Warsaw, 20 November 2018

HEAD

OF THE OFFICE FOR FOREIGNERS

No. DL.WWC.4171.963.2018.AB

DECISION

Pursuant to Article 444, section 1, point 3 of the Act of Foreigners of 12 December 2013 (Polish Journal Of Laws of 2018, item 2094) in conjunction with Article 219, Article 127 § 3 and Article 138 § 1 point 1 in conjunction with Article 144 of the Law of 14 June 1960 – Code of Administrative Procedure (Polish Journal of Laws of 2018, item 2096)

having considered

the application of Attorney Izabela Banach, a legal representative acting on behalf of and for the benefit of the party to the proceedings – citizen of Ukraine Mrs. Lyudmyla Kozlovska, born on 17 March 1985, to reconsider the case settled by decision of the Head of the Office for Foreigners of 1 October 2018 No. DL.WWC.4171.963.2018.SW concerning the refusal to issue a certificate with desired content

I hereby decide to uphold the decision under appeal

It is hereby certified that the personal data:

FIRST NAME	**LYUDMYLA**
SURNAME	**KOZLOVSKA**
FATHER'S NAME	[redacted]
MOTHER'S NAME	[redacted]
MOTHER'S MAIDEN NAME	[redacted]
DATE OF BIRTH	**17 March 1985**
PLACE OF BIRTH	**SEVASTOPOL**
SEX	**FEMALE**
CITIZENSHIP	**UKRAINE**
PLACE OF RESIDENCE	**NO DATA AVAILABLE**

are included in the list of foreigners whose stay on the territory of the Republic of Poland is undesirable, and in the Schengen Information System for the purpose of refusing entry with the date of validity of the alert until **26 July 2023**, in connection with the conclusion that the entry or stay of a foreigner on the territory of the Republic of Poland constitutes a threat to state security. The legal basis for the entry is Article 435, section 1, point 4 in conjunction with Article 438, section 1, point 8 of the Act on Foreigners of 12 December 2013. Pursuant to Article 443, section 1, point 3 of the Act on Foreigners of 12 December 2013, the foreigners' data were transferred to the Schengen

Information System for the purpose of refusing entry into the Schengen area for the period of their being kept on the list.
Pursuant to Article 444, section 2 of the Act on Foreigners of 12 December 2013, the Head of the Office for Foreigners shall refuse to provide information on the actual basis of the entry if his or her data are included in the list or the Schengen Information System in connection with the circumstances referred to in Article 435, section 1, point 4 of this Act.

JUSTIFICATION

On 31 August 2018, Counsel Izabela Banach, a legal representative of the Ukrainian citizen Lyudmyla Kozlovska, born on 17 March 1985, acting on her behalf and for her benefit, applied to the Head of the Office for Foreigners with a request that the foreigner's data included on the list of foreigners whose stay in the territory of the Republic of Poland is undesirable, and in the Schengen Information System for the purposes of refusing her entry, be removed. On 1 October 2018, by decision No DL. WWC. 4171.963.2018.SW, the Head of the Office for Foreigners refused to issue the certificate with the desired content to the applicant. The decision included information that, with regard to Lyudmyla Kozlovska, there are grounds to place her data on the list and the foreigner's personal data are included on the list of foreigners whose stay in the territory of the Republic of Poland is undesirable, and in the Schengen information system with the term of validity of the entry until 26 July 2023. The interested party has been informed that data have been placed on the list and the Schengen Information System in connection with the conclusion that it is required due to state security considerations. The legal basis for the entry is Article 435, section 1, point 4 in conjunction with Article 438, section 1, point 8 of the Act on Foreigners of 12 December 2013, and Article 443, section 1, point 3 of the Act on Foreigners of 12 December 2013 **with validity of the entry until 26 July 2023**. In addition, pursuant to Article 444, section 2 of the aforementioned Act on Foreigners of 12 December 2013, the Head of the Office for Foreigners refused to grant access to the information regarding the actual basis for the entry, as the data has been included on the list based on Article 435, section 1, point 4 of the Act, and, consequently, pursuant to Article 443, section 1, point 3 of the Act, they have been transferred to the Schengen Information System for the purpose of refusing entry. This decision issued by the Head of the Office for Foreigners was delivered to the mailing address of the foreigner's legal representative on 8 October 2018.

On 16 October 2018, the Head of the Office for Foreigners received a request, sent on 15 October 2018 by Lyudmyla Kozlovska, represented by Counsel Izabela Banach, to reconsider the case regarding the removal of the data placed on the list of foreigners whose stay in the territory of the Republic of Poland is undesirable, and in the Schengen Information System.

It was stated that the decision of the Head of the Office for Foreigners under appeal has violated: "*1) Art. 77, § 1 of the CAP in conjunction with Art. 80 of the CAP 435, section 1, point 4 of the Act on Foreigners of 12 December 2013, affecting the outcome of the case, as it includes an erroneous assessment of the evidence* in terms of *fulfilment of the premise, indicated in Article 435, section 1 point 4 for entering her data in the list of foreigners whose stay in the territory of the Republic of Poland is undesirable*; *2) Article 435, section 1, point 4 of the Act of Foreigners of 12 December 2013* due to the fact that the Authority failed to indicate which of the premises occurred in the case of Lyudmyla Kozlovska – *whether the considerations regarded state defence, state security, the protection of public order and safety, or the interests of the Republic of Poland; 3) Art. 24, section 1 of the Regulation (EC) No. 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second-generation Schengen Information System (SIS II; hereinafter referred to as: 'The SIS II Regulation'), through its* improper application and placement of Lyudmyla Kozlovska's data in the SIS II based on material technical activity, rather than based on an individual administrative decision; ***4)*** *Art. 21 of the SIS II Regulation, by making a wrong assessment and recognition that the case and the basis for entry of Lyudmyla Kozlovska's data are adequate, relevant and important enough to justify the introduction of the applicant's data in the SIS II while there were no adequate premises for doing so, the authority violated* the principle of proportionality; ***5)*** *Art. 436, section 1, point 1 of the Act on Foreigners of 12 December 2013 through improper application and consideration that despite the fact that the Applicant is the spouse of a Polish citizen, her data could still be entered into the Schengen Information System due to considerations regarding state defence or security, or the protection of public safety and order*; ***6)*** *Article 444, section 2, Article 447, section 1 and Article 447, section 2 in conjunction with Article 435, section 1, point 4 of the Act on Foreigners of 12 December 2013, through banning the Applicant from becoming familiarised with the evidence collected in the case based on which the Authority issued the aforementioned decision, as it has concluded that viewing the evidentiary material in question could threaten the state defence or security, or public safety and order, or the interest of the Republic of Poland; 7) Article 444, section 1, point 3 of the Act on Foreigners of 12 December 2013, by making the erroneous conclusion that no conditions have appeared to allow the deletion of the Applicant's data from the Schengen Information System 8) Art. 7 of the CAP in conjunction with Article 77, § 1 of the CAP in conjunction with Article 80 of the CAP, through the failure to apply them and determine the actual situation in a situation in which the Authority is obliged to collect and consider exhaustively all the evidence, and issue a decision only on the basis of all the evidence;* ***9)*** *Article 8, § 1 of the CAP in conjunction with Article 107, § 1 of the*

CAP by improper justification of the decision as the Authority used too general assertions and conclusions, and hence failed to explain the justification for the case precisely'.

