article 6 (1) of the Convention and Article 47 of the Charter of Fundamental Rights, which resulted in the invalidity of the procedure referred to in Article 183 (2) (4) of the Law on Proceedings before Administrative Courts;

II. infringed the rules of procedure having a material impact on the outcome of the case:

1. Article 133 (1) in conjunction with Article 106 (3) of the Law on Proceedings before Administrative Courts by completely omitting the appellant's requests for evidence

submitted with the letter of June 30, 2021 and by refraining from conducting supplementary evidence proceedings from documents, in the circumstances, inter alia, of the discontinuation of criminal proceedings conducted by the Prosecutor's Office for Combating Organised Crime and Special Affairs in Moldova without making any allegations to any person (including the appellant), as well as the findings regarding the circumstances of the so-called *"Moldovan report"* and the role of Moldova's politicians and special services in leading to the placement of the appellant's details in the list of foreigners whose stay on the territory of the Republic of Poland was undesirable, in order to assess whether the administrative authorities have correctly established the facts of the case and whether they correctly applied the substantive provisions to the findings made, which consequently led to a ruling with the omission of a substantial part of the case file and on the basis of incomplete evidence;

2. Article 145 (1) (1) (c) of the Law on Proceedings before Administrative Courts in conjunction with Articles 7, 77 (1) and 80 of the Code of Administrative Procedure and Article 153 of the Law on Proceedings before Administrative Courts, by the unjustified dismissal of the application and the recognition that the contested decision corresponds to the law, while the authority of the second instance did not sufficiently clarify the facts and incorrectly assessed the evidence of the case – in a manner inconsistent with the legal assessment and the indications contained in the judgement of the Voivodeship Administrative Court in Warsaw of September 5, 2019, case no. IV SA/Wa 1311/19 – by incorrectly finding that the further stay of the appellant on the territory of the Republic of Poland would constitute a threat to the state security, in a situation where the appellant does not pose a threat to the state security and the overwhelming part of the evidence gathered in the case has already been critically assessed by the Court as *"not justifying the issuance of a negative decision"*, and the appellant has also submitted a number of new evidence requests in the case, which have not been duly considered and assessed by the authority of second instance or the Court, despite the fact that the circumstances resulting from them justify the issue to the appellant of a long-term EU residence permit on the territory of the Republic of Poland;

3. Article 145 (1) (1) (c) of the Law on Proceedings before Administrative Courts in conjunction with Article 8 (1), Article 11 and Article 107 (3) of the Code of Administrative Procedure, by unjustifiably dismissing the complaint and by unjustly approving of the fact that the second instance authority completely failed to explain:
   i. what new information collected during the administrative proceedings was the basis for the decision of the second instance authority and the decision of the first instance authority preceding it, since the Voivodeship Administrative Court in Warsaw, in the judgement of September 5, 2019, case no. IV SA/Wa 1311/19, considered the evidence previously collected in the case to be insufficient to refuse the appellant the right to a long-term EU residence permit on the territory of the Republic of Poland, and
   ii. what was the result of the analysis by the second instance authority of the evidence requests submitted by the appellant to the case file, which the second instance authority allegedly had in mind, but did not refer to their content in any respect in the decision, which testified to the conduct of the proceedings in a way that violates confidence in public authority;

III. violation of substantive law:

1. Article 214 (1) (2) of the Act on Foreigners through its improper application and acceptance of the Court's refusal to grant the appellant a long-term EU residence permit on the territory of the Republic of Poland, despite the lack of statutory grounds for this, because the stay of the appellant on the territory of Poland does not pose a threat to the state security;
2. Article 211 (1) of the Act on Foreigners through its improper application and acceptance of the Court's refusal to grant the appellant a long-term EU residence permit on the territory of the Republic of Poland despite the appellant meeting all the conditions required by the Act.

In view of the foregoing, the appellant in cassation requested that the appeal be heard at the hearing, that the judgement under appeal be set aside in its entirety and that the case be referred back to the Court of First Instance and that the costs of the proceedings, including the costs of legal representation, be reimbursed by the authority in her favour in accordance with the existing regulations.