In an extensive justification of the application for reconsideration of the case, Lyudmyla Kozlovska's counsel raised, among others, that: " *(...) placing Lyudmyla Kozlovska's data on the register of undesirable persons is groundless and is not reflected in the facts or the law. In the case of the Applicant, none of the conditions mentioned in Article 435 of the Act on Foreigners of 12 December 2013 (Polish Journal of Laws of 2013, item 1650) that could be the basis for the entry have appeared. Lyudmyla Kozlovska is not a party in any criminal proceedings; she did not commit any crime or minor offence which could result in such far-reaching actions being taken. (...) The Authority has not indicated which of the conditions referred to in Article 435, section 1, point 4 of the Act on Foreigners occurred in the case of Lyudmyla Kozlovska; whether the considerations regarded state defence, (or) state security, (or) the protection of the security and public order, or the interest of the Republic of Poland. Due to the classification of notes and residence permit file, Lyudmyla Kozloyska has an extremely limited capacity to defend her rights. Therefore, the legal justification and the basis for the alert itself should be shown with extreme precision. It is not without reason that in the content of the norm expressed in Article 435, section I, Point 4 of the Act on Foreigners, the legislator used an exclusive junction. Therefore, the Authority should indicate which of the conditions occurred in the case of the Complainant (...) The Authority entered the data of the Complainant in the SIS II system on the basis of a material and technical activity, rather than in the form of a decision against which an appeal procedure would be available. Lyudmyla Kozloyska was not even informed of the fact that her data had been placed in the system. According to J. Starościak, material and technical activities are activities of administrative bodies which, being factual activities, are based on a clear legal basis and produce specific legal effects, and they differ from administrative acts (decisions, provisions) in that the actual activities do not give rise to any standard of conduct. Still, it must be emphasised once again that in accordance with the content of Article 24, section 1 of the SIS II Regulation, 'the data regarding third-country nationals, in respect of which an entry has been made in order to refuse their entry or stay, shall be entered on the basis of a national alert resulting from a decision issued on the basis of an individual assessment made by competent administrative authorities or courts in accordance with the procedural rules laid down in national law. The appellate proceedings against these decisions shall be carried out in accordance with national legislation (....). Analysing the provisions of European Union law, in the context of the rules implemented by the Polish legislator, an entry into the SIS II system should be made by way of order or decision, rather than solely on the basis of material or technical activity. Such a construction is contrary to the SIS II Regulation, as the data subject is not able to appeal against such activities,*

which have far-reaching consequences. (...) Lyudmyla Kozlovska has not received any information about the fact that her data were included in the SIS II; such a situation is unacceptable under the SIS II Regulation, Article 42 of the Regulation (....) The Applicant is the wife of a Polish citizen. Due to the fact that her stay does not in any way threaten security and public order, it is a sufficient reason not to include the Applicant's data in the Schengen Information System (...). According to the settled view of the Court of Justice of the European Union, "Article 30(2) and Article 31 of the Directive must, in the light of Article 47 of the Charter of Fundamental Rights of the European Union, be interpreted as requiring the national court to ensure that the non-disclosure to the person concerned by the competent national authority, in a full and accurate manner, of the grounds on which the decision based on Article 27 of the Directive was issued, and the relevant evidence, is limited to strict necessity and, in any event, that the person concerned is informed of the substance of those grounds in a manner which takes due account of the necessary confidentiality of evidence. (...) In the judgement of the Supreme Administrative Court in Katowice of 8 September 1997, issued in Case No. I SA/Ka 298/96, ONSA 1999/1, item 15, it was considered that: "The concept of an important state interest (Article 74, paragraph 1 of the Code of Administrative Procedure) requires individualisation and concretisation in each case when considering the right of the party to view the case file. Its interpretation must take account of the fact that, in the wording of the provision, it is mentioned in the singular form, and, therefore, it is not about all important national interests, but rather about a specific one that has been indicated. Citing the protection of the interest of a citizen – the author of an anonymous letter whose personal data is not known to the Authority – and, on that basis, classifying that letter, seems to be a misunderstanding (...)."

Referring to allegations Nos. 1, 2, 4, 7, 8, 9 contained in the application for reconsideration of the case, it should first be clarified again that Article 435 of the Act on Foreigners specifies enumeratively the conditions for including the data of a foreigner on the list of foreigners whose stay on the territory of the Republic of Poland is undesirable. In accordance with the aforementioned provision, the list includes and stores the data of a foreigner in the event that:

1) the foreigner has been issued a decision obliging him or her to return [to the country of origin] with a ban on entry into the territory of the Republic of Poland or a ban on entry into the territory of the Republic of Poland and other Schengen area countries;

2) the foreigner has been sentenced, by a final judgement in: the Republic of Poland for an intentional crime or a fiscal crime, to a fine or imprisonment, or; in a state other than a Schengen State for an offence constituting a crime within the meaning of the Polish law; or in the Republic of Poland or another Schengen State for an offence, to imprisonment for

more than one year;

3) the entry or stay of a foreigner on the territory of the Republic of Poland is undesirable due to the obligations resulting from the provisions of ratified international agreements existing in the Republic of Poland;

4) **it is required due to considerations regarding state defence or security, or the protection of public safety and order, or the interests of the Republic of Poland;**

5) the foreigner, having been detained in connection with crossing the border in violation of the law, has been transferred to a third country on the basis of an international agreement on transfer and reception of persons.

In the introductory part of the provision, the legislator uses the clear wording "the list shall include and store the data of the foreigner if at least one of the following conditions applies".

The circumstances on the basis of which the data of a foreigner are included in the aforementioned list may be differentiated into two groups: (1) circumstances arising directly from administrative decisions or judgements of courts of Poland and other countries referred to in Article 435, section 1, points 1 and 2, and (2) circumstances defined in the form of general clauses listed in points 3 and 4, or events which do not result from an administrative decision or judgement, referred to in points 5 and 6 of Article 435, section 1 of the Act on Foreigners.

Lyudmyla Kozlovska's data, as stated above, have been entered pursuant to Article 435, section 1, point 4 of the Act on Foreigners, **due to a threat to state security**, and this circumstance is described in the form of a general clause and its existence does not result from issuing a judgement or a decision on the obligation to return with a ban on re-entry by the Republic of Poland and other States of the Schengen area. At the same time, referring directly to the allegation included in the application for reconsideration of the case, it should be pointed out that the information about the identification of a legal interest from the catalogue referred to in Article 435, section 1, point 4 of the Act on Foreigners; it is with this legal interest that the basis for the data entry and, subsequently, the validity of the data entry, clearly indicated on page 11 of the decision under appeal, should be connected.