The party also requested that the Supreme Administrative Court consider suspending the proceedings ex officio, on the basis of Article 125 (1) (1) of the Law on Proceedings before Administrative Courts in conjunction with Article 193 of the Law on Proceedings before Administrative Courts, pending the consideration by the Court of Justice of the European Union of the combined preliminary ruling cases C-181/21 and C-269/21, which will be resolved as a result of the preliminary ruling procedure concerning the interpretation of Article 2 and Article 19 (1) of the Treaty on European Union and Article 6 (1) to (3) of the Treaty on European Union in conjunction with Article 47 of the Charter of Fundamental Rights, in the context of determining whether a court composed of persons appointed at the request of the improperly appointed National Council of the Judiciary is a court established under a law within the meaning of European Union law.

By the letter of November 15, 2022, the representative of the appellant in cassation requested the admission and performance of supplementary evidence from documents in the form of:

1) Resolution 2458 (2022) of the Parliamentary Assembly of the Council of Europe on the misuse of the Schengen Information System by the Member States of the Council of Europe as a politically motivated sanction (with certified translation from English),
2) Document No 15600 – Report of the Committee on Legal Affairs and Human Rights to the Parliamentary Assembly of the Council of Europe (with certified translation from English),
3) Copy of the judgement of the Supreme Administrative Court of March 22, 2022, case no. II OSK 1214/21,

to the circumstances indicated in this letter.

The Supreme Administrative Court has ruled the following:

As provided for in Article 183 (1) of the Law on Proceedings before Administrative Courts, the Supreme Administrative Court shall hear the case within the limits of the cassation appeal, taking into account ex officio only the invalidity of the proceedings. If there are no grounds for invalidity listed in Article 183 (2) of the aforementioned Act, the Court hearing the case shall be bound by the limits of cassation.

When examining the cassation appeal lodged within the above limits, it should have been considered that it contains justified grounds, but not all the allegations indicated therein are correct.

First of all, it was necessary to refer to the most far-reaching plea, the consideration of which would lead to the conclusion that the proceedings before the Court of First Instance are vitiated by a defect of invalidity. The appellant sees this defect in the issuing of a judgement by the Court, which consisted of persons appointed to the position of a judge in a procedure inconsistent with Article 179 of the Constitution of the Republic of Poland, which was to result in the issuing of a judgement by a court inconsistent with the provisions of law within the meaning of Article 183 (2) (4) of the Law on Proceedings before Administrative Courts.

The issue of participation in the composition of a C ourt of a judge appointed to the position at the request of the National Council of the Judiciary formed in accordance with the provisions of the Act of December 8, 2017 amending the Act on the National Council of the Judiciary and certain other acts (Journal of Laws of 2018, item 3 – hereinafter: the Act of December 8, 2017 amending the Act on the NCJ or the *"new NCJ"*) has been discussed several times by the Supreme Administrative Court. In the judgement of July 5, 2022, case no. II OSK 249/22, the Court, referring to numerous decisions of the Supreme Administrative Court, stated that the mere fact of participating in the composition of a judge appointed to the position in the procedure before the National Council of the Judiciary formed in accordance with the provisions of the Act of December 8, 2017 amending the Act on the NCJ, a priori does not determine the defectiveness of the procedure. In particular, the fact that the National Council of the Judiciary, so formed, has selected a candidate for a judge does not constitute a basis for stating the invalidity of the proceedings. In the event of doubt as to the impartiality and independence of a given judge, it is necessary to examine specific facts to justify these doubts in the light of the circumstances of the case (the above-mentioned judgement of the Supreme Administrative Court and the decisions of the Supreme Administrative Court referred to therein are available in the Central Database of Decisions of Administrative Courts at: http://orzeczenia.nsa.gov.pl/). Justifying the position contained in the judgement of July 5, 2022, the Supreme Administrative Court referred to the content of the judgement of the Court of Justice of the European Union of November 19, 2019 (No. C-585/18, C-624/18, C-625/18; – hereinafter: the CJEU judgement) and indicated that the ground of invalidity specified in Article 183 (2) (4) of the Law on Proceedings before Administrative Courts concerns a situation in which the composition of the adjudicating court was contrary to the provisions of law or in which a judge excluded by virtue of an act participated in the hearing of the case.