On the other hand, Article 438, section 1 of the Act on Foreigners precisely specifies the periods for which a foreigner's data may be included in the list of foreigners whose stay on the territory of the Republic of Poland is undesirable due to the circumstances referred to in Article 435,

section 1 of the Act on Foreigners. The data of a foreigner shall be included in the list for a period of time:

1) specified in the decision on the foreigner's obligation to return, if the decision contains a ban on re-entry into the territory of the Republic of Poland or a ban on re-entry into the territory of the Republic of Poland and other Schengen area countries;

2) 3 years from the date of transfer of a foreigner to a third country on the basis of an international agreement on transfer and reception of persons, after having been apprehended in connection with crossing the border, contrary to the provisions of law;

3) 5 years from the date of the end of the sentence of imprisonment handed down on the basis of a judgement being the basis for inclusion of the data in the list, if the foreigner has been sentenced to at least 3 years' imprisonment;

4) 3 years from the date of the end of the sentence of imprisonment handed down on the basis of a judgement being the basis for placing the data in the list, if the foreigner has been sentenced to a sentence of imprisonment for less than 3 years;

5) 3 years from the date of the end of the sentence of imprisonment handed down on the basis of a judgement being the basis for placing the data in the list, if a fine has been imposed on the foreigner;

6) conditional suspension of a sentence of imprisonment, from the date on which the judgement referred to in Article 435, section 1, point 2 becomes final, if the foreigner has been sentenced to a sentence of imprisonment with conditional suspension of its execution;

7) resulting from international agreements existing in the Republic of Poland, which constitute the basis for including the foreigner's data on the list;

8) **no longer than 5 years with the possibility of extending for successive periods, of which none exceeds 5 years, in the case of entries made in the list due to the fact that the entry or stay of a foreigner may pose a threat to state defence or security, or the protection of public safety and order, or violate the interest of the Republic of Poland**.

At this point, it should be clarified that in the case of circumstances referred to in Article 435, section 1, point 4 of the Act on Foreigners of 12 December 2013 an entry is made *ex officio*, or at the request of the competent authorities, in accordance with Article 440, section 1 of the Act. In such a case, the proceedings conducted by the Head of the Office for Foreigners concerning the entry of the foreigner's data into the list and the SIS system for the purposes of refusing entry were aimed at carrying out an individualised assessment of the evidence gathered in the file of the evidence, with regard to the existence of the conditions listed in Article 435, section I, point 4 of the Act on Foreigners.

The information in the possession of the Head of the Office for Foreigners indicates that the basis for the inclusion of Mrs. Lyudmyla Kozlovska's data on the list **constitutes the occurrence of an actual situation covered by the hypothesis of a legal standard decoded from Article 435, section I, point 4 of the Act on Foreigners of 12 December 2013.** It follows from this provision that data of a foreigner shall be included and stored on the list if it is required for reasons of state defence or security, or the protection of public safety and order, or the interest of the Republic of Poland. **The inclusion of Mrs Lyudmyla Kozloyska's data on the list was justified on grounds of state security.** In addition, Article **438,** section **1** point 8 of the Act on Foreigners provides that the data shall be entered into the list for a period not exceeding 5 years, with the possibility of extending this alert for further periods none of which shall exceed 5 years. In the opinion of the Head of the Office for Foreigners, the circumstances determined on the basis of the collected evidence justified the determination of the 5-year duration of the data entry.

At the same time, taking into consideration the content, type and nature of the document containing information that has been classified as 'Secret', which is included as part of the evidence being in the possession of the Authority, the Head of the Office for Foreigners is of the opinion that the national security considerations unambiguously justify the derogation, based on the principle laid down in Article 6, section I of the Act on Foreigners, from broader justification of this decision in the part of the actual justification, due to the previous determination that the condition provided for in Article 435, section I, point 4 of the Act on Foreigners occurs to the extent to which this provision refers to the "state security" concept. As a consequence of the application of Article 6, section I, point 1 of the Act on Foreigners, it is not permissible to cite specific factual circumstances from which it can be concluded that the state security considerations were the basis for the inclusion of the Foreigner's data on the list and the transfer of her data to the Schengen Information System for the purposes of refusing entry pursuant to Article 443, section I, point 3 of the Act on Foreigners. This is due to the fact that an action carried out against the

Authority would lead to disclosure of the content of a document containing information classified as “secret”. Consequently, it is also impossible to disclose, in the justification of this decision, the relation between the facts resulting from the evidence in the form of a document containing classified information and the facts or statements of facts raised in the application for reconsideration of the case concerning the Foreigner's previous stay on the territory of the Republic of Poland and her professional activity. Therefore, the Head of the Office for Foreigners is obliged to limit itself to stating that these facts or statements of facts do not undermine the reliability of the facts resulting from a document containing classified information, and this is due to the very nature of these facts.

Therefore, the Head of the Office for Foreigners has stated that there was a basis for including the Foreigner's data on the list; the basis results from Article 435, section I, point 4 of the Act on Foreigners, to the extent in which this provision refers to the notion of “state security”, and, therefore, the inclusion of the Foreigner's data on the list was required for state security reasons. At the same time, in connection with this determination, there was also a ground resulting from Article 443, section 1, point 3 of the Act on Foreigners, to transfer the Foreigner's data to the Schengen Information System for the purposes of refusing entry. Having become familiarised with the whole argumentation of the application for reconsideration of the case, the Head of the Office for Foreigners does not see any grounds to change this position, and so, the basis for storing the Foreigner’s data on the list and in the SIS for the purpose of refusing entry still exists today.

Going further, it should be clarified that pursuant to Article 435, section 2 of the Act on Foreigners of 12 December 2013, the inclusion of a foreigner's data on the list may take place without his or her knowledge or consent.

It should be noted that pursuant to Article 444, section 2 of the Act of 12 December 2013, the Head of the Office refuses to provide a foreigner with information on the actual basis of the entry if his or her data have been included on the list or in the Schengen Information System in connection with the circumstances referred to in Article 435, section I, point 4.

Due to the aforementioned provision, the Head of the Office for Foreigners has no legal right to provide information on the actual basis of the entry of the data placed in connection with the circumstances referred to in Article 435, section I, point 4.

However, due to the non-procedural regulation concerning the entry and removal of the foreigner's data from the list, the norm adopted in Article 444, section I, point 3 of the Act on Foreigners provides the foreigner with access to the information stored on the list and verification of these data at the request of the data subject. The proceedings referred to in Article 444 of the Act

on Foreigners are a kind of simplified, largely formalised, but, nevertheless, administrative proceeding to which the general principles of administrative proceedings apply. These general principles include the rule of law, taking into account the social interest and legitimate interest, seeking objective truth, increasing trust in state authorities and legal awareness and culture, and providing legal assistance. The control of the entry made by the Head of the Office for Foreigners on the basis of the aforementioned legal provision is a substantive control, i.e. the material and legal conditions for making the entry are subject to assessment.