The afore-mentioned CJEU judgement of November 19, 2019 was issued as part of a case requiring an assessment of the compliance with EU law of the provisions concerning the Disciplinary Chamber. The Court noted that paragraphs 152 to 153 of the judgement indicated that the case must have specific circumstances which must be taken into account in order to reach a conclusion that the appointment of a judge to the Disciplinary Chamber is defective.

A similar position was taken by the Supreme Court in the resolution of the joint Chambers: Civil, Criminal and Labour and Social Security of January 23, 2020 in the case no. BSA 1-4110-1/20. Notwithstanding the fact that the afore-mentioned resolution does not bind the administrative courts, it applies only to judges of the Supreme Court, common courts and military courts (due to the distinctiveness of the administrative and common courts), contrary to the appellant's claims in cassation, it does not follow that the mere fact of the participation of a judge appointed by the *"new NCJ"* a priori determines the defectiveness of the proceedings before a common court. The Supreme Court expressly ordered to examine the specific circumstances and their consequences in order to determine whether the court was competent, and therefore to assess ad casum any specific doubts as to the court's composition.

Such a position – as to the need to examine specific circumstances for assessing the consequences of an erroneous procedure preceding the appointment of a candidate for a judge or court assessor by the *"new NCJ"* – is also presented uniformly in the decisions of the Supreme Administrative Court. Sharing the reasoning of the judgements in which the subject matter was to present (not to present) applications for appointment to the office of a judge of the Supreme Court (including judgements of May 6, 2021, II GOK 2/18, II GOK 3/18, II GOK 5/18; of May 13, 2021, II GOK 4/18; of 6 May 2021" II GOK 6/18 and II GOK 7/18; of September 21, 2021, II GOK 8/18, II GOK 10/18, II GOK 11/18, II GOK 12/18, II GOK 13/18, II GOK 14/18 and the judgement of October 11, 2021, II GOK 9/18; all available in Central Database of Decisions of Administrative Courts), in the judgement of November 4, 2021, file reference number III FSK 3626/21, the Supreme Administrative Court accepted that a judge of an administrative court or a court assessor in a voivodeship administrative court, appointed to exercise the office by the President of the Republic of Poland, is a judge of the Republic of Poland and a European judge within the meaning of Article 2 and Article 19 (1) of the Treaty on European Union (Journal of Laws of 2004 No. 90, item 864/30, as amended) and Article

6 (1) to (3) of the TEU in conjunction with Article 47 of the Charter of Fundamental Rights (Journal EU C 303 of 14 December 2007, p. 1), and Article 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, drawn up in Rome on November 4, 1950 (Journal of Laws of 1993., No. 61, item 284, as amended), also when the procedure preceding their appointment may have been vitiated by defects.

Such a position as to the need to examine ad casum the conditions of impartiality and independence of a judge is also shared by the Court in its adjudication of the present case. This assessment is not changed by the view presented in the judgements of the CJEU cited by the author of the cassation complaint in the justification: of March 2, 2021 in case no. C-824/18 and of October 6, 2021 in case no. C-487/19. They referred to entirely different problems defined by the limits of the preliminary ruling procedure.

Transferring the above to the present case, it should be recalled that the appellant pointed out in cassation that all three judges participating in the composition issuing the contested judgement were selected in the procedure conducted by the *"new NCJ"*, the appointment of Judge Anna Sidorowska-Ciesielska occurred at the request of the National Council of the Judiciary presented by a resolution of October 14, 2020 (No. 783/2020), and Judge Agnieszka Wąsikowska – on the basis of a resolution of this body of April 14, 2021 (No. 384/2021). The author of the cassation appeal did not provide any other circumstances against these persons that would indicate their lack of independence and impartiality. The C ourt is also not aware ex officio of such circumstances which would lead it to conclude that the aforementioned judges do not guarantee independence and impartiality. Only as a side note does the Supreme Administrative Court indicate that it is apparent from the operative part of the contested judgement that at the date of the judgement Agnieszka Wąsikowska had (since November 15, 2015) the status of an assessor and not judge.