It should be remembered that the issue of the inability in the proceedings to become acquainted with the factual basis of an entry in accordance with Article 444 of the Act on Foreigners, in connection with the statement that the entry or stay of a foreigner may constitute a threat to the defence or security of the state or the protection of public safety and order, or may violate the interest of the Republic of Poland, has already been the subject of the judgements of administrative courts, including the most recent one. In the justifications of the judgements handed down by the Supreme Administrative Court of 26 March 2018 (Case file No. II OSK 3358/17) and of 27 July 2018 (Case file No. II OSK 1930/17) it was pointed out that "*in the case under consideration, the Court of 1st*

Instance had the opportunity to verify the justification of the entry made. However, a detailed justification for the assessment in this respect was not possible without disclosing the factual basis for the entry, which is prohibited by Article 444, section 2 of the Act on Foreigners. The same applies to a more detailed indication of the specific circumstances in favour of the application of the 5-year entry period. It should be stressed that the Polish legislation provides for instruments ensuring control of the actions of the authorities in such cases like the one which the cassation complaint under consideration regards. This type of instrument is a two-instance judicial control of the legality of decisions issued by an authority; the control is carried out by means of lodging a complaint to the Voivodeship Administrative Court, and, then, by lodging a cassation complaint to the Supreme Administrative Court. The judicial control of the legality of the activities of the Head of the Office for Foreigners exercising his powers under Article 444, section 2 of the Act on Foreigners is not limited solely to strictly formal control, i.e. to an examination of whether the decision to refuse to issue a certificate with the required content has been issued in compliance with the basic procedural requirements. It also includes the obligation of the administrative court to both acquaint themselves with classified evidence and to assess its credibility. It should be recognised that the above is a necessary guarantee of protection of the foreigner's rights. Regulations concerning access to classified information do not limit courts in the performance of justice and do not limit the

competence of administrative courts as regards the scope of the control exercised.

In addition to the arguments concerning the inability of the complainant to obtain access to classified information, which constituted e.g. the factual basis for placing the data on the list and the Schengen Information System, which does not violate the rights of the Complainant, the Supreme Administrative Court in Judgement of 27 July 2018 (Case No. II OSK 1930/17) refers to the position of the Constitutional Tribunal expressed in connection with the examination of the constitutionality of the limitation of the party's right to access classified information and to familiarise itself with the reasons for the judgement of the Court of First Instance in cases concerning the revocation of security clearance. When examining the constitutionality of Article 38, section 3 of the Act of 5 August 2010 on the protection of classified information (Polish Journal of Laws of 2018, items 421 and 650) in Judgement of 23 May 2018, file no. SK 8/14, the Constitutional Tribunal did not question the limitation of the right of a party to become acquainted with classified information. The Constitutional Tribunal held that the denial of access of a person whose security clearance has been revoked to classified information that influenced the decision on revocation of the security clearance, such as was contained in the justification of the judgement, constitutes a useful, necessary and proportionate restriction of his or her constitutional rights. In this respect, the value that state security constitutes justifies the restriction of the complainant's rights provided for in Article 45, section I and Article 78 of the Constitution.

In the same judgement of the Supreme Administrative Court of 27 July 2018 (Case No. II OSK 1930/17), reference was also made to the most recent case law of the European Court of Human Rights. The Supreme Administrative Court ruled: *"It should also be noted that the European Court of Human Rights (Grand Chamber), in its judgement of 19 September 2017 in the case of Regner v. Czech Republic (Application No. 35289/11), expressed its opinion on the balance between the right to effective judicial protection and requirements related to state security. The ECtHR concluded that this balance was not affected to such an extent as to damage the very essence of the complainant's right to a fair trial. For the Court, the decisive argument was that the national courts had unlimited access to all classified documents and the jurisdiction of the national court covered all the facts in the case and was not limited to examination of the reasons indicated by the applicant.*"

In this context, it should be emphasised that the Polish legal order provides for the possibility of independent two-stage control by administrative courts of administrative decisions issued on the basis of classified materials for a party, or decisions refusing to remove from the list foreigner's data that had been included on the list on the grounds of state defence or security or protection of public safety and order, or the interest of the Republic of Poland.

In Judgement of 29 June 2012 (Case no. II OSK 1312/11, not published) concerning the refusal to delete the complainant's data included on the list of foreigners who are undesirable on the territory of the Republic of Poland and in the Schengen Information System, the Supreme Administrative Court indicated as follows: "*Limiting access to the case file regards the party, rather than the court ruling on the case. This restriction, although it constitutes a limitation of an active participation of the party in the proceedings and poses a potential threat to the principle of a fair procedure, is nevertheless based on the legal basis in Article 74 § 1 of the Code of Administrative Procedure). It is of an exceptional nature, related to the protection of superior values, which has the consent of the Constitution, contained in Article 31, section 3 of the Constitution.*

The assessment of the legitimacy of the allegations made by the Foreigner based on the aforementioned judgements of the Court of Justice of the European Union should not be carried out in isolation from all legal regulations concerning such cases. In her argumentation, the foreigner seems to disregard the issue of the scope of judicial review of administrative decisions in the course of which the courts may not only familiarise themselves with the case file whose disclosure to a party has been excluded by law and which constituted the basis for issuing the decision under appeal against, but also

independently assess the nature and importance of the aforementioned case file and, more specifically, assess the correctness of the findings and assessments made by the administration bodies.

The court, having full evidence at its disposal, may come to the conviction that the assessment of administrative bodies was justified, but also, that administrative bodies erroneously determined the existence of certain types of threats on the basis of all the evidence gathered. It should be added here that, pursuant to Article 133, § 1 of the Act of 30 August 2002 – Law on Proceedings Before Administrative Courts (Polish Journal of Laws of 2017, item 1369, as amended), the court issues a verdict after the hearing has been closed on the basis of the case file, unless the authority has failed to fulfil the obligation referred to in Article 54, paragraph 2. Case file should also be understood as administrative files containing evidence gathered by public administration bodies in the course of the entire proceedings pending before the said bodies. The court also takes into account generally known facts (see: comments to Article 106, paragraph 4 of the Law on Proceedings Before Administrative Courts), as well as supplementary evidence from the documents referred to in Article 106, paragraph 3 of the Law on Proceedings Before Administrative Courts. In Judgement of the Supreme Administrative Court of 19 March 2013 (case file No. II OSK 2231/11, LEX No. 1340231), it was also noted that: *"If the administrative court issues a judgement after closing the hearing on the basis of the case file, the conditions of Article 133, section 1 of the Law on Proceedings Before*

Administrative Courts must be met. This means that the court must have a complete set of case files, which should, of course, be sent by the authority whose decision is the subject of the complaint. However, if the court does not have a complete file on the date of its judgement, it should not rule on the case but oblige the competent authority to complete the file".

In this context, Judgement of the Supreme Administrative Court of 17 October 2014 (Case No. II OSK 829/13 CBOSA) deserves special attention. In the judgement, it was stated extensively that:

"The cassation Complainant could have, in fact, used three means of redress. The first means of redress was a request for reconsideration of the case by the administrative authority. In considering this appeal, the administrative body re-examines the merits of the case. The second means of redress is a complaint filed with the Voivodeship (Provincial) Administrative Court. It should be emphasised that when examining the complaint, the Voivodeship Administrative Court is not bound by the allegations of the complaint and takes into account ex officio *any flows which have arisen in the course of the administrative proceedings. This results directly from Article 134 § 1 of the Law on Proceedings Before Administrative Courts which states that the court decides within the boundaries of a given case without being bound by the allegations and motions of the complaint or the legal basis cited. The third means of redress is a cassation appeal against the judgement of the Voivodeship Administrative Court. When considering this appeal, the Supreme Administrative Court verifies the correctness of the decision handed down by the Court of First Instance and, indirectly, the decisions issued by administrative bodies. When investigating the cassation complaint, the Supreme Administrative Court is bound by the allegations of the complaint; however, there is a requirement to prepare a cassation complaint by a professional counsel who may raise such allegations that the control of the Supreme Administrative Court will be carried out to a large extent.*

In the opinion of the Supreme Administrative Court, a legal institution such as the Court of First Instance, which, while verifying the decisions of administrative bodies, takes into account ex officio *any flows which have arisen during the administrative proceedings, provides the same effective protection for the foreigner as the institution of a Special Master holding a certificate of access to confidential information. The Special Master is independent of the party and cannot provide the party with confidential information to which he or she has access. This institution makes sense in legal systems in which the Court of First Instance, when deciding on a case, does not take into account any flows committed in administrative proceedings* ex officio*, but only those resulting from an allegation raised by a party to the proceedings. The practice of the administrative judiciary indicates that the Courts of first instance overrule decisions for reasons that they take into account* ex officio*. Therefore, it is not a legal institution which is not used by the Courts".*

A similar view was adopted in Judgements of the Supreme Administrative Court of 29 June 2016 (Case No. II OSK 2586/14), of 9 September 2016 (Case No. II OSK 538/15, LEX No. 2143553, also in CBOSA [Central Database of Administrative Courts]) and of 9 September 2016 (Case No. II OSK 61/15).

It should be stressed that the aforementioned view was formulated by the Supreme Administrative Court in relation to the allegation of violation of Articles 8 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which, similarly to Article 47 of the Charter of Fundamental Rights, concerns the issue of the right to an effective remedy. In subsequent judgements, in turn, the aforementioned view concerned the allegation of infringement of Article 31, section 3 in conjunction with Article 51, section 3 of the Constitution of the Republic of Poland in conjunction with Article 151 of the Law on Proceedings before Administrative Courts, as well as Article 47 of the Charter of Fundamental Rights itself to which the foreigner refers by citing the case law of the EU Court of Justice (page 8 of the application for reconsideration of the case). In Judgements of 29 June 2016 (file no. II OSK 2586/14), of 9 September 2016 (file no. II OSK 538/15) and of 9 September 2016 (file no. II OSK 61/15), the Supreme Administrative Court stated unequivocally that limiting the foreigner's ability to become acquainted with evidence material does not automatically mean that his or her right to an effective remedy with regard to decisions ordering the foreigner to return to his or her country has been infringed and, therefore, there are no grounds to assume that Article 47 of the Charter of Fundamental Rights of the European Union has been violated in that case. In accordance with Article 52, section 1 of the CFR, any restrictions on the exercise of the rights and freedoms recognised in the Charter must be provided for in a law and they should respect the essence of these rights and freedoms. Subject to the principle of proportionality, the limitations may be imposed only if they are necessary and genuinely meet the objectives of public interest recognised by the Union or the need to protect the rights and freedoms of others. In the Supreme Administrative Court's view, if the public interest recognised by the EU or the need to protect the rights and freedoms of others speaks for restricting the rights set out in the Charter, these conditions must be considered to be met in situations where state security or public order is at stake, and the Charter allows for such situations.

It should be noted again that the restriction of access to the case file concerns the party, rather than the court adjudicating in the case, which will have the opportunity to become familiarised with all the evidence which justified the entry of the Foreigner's data on the list of undesirable foreigners in Poland and in the SIS (if the foreigner decides to submit this decision to judicial review). The review carried out by the court may result in reversal of the appealed decision, or (in the case being examined by the Supreme Administrative Court) the judgement of the court of first instance, and the courts

sometimes make use of such a possibility. As a result, the procedural guarantees existing in the Polish legal system ensure the necessary minimum protection against arbitrariness of authority, although undoubtedly, due to the confidentiality of evidence, a party to the proceedings may have an understandable difficulty in formulating a precise procedural position.

Notwithstanding the above, it should be stated that the legal literature indicates that the right to defence derived from Article 47 of the CFR is not absolute in nature and may be subject to limitations, provided that it is necessary for the purposes of the public interest and does not constitute a disproportionate interference with the very essence of this right. The need to ensure the protection of public health is cited as an example (Judgement of the Court of Justice of 15 June 2006 in case C-28/05 *G.J. Doctor, Maatschap Van den Top, W. Boekhout v. Minister van Landbouw, Natuur en Voedselkwaliteit).*

The case-law has also sometimes stressed that the right of access to the entire file in court proceedings may be subject to restrictions and it is for the courts of the Member States to determine, on the basis of national law, the conditions under which such access should be granted or refused, after considering the interests protected by Union law (judgement of the Court of Justice of 14 June 2011 in case C-360/09, *Pfleiderer AG v. Bundeskartellamt*).

The possibility of the existence of exceptions to the aforementioned scope is also indicated by Judgement of the EU Court of Justice of 4 June 2013, cited by the Foreigner (page 8 of the application, without the case no. or date of the judgement) (Case C-300/11 ZZ *v. Secretary of State for the Home Department).* In that case, the following question was referred to the Court of Justice for a preliminary ruling:

"Does the principle of effective judicial protection set out in Article 30, section 2 of Directive 2004/38 and interpreted in the light of Article 346, section 1, letter a) [TFEU] require the judicial authority hearing an appeal against a decision to expel a citizen of the European Union from a Member State on grounds of public order and public security under Chapter VI of Directive 2004/38, to ensure that the citizen of the European Union is informed of the essential reasons against him despite the fact that the authorities of the Member State and the competent national court, having examined all the evidence submitted by the authorities of the Member State in relation to the citizen of the European Union, considered that disclosure of the essential reasons against him would be contrary to the interests of national security?"

It must be explained here that the question referred to Article 30, section 2 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 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, which amended Regulation (EEC) No 1612/68 and repealed Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, hereinafter referred to as 'Directive 2004/104/EC'. The Foreigner, being a national of a third country and married to a Polish national (which is also referred to hereafter) is not covered by the scope of that Directive. The aforementioned legal act comprehensively safeguards the implementation of the Treaty right of citizens of the European Union to move and reside freely within the territory of the Member States, currently expressed in Article 20 of the TFEU (previously Article 18 of the Treaty establishing the European Community). The right of family members of Union citizens to enter and reside with them on the territories of Member States other than the country of nationality of the Union citizen concerned is secondary to this Treaty right. Only in certain cases directly related to the prior exercise by Union citizens of the right of free movement of persons in a Member State other than that of their nationality does the case-law of the Court of Justice of the EU accept the need to apply Directive 2004/38/EC by analogy to the situation of family members of Union citizens currently residing in their Member State of nationality (e.g. Judgement of the Court of Justice of the European Union of 14 November 2017, Case No. C-165/16, in the case *Toufik Lounes v. Secretary of State for Home Department)*. However, regardless of the above, in the context of Judgement of the EU Court of Justice of 4 June 2013 (in Case No. C-300/11 ZZ v. Secretary of State for the Home Department) it should be noted that Article 30 and

30 Directive 2004/38/EC provides for procedural safeguards, in particular:

- the right to be notified in writing of any decision issued under Article 27, section 1, in such a way that they are able to understand the content of the notification and its effects, and

- the right to be fully and accurately informed of the grounds of public order, public security or public health on which the decision has been issued in their case, unless this is contrary to the interests of state security (Article 30, sections 1 and 2), and

- the right to seek judicial and, where appropriate, administrative redress in the host Member State, or to require a review of any decision issued against them on grounds of public order, public security or public health, whereby appellate procedures should make it possible to examine the lawfulness of the decision and the facts and circumstances on which the proposed measures were based (Article 31, sections 1 and 3).