As regards Judge Wojciech Rowiński, the appellant pointed out in cassation that, in addition to the fact of taking part in the procedure of selecting a candidate before the defective, in her opinion, National Council of the Judiciary, he had signed a list of support for one of the candidates for this body. In the opinion of the foreigner, the above raises reasonable doubts as to the impartiality and correctness of such a choice. In the light of the criteria set out above, it cannot be assumed that the mere fact of signing the list of support for a candidate for the *"new NCJ"*, without linking this fact to other circumstances accompanying the appointment to that position, constitutes a lack of guarantee of the

independence and independence of such a judge. It must therefore be held that the circumstances relied on by the appellant in cassation do not justify the assertion that the Court of First Instance was composed of a judge who should have been excluded by virtue of law or that the court was improperly appointed.

Therefore, the allegation related to Article 183 (2) (4) of the Law on Proceedings before Administrative Courts is unfounded.

For the same reasons, the Supreme Administrative Court refused to suspend the proceedings on the basis of Article 125 (1) (1) of the Law on Proceedings before Administrative Courts in conjunction with Article 193 of the Law on Proceedings before Administrative Courts, pending the consideration by the Court of Justice of the European Union of the combined preliminary ruling cases C-181/21 and C-269/21, considering that the previous case law of the courts and tribunals of the European Union and the case law of the Polish courts (both common and administrative) based on it allows the court to take a position on an issue that is relevant to the resolution of the present case. Only as a side note does the Court points out that neither on the date of the judgement nor even on the date of its written statement of reasons, had the Court's judgement in the cases referred to above been delivered and the date set for the hearing.

Moving to the substantive objections of the cassation appeal, it should be pointed out that they focus on one issue: whether the material collected by the administrative body, with the active participation of the foreigner, allowed the assumption that the foreigner Lyudmyla Kozlovska threatened the state security, which justified the refusal to grant her a long-term EU residence permit. In the opinion of the Supreme Administrative Court, the Court of First Instance incorrectly assessed the evidence, and this means that the cassation appeal correctly alleges a violation of the provisions of the proceedings: Article 133 (1) in conjunction with Article 106 (3) of the Law on Proceedings before Administrative Courts and Article 145 (1) (1) (c) of the Law on Proceedings before Administrative Courts in conjunction with Article 7, Article 77 (1), Article 80, Article 8 (1), Article 11 and Article 107 (3) of the Code of Administrative Procedure.

Thus, one cannot deny the validity of those allegations of the cassation appeal which point out that the Court of First Instance completely disregarded the requests for evidence which were submitted with the letter of 30 June 2021, that is, inter alia, the letter of the Prosecutor's Office for Combating Organised Crime and Special Affairs in Moldova dating

from March 23 2021 (together with the Polish translation), from which it appeared that the criminal proceedings conducted by the law enforcement authorities in Moldova had been discontinued without charges being brought against anyone (including the appellant). The appellant also included press articles on journalistic findings regarding the circumstances of the so-called Moldovan report and the documentation collected about it, which would indicate the lack of evidence supporting the fact that the foreigner poses a threat to the state security.

Pursuant to Article 106 (3) of the Law on Proceedings before Administrative Courts, the Court may, ex officio or at the request of the parties, take supporting evidence from documents where this is necessary to clarify significant doubts and does not lead to an excessive prolongation of the proceedings. The decision refusing to take evidence issued pursuant to Article 106 (3) of the Law on Proceedings before Administrative Courts does not require justification and, as a rule, is subject to entry in the minutes of the hearing, however, in the justification of the judgement issued in the case, the Court should have explained what conditions guided the disputed decision (such as the judgement of the Supreme Administrative Court of July 7, 2021, II OSK 192/20). In the case law of the Supreme Administrative Court, it is assumed that the condition for the assessment of such an non-appealable decision by the Supreme Administrative Court pursuant to Article 191 of the Law on Proceedings before Administrative Courts is the correct formulation of the cassation plea (conclusion by the appellant in cassation of a request to examine an non-appealable decision) and the submission of reservations to the minutes pursuant to Article 105 of the Law on Proceedings before Administrative Courts. The circumstances of the present case, however, require to assume that the formulation of the plea by indicating the violation of Article 133 (1) in conjunction with Article 106 (3) of the Law on Proceedings before Administrative Courts corresponds to the formal and constructional conditions of the cassation appeal and requires its substantive assessment. The analysis of the reasoning of the contested judgement makes it necessary to assume that the Court of First Instance in no way noted the receipt of letters of June 30, 2021 or the evidence requests contained therein. Moreover, the Court did not respond to the above-mentioned requests by issuing a decision (refusing to take such evidence or taking it into account). Since the case was heard at a sitting in camera, the parties to the proceedings also did not have the opportunity to object to the minutes. Obviously, the cassation appeal was the first pleading after the Court of First Instance had given its decision and served it on the parties.

Therefore, when assessing the above-mentioned objections, it was necessary to share the appellant's position in cassation as to the fact that the Court of First Instance did not rule on the basis of the entire file, which violated Article 133 § 1 of the Law on Proceedings before Administrative Courts and which undoubtedly affected the outcome of the case.

The above plea is closely linked to the defective, as the appellant in cassation rightly pointed out, the assessment by the Court of First Instance of the evidence which was the basis for this Court's contested decision.

As stipulated in Article 80 of the Code of Administrative Procedure, a public administration body assesses on the basis of the entire evidence whether a given circumstance has been proven. The case-law of administrative courts emphasises that the obligation to consider all evidence is closely related to the accepted principle of free assessment of evidence. The free assessment of evidence, in order not to turn into arbitrariness, must be carried out in accordance with the rules of procedural law and in compliance with the rules of that assessment. First, the evidence collected by the authority should be relied on, subject to the exceptions provided for by law. Secondly, the assessment should be based on a comprehensive assessment of all evidence. Thirdly, the authority should assess the relevance and value of the evidence for the pending case, subject to restrictions on official documents that have special evidentiary power under Article 76 § 1 of the Code of Administrative Procedure. Finally, fourthly, the reasoning, as a result of which the authority establishes the existence of factual circumstances, should be consistent with the principles of logic (such as, among others, the Supreme Administrative Court in its judgement of February 15, 2022, II OSK 677/21; Central Database of Decisions of Administrative Courts).

The analysis of the reasoning of the judgement under appeal gives grounds to conclude that the Court did not notice that the administrative authorities issued a decision in omission of part of the evidence, which was not classified a *"secret"*. The foreigner is right to point out that, although the appeal body stated that it had taken evidence from the letter of December 22, 2020 and the evidence attached to it, including, among others, the press release published on the website of the Prosecutor's Office of the Republic of Moldova, the press article: *"Lyudmyla Kozlovska without charges. Moldova withdraws from the charges and closes the investigation"* of May 13, 2020 and the judgement of the National Asylum Court in France of September 29, 2020 granting Mr. Mukhtar Ablyazov

the status of a refugee, however, it is not possible to find in the grounds of the contested decision an assessment of that evidence and its impact on the decision. Given that the evidence in this case contains both non-classified and classified documents, covered by a confidentiality clause, which were not made available to the appellant (the legality of this decision was the subject of a separate proceeding in which the Voivodeship Administrative Court in Warsaw dismissed the complaint by judgement of May 26, 2021, case no. IV SA/Wa 349/21, and the Supreme Administrative Court dismissed the appeal by judgement of December 5, 2022, case no. II OSK 2295/21), the body was under a special obligation to present to the party the reasons that guided it when not taking into account the evidence provided by the party. It is worth pointing out that such an obligation was imposed on the authorities by the legislator, who, in Article 8 of the Code of Administrative Procedure, pointed out the need to conduct proceedings in a way that inspires the trust of its participants in the public authority, guided by the principles of proportionality, impartiality and equal treatment. An analysis of the proceedings conducted on granting the appellant a long-term EU resident permit indicates that the authorities did not comply with the above-mentioned obligation, and the Court of First Instance did not notice this breach.