In response to the question formed in this way, the Court held that Article 30, section 2 and Article 31 of Directive 2004/3 8/EC must, in the light of Article 47 of the Charter of Fundamental Rights of the European Union, be interpreted as requiring the national court to ensure that the non-disclosure to the person concerned by the competent national authority, in a full and accurate manner,

of the grounds on which the decision based on Article 27 of that directive was issued, and the relevant evidence, is limited to strict necessity, and to ensure that, in any event, the person concerned is informed of the substance of those grounds in a manner which takes due account of the necessary confidentiality of evidence.

The Court, therefore, considered that it may be necessary, both during the administrative and judicial proceedings, to refrain from providing the person concerned with certain information, in particular, for overriding reasons relating to state security (also, Judgement of the Court of Justice in the joined cases Kadi and Al Barakaat International Foundation v. Council and Commission, point 342) (para. 54). In principle, basing the justification for a judicial decision on factual circumstances and documents of which one or all of the parties could not become aware and on which they were, therefore, unable to comment, would constitute an infringement of the fundamental right to an effective remedy before a court (Commission v. Ireland, point 52 and the case-law cited therein). However, when, in exceptional cases, the competent national authority, citing state security, objects to a full and accurate notification of the person concerned of the grounds on which the decision under Article 27 of Directive 2004/38 is based, the competent court of the Member State concerned must have at its disposal and apply methods and procedural rules which make it possible to reconcile, on the one hand, the legitimate grounds of state security with regard to the nature and sources of information taken into account when issuing the decision and, on the other hand, the need to ensure that the party's procedural rights, such as the right to be heard and the adversarial principle, are sufficiently respected (para. 56, 57, 64 of the judgement).

The Court even found that finding a balance between the right to effective judicial protection and the need to protect the security of the Member State concerned, i.e. the very balance on which the conclusion set out in the preceding paragraph is based, is not of the same importance in the case of evidence supporting the reasons presented to the competent national court. In some cases, disclosure of that evidence may directly and specifically jeopardise the security of the state, in so far as it may jeopardise the life, health or freedom of persons or reveal the specific investigative methods used by the national security authorities and, thus, make it more difficult or even impossible for those authorities to carry out their tasks in the future (para. 66 of the Judgement in case No. C - 300/11).

It should also be noted that the rights of the Foreigner in the present case are not identical to those of the complainant in case C-300/11, as that case concerned the EU citizen and his rights guaranteed by the Treaty on the Functioning of the European Union and by the aforementioned Directive, which in Articles 30 and 31 grants more precisely certain procedural guarantees without establishing a reference to national law, which is provided for in Articles 24 and 42, section 2 of

Regulation 1987/2006. This problem was highlighted in Judgements of the Supreme Administrative Court of 14 December 2011 (Case No. II OSK 1938/10) and of 26 May 2015 (Case No. II OSK 1979/13).

The reference in Regulation 1987/2006 to national provisions must be linked, *inter alia*, to the fact that national security (state security) remains the sole responsibility of each Member State of the European Union (Article 4, section 2 of the Treaty on European Union), and the Treaty provisions do not provide for an obligation of a Member State to provide information the disclosure of which it considers contrary to the essential interests of its security (Article 346, section 1, letter a] of the TFEU). The aforementioned issue was also recognised by the Supreme Administrative Court in its Judgement of 14 December 2011. (Case No. II OSK 1938/10, ONSAiWSA 2013/29) in the context of the provisions of the previously binding Act on Foreigners of 13 June 2003, constituting an equivalent of the regulations currently in force.

Furthermore, referring specifically to allegation No. 3 of the person concerned regarding the lack of an alert in the Schengen Information System on the basis of a decision issued by the authorities in the form of an order or a judgement, it should be pointed out again that, as a result of compliance with the obligation arising from Article 443, section I, letter b) of the Act on Foreigners, in so far as that provision refers to the circumstances underlying the storage of data on the list on the basis of Article 435, section I, point 4, in conjunction with Article 24, section 1 and 2 of Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second-generation Schengen Information System (SIS II) (Official Journal of the European Union L 381 of 28 December 2006, p. 4), hereinafter referred to as 'Regulation 1987/2206', foreigners' data are transmitted by the Head of the Office for Foreigners to the Schengen Information System for the purpose of refusing entry for a period corresponding to the duration of the entry of the foreigner's data on the list. These data are processed for the purpose of refusing entry and stay (Article 24, section 1 of Regulation 1987/2006).

The necessity to transmit the data of foreigners whose data have been entered on the list on the basis of Article 435, section 1, point 4 of the Act on Foreigners, to the Schengen Information System was derived from Article 24, section 1 and 2 of Regulation 1987/2006. According to the first of these provisions, data on third-country nationals for whom an alert has been issued for the purpose of refusing entry or stay shall be entered on the basis of a national alert resulting from a decision issued on the basis of an individual assessment made by the competent administrative authorities or courts in accordance with the procedural rules laid down in national law. The appellate proceedings against these decisions shall be carried out in accordance with national legislation. In accordance with Article

24, section 2 of Regulation 1987/2006, an alert shall be entered if the decision referred to in paragraph 1 is justified by a threat to public order, public security or national safety which may be posed by the presence of the third-country national concerned on the territory of a Member State. This is the case, in particular, for: (a) a third-country national who has been convicted in a Member State of an offence punishable by imprisonment for more than one year; (b) a third-country national regarding whom there are reasonable grounds to believe that he or she has committed serious criminal offences, or regarding whom there are serious grounds to believe that he or she intends to commit such offences on the territory of a Member State.

The structure of the provisions laid down by the Polish legislator, in accordance with the aforementioned provisions of Regulation 1987/2006, assumes that the transfer of the foreigner's data into the Schengen Information System for the purposes of refusing entry is only a result of prior inclusion of his or her data on the list, which was done only in connection with the specific circumstances listed in Article 443, section 1 of the Act on Foreigners, which establishes an obligation on the part of the Head of the Office for Foreigners to carry out this activity. At the same time, however, Article 435, section 2 of the Act on Foreigners provides that the inclusion of a foreigner's data on the list may take place without his or her knowledge and consent. In this respect, i.e. the "procedural rules" concerning the issuance of a "decision" from which the "national alert" results, Article 24, section 1 of Regulation No 1987/2006 cited above, refers to the national law of the Member State concerned. The term "decision" should be understood specifically as a concept applicable to European Union law, and not as a concept of "decision", the meaning of which is defined, for example, by Article 104, section 1 and 2 of the Code of Administrative Procedure. In his previous activity, the Head of the Office for Foreigners expressed his conviction (which was not negated in the case law of administrative courts) that the notion of a "decision", referred to in Article 24, section 1 of Regulation (EC) No 1987/2006 is to be understood as the expression of an action by a public authority of an EU Member State *vis-à-vis* an individual, but which is not an administrative act and, therefore, does not require formal notification of the person concerned. The fact that the literal wording of Article 24, section 1 of Regulation 1987/2006 is slightly different from Article 96, section 1 of the Convention implementing the Schengen Agreement of 14 April 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, hereinafter referred to as the 'Implementing Convention', which has been replaced by that provision, should not mean that the structure of the entry of data in the Schengen Information System has fundamentally changed. The "decision" on the basis of which the "national alert" is based, should still be issued on the basis of

national procedural rules.

The novelty is the addition of the proviso that national law is also to govern "the appellate procedure against such decisions". However, Regulation 1987/2006 did not provide for the structure of the appellate procedure, even if only in general terms, but it referred the question entirely to the national law of the Member State, i.e. in particular, it does not prejudge whether the review of the alert must take place necessarily before it is introduced on the basis of the "decision" referred to in Article 24, section 1 of the Regulation.

In this context, it is worth mentioning Judgement of the Voivodeship Administrative Court in Warsaw of 26 March 2015 (Case No IV SA/Wa 2461/14, LEX No 2035002), which refers to the implementation (within the meaning of ensuring execution) of the provisions of Regulation 1987/2006 concerning the inclusion of foreigners' data in the SIS: "*First of all, the Member State has been delegated the competence to weigh whether or* not *the case is sufficiently justified to make its introduction in the SIS II legitimate (Article 21 of the Regulation). This regulation is reflected in Article 443 of the Act, where Poland introduced criteria and determined what situations it considers justified for transferring information contained in the national list to the SIS for the purpose of refusing entry. The freedom of national law in this respect has been exercised in the aforementioned norm, where the situation justifying an entry made in the SIS was, among others, the fact that the foreigner's entry into the territory of the Republic of Poland or his stay was considered undesirable due to a threat to the defence or security of the state or to the protection of public safety and order, or the possibility of violating the interest of the Republic of Poland*.

Article 24, section 1 of the Regulation provides, in turn, that data regarding third-country nationals for whom an alert has been issued for the purpose of refusing entry or stay shall be entered on the basis of a national alert resulting from a decision issued on the basis of an individual assessment by the competent authorities or courts in accordance with the procedural rules laid down in national law. The appellate proceedings shall be conducted in accordance with national law. The regulation indicated above means that the procedural rules for such cases shall be transferred exclusively to national law. Paragraph 2 further states that an alert for refusal of entry and stay in the territory of a Member State shall be issued if the decision to include a person in the national list is justified by a threat to public order, public security or national security, and the provision further specifies similar situations as an example. The enumeration is, therefore, not exhaustive, which means that other situations may also cause issuing an alert for refusal of entry and stay justified. The EU rules also provide for the possibility of placing the data of the foreigner, a third-country national against whom a national decision refusing entry has been issued, in the SIS. At the same time, it

leaves the freedom to determine the criteria for entry in the national register to national law. The issue of public or national order and security is considered to be such a case. The same criterion for entry in the SIS is also laid down in national law, namely, in Article 443, section I, point 3 of the Act."

It is also worth noting here once again that the current Article 24, section 1 of Regulation 1987/2006 was preceded by Article 96, section 1 of the Implementing Convention. This provision had a very similar wording and provided that data regarding foreigners for whom an alert has been issued for the purpose of refusing entry shall be entered on the basis of a national alert resulting from decisions issued by competent administrative authorities or courts in accordance with procedural rules established by national law. As already indicated, the Head of the Office for Foreigners is of the opinion that certain differences in the wording of Article 24, section 1 of Regulation (EC) No 1987/2006 and Article 96 section I of the Implementing Convention cannot be the basis for concluding that the substance of the data entry into the Schengen Information System for the purpose of refusing entry or stay has changed. Therefore, in the opinion of the Head of the Office for Foreigners, the views of court case-law expressed on the basis of Article 96, section 1 of the Implementing Convention are still valid. Thus, the Supreme Administrative Court, in Judgement of 26 May 2015 (Case No. II OSK 1979/13, LEX No. 1982778) with reference to Article 96, section 1 of the Implementing Convention and to the legal status, in force until 1 May 2014, concerning the control of the correct inclusion of foreigners' data on the list and in the Schengen Information System for the purposes of refusal, resulting from the provisions of the Act of 13 June 2003 on foreigners (Polish Journal of Laws of 2011, No. 264, item 1573, as amended) stated as follows: "*In the Polish legal order, the issue of introducing data regarding foreigners for whom an alert has been introduced for the purposes of refusing entry, as well as the indication of competent authorities which have access to the data entered pursuant to Article 96 of the Convention, is regulated by Article 128 et seq. of the Act on Foreigners. Article 128 et seq. of the Act on Foreigners indicates that there are 3 groups of circumstances (3 procedures) justifying inclusion on the list: on the basis of a decision on the ban on re-entry into the territory of the Republic of Poland or into the territory of the Republic of Poland and the Schengen states (Article 128, section 1, point 1 of the Act on Foreigners); on the basis of a final court judgement (Article 128, section 1, point 3 of the Act); in connection with the circumstances referred to in Article 128, sections 4, 5 and 6 of the Act, at the request of the authorities mentioned in Article 129 of the Act; also, an ex officio entry is allowed. None of these procedures* provides for the issuance of a separate decision in the procedural sense on including data on the list, which does not mean that the entry is not preceded by a decision based on individual assessment made on the basis of relevant national procedures referred to in the norm of Article 96, section 1 of the Convention. In the

case of circumstances referred to in Article 128, section 1, point 6 of the Act on Foreigners, the entry shall be made ex officio or at the request of the competent authorities. In such a case, the proceedings carried out with regard to the entry onto the list and the Schengen Information System are aimed at assessing the evidence on the basis of which a public administration body, within the framework of the administrative power granted to it, issues authoritarian concretisation of substantive law norms, i.e. issues a decision to make an entry or refuse to enter data onto the list, thus unilaterally shaping the legal situation of the addressee and imposing on it the obligation to comply with the arrangements made by the authority under pain of the application of state coercive measures. The 'decision' issued by the authority is subject, therefore, to making an assessment of the documentation gathered in the case from the point of view of *the existence of conditions listed in Article 128, section 1, point 6 of the Act on Foreigners. From a material point of view, it is a sovereign administrative act establishing certain orders and prohibitions.*" Also the literature relating to the Act on Foreigners of 13 June 2003, expressed the view that the "decision" on entering the foreigner's data onto the list did not take the form of an administrative decision (J. Borkowski, Commentary to Article 129 of the Act on Foreigners [in:] J. Chlebny [ed.] *Law on Foreigners. Commentary.* C.H. Beck 2006).

In the opinion of the Head of the Office for Foreigners, the aforementioned position remains valid also in the current legal status and may constitute a guideline for the interpretation and application of the existing provisions of the Act on Foreigners of 12 December 2013.