It cannot be overlooked that the decision reviewed by the Court of First Instance was not the first decision regarding the application of the foreigner for a residence permit. The first decision of the Mazovian Voivode of October 4, 2018 and the decision of the Head of the Office, which was upheld by it, was overturned by the Voivodeship Administrative Court in Warsaw by the judgement of September 5, 2019, case no. IV SA/Wa 1311/19, and the Court, in the guidelines for further proceedings, indicated the need to conduct a thorough assessment of all the evidence collected in the foreigner's case. Although it is impossible to agree with the appellant in cassation as to the fact that the administrative body, adjudicating once again, should have indicated what new factual circumstances were proved on the basis of documents collected after the judgement was issued by the Voivodeship Administrative Court, because their part is covered by the classification clause, which makes it impossible to make them available. In addition, the authority is exempted in this part from providing a justification for the actual decision. However, such an exemption was not valid in relation to the remaining evidence, i.e. public evidence, both obtained ex officio and submitted by the party.

In conclusion, the allegations of infringement of the rules of procedure that affected

the outcome of the case should have been regarded as well-founded.

At the same time, the Supreme Administrative Court ruled that the substance of the case had been sufficiently clarified, which justified the examination of the complaint.

Taking into account the above circumstances, the Supreme Administrative Court came to the conclusion, having also analysed the documents which had been classified as *"secret"*, that the totality of the evidence does not allow it to recognise, as the administrative authority did, that the appellant is a threat to the security of the Polish State, which was the basis for the refusal to grant the application for a long-term EU residence permit. It requires clarification that the legislator did not define the concept of *"security of the state"* in the Act on Foreigners, despite the fact that in several places this concept is used as a prerequisite for refusing to grant foreigners the right to stay in the Republic of Poland. Commentators on Article 31 (3) of the Constitution point out (so: M. Safjan [ed.], The Constitution of the Republic of Poland. Volume I, Commentary on Articles 1-86, Warsaw 2016, commentary on Article 31) that state security, as well as security in general, must always be considered in connection with specific threats. In fact, security is a state in which a given entity does not feel threatened. In other words, security is a feeling of absence of danger. A contrario, in order to determine a threat to the state security, the authority should demonstrate that the action of a foreigner significantly violates the primary values, which are the matters of the security of the state and its citizens. Such a situation did not arise in the present case, as the totality of the evidence does not allow the assumption that such a threat existed or was likely to exist.

For these reasons, the Supreme Administrative Court, considering the allegation of violation of Article 214 (1) (2) of the Act on Foreigners due to its improper application, considered it necessary to take into account the complaint and to revoke the decision of the authorities of both instances.

When re-examining Lyudmyla Kozlovska's application for a long-term EU resident permit, the administrative authorities will be bound by the above-mentioned assessment as to the probative force of the existing evidence. It will therefore be up to the authorities to re-assess the collected evidence and possibly supplement it not only with secret documents, but also documents not covered by such a clause, and then thoroughly assess it, which should take place in compliance with the obligation set out in Article 7a § 1 of the Code of Administrative Procedure, unless the circumstances referred to in § 2 point 1 of this provision occur in the case.

The Supreme Administrative Court did not carry out the evidence requested on November 15, 2022, taking into account the fact that the role of administrative courts is to examine the legality of administrative decisions according to the factual and legal status in force as of the date of its issuance. On the other hand, the administrative body will assess at the re-examination of the case whether and to what extent this evidence is relevant for the examination of the application of the foreigner. As can be seen from the content of the letter of the foreigner's attorney, its copy together with attachments was delivered to the authority's attorney by registered letter, which means that these documents should have been at the disposal of the administrative authority.

Having regard to the above, pursuant to Article 188 and Article 145 (1) (1) (a) and (c) and Article 135 of the Law on Proceedings before Administrative Courts, the Supreme Administrative Court has ruled as in the sentence.

The decision on costs was based on Articles 200, 205 and 203 (1) of the present case.

[STAMP AND SIGNATURE]

File no. II OSK 2603/21

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