Article 435 et seq. of the Act on Foreigners of 12 December 2013 cannot constitute a substantive basis for issuing an administrative decision on making an entry on the list of foreigners. However, this does not mean at all that a material and technical action, which entering the foreigner's data into the list constitutes, is not preceded by an individualised assessment of a specific case. Provisions of the Act on Foreigners do not provide for the obligation to accept every application submitted pursuant to Article 440, section 1. The Head of the Office for Foreigners makes an independent assessment of the applications of the authorised authorities and the issue of making an entry is left to the discretion of this very authority. It should also be added that an entry may also be made *ex officio*. In the case of refusal to make an entry, there is a specific appeal procedure – if the Head of the Office for Foreigners does not accept the application of the authority referred to in section 1, the authority may apply to the competent minister responsible for internal affairs (Article 440, sections 2 and 3 of the Act) with a request that he issue a decision on the matter. At this stage, the procedure takes place without the participation of the foreigner.

Referring to the need to guarantee the appellate procedure for persons whose data have been entered into the SIS for the purposes of refusing entry and stay, referred to in Article 24, section 1 of

the Regulation, which is to be carried out in accordance with national provisions, it should be borne in mind that Article 444 of the Act on Foreigners allows the foreigner to submit an application with the Head of the Office for Foreigners for, *inter alia*, deletion of the data if they have been entered or are being stored in breach of the Act. The procedure provided for in Article 444, section 1, point 3 of the Act on Foreigners, as a follow-up procedure, the subject of which is checking the legality of the inclusion of the data on the list of foreigners whose stay on the territory of the Republic of Poland is undesirable, and the storage of such data, may also be regarded as such "appellate proceedings". Establishing a legal defect of the inclusion or storage of data on the list should result in the deletion of the data and, consequently, the deletion of the same data from the Schengen Information System.

At the same time, it should be borne in mind that in the proceedings referred to in Article 444, section 1 of the Act on Foreigners, pursuant to Article 445 of that Act, the provisions of the Code of Administrative Procedure on Certificates (Section VII) apply, and, therefore, the refusal to grant an application for deletion of data takes the form of a decision referred to in Article 219 of the Code of Administrative Procedure, against which, pursuant to Article 3 § 2, point 2 of the Code of Administrative Procedure, a complaint may be filed with the Voivodeship Administrative Court. Thus, judicial control of the activities of the Head of the Office for Foreigners as the authority in charge of the list and the authority competent to transfer foreigners' data to the Schengen Information System for the purposes of refusing entry, is ensured. It constitutes a basic and sufficient counterbalance to the restrictions on the foreigners' ability to become acquainted with information concerning certain facts underlying the inclusion of their data on the list and the SIS.

Referring to Article 42, section 1 of Regulation (EC) No 1987/2006, indicated by the party's representative also in this context, one should mention paragraph 2 of the aforementioned regulation, which was omitted in the argumentation of the application for reconsideration of the case. Pursuant to Article 42, section 1 of Regulation 1987/2006, third country nationals with regard to whom an alert has been issued in accordance with this Regulation shall be informed of the alert in accordance with Articles 10 and 11 of Directive 95/46/EC, and this information shall be communicated in writing along with a copy of the national decision referred to in Article 24, section 1, which constitutes the basis for the alert or, along with a reference to such a decision,. Still, this right is not absolute and unrestricted. According to Article 42, section 2, letter c) of Regulation 1987/2006, this information shall in no case be transferred if national law allows the right to limit information, in particular for reasons of national security, defence, public safety and for the purpose of prevention, detection, investigation and prosecution of criminal offences. The aforementioned provision refers to national rules on the limitation of the right to be informed of an alert. Since it is permissible under national law

not even to communicate information on an alert, it is all the more acceptable, in such cases, not to provide a "copy of the national decision" within the meaning of Article 42, section 1 of Regulation (EC) No. 1987/2006. The acceptance of the position adopted in the application for reconsideration of the case, according to which a separate administrative decision on issuing an alert would have to be issued each time prior to entering the foreigner's data in the Schengen Information System, which would then have to be delivered to a person whose data are yet to be entered into the system, would lead to conclusions which would be directly contrary to Article 42, section 2 of Regulation 1987/2006. For example, it would not be possible to issue an alert for persons who are not residing in Schengen countries, whose current whereabouts are not known, and whose activities pose a threat to the security of the Member States or to public order in the aforementioned countries. The purpose of issuing an alert for such persons is to prevent their entry into the territory of the Schengen States. The requirement to issue and serve a decision on an alert each time before it is issued would undermine the purpose of the regulation in such cases, as issuing an alert in many cases would not be possible at all. For these reasons, the interpretation of Article 42, section 1 of Regulation (EC) No. 1987/2006, presented in the request for reconsideration, is incorrect, as it does not take into account the exceptions in Article 42, section 2 of that regulation, irrespective of the question of access to the source information justifying the entry of the alert. Article 42, section 2, letter c) of Regulation 1987/2006 expressly allows the right to information on the alert and the grounds for issuing it to be limited, and also makes reference to national rules in this respect.

In view of the arguments set out above, it should be reiterated that the procedure provided for in Article 444, section 1 of the Act on Foreigners fully implements the appellate procedures for persons whose data have been entered in the SIS for the purposes of refusing entry and stay, as referred to in Article 24, section 1 of Regulation 1987/2006.

In the aforementioned case, in connection with the allegation set out in point 5 of the application for reconsideration of the case, the possibility of applying the provision of Article 436, section 1, point 1 of the Act on Foreigners of 12 December 2013 was also considered. The provision states that a foreigner's data should not be placed on the list if the foreigner is married to a Polish citizen, or resides on the territory of the Republic of Poland and is married to a foreigner who holds a permanent residence permit or a long-term EU residence permit, unless 1) it is required for reasons of state defence or security, or the protection of public safety and order; 2) the decision refusing to grant the foreigner a temporary residence permit or a permanent residence permit, issued in connection with the statement that the marriage was concluded by the foreigner in order to circumvent this Act, has

become final; or 3) the decision obliging the foreigner to return, issued for reasons of state defence or state security, or the protection of public safety and order, or in connection with the statement that the marriage was concluded or exists in order for the foreigner to circumvent this Act, has become final. The documentation collected in the case shows that Mrs Lyudmyla Kozlovska is married to a Polish citizen, but it should be noted that the basis for including Mrs Lyudmyla Kozlovska's data on the list of foreigners whose stay on the territory of the Republic of Poland is undesirable is the regulation resulting from Article 435, section 1, point 4 of the Act on Foreigners, within the scope in which this provision refers to state security considerations.

As indicated in Judgement of the Voivodship Administrative Court in Warsaw of 6 September 2017. (Case No. IV SA/Wa 1337/17): "*As regards the allegation of violation of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Polish Journal of Laws of 1993, item 284), it should first be pointed out that the principle of respect for family and private life expressed therein does not mean that in every case of the existence of family ties, the State has an absolute obligation to respect these relations, i.e. without taking into account other protected values. One such value is the security of the State. Paragraph 2 of the article reads that interference by a public authority with the exercise of this right is unacceptable, except in cases provided for by the act and such that are necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, the protection of law and order and prevention of crime, protection of health and morals, or protection of the rights and freedoms of others. This means that the signatories of the Convention, weighing the interests of the individual and of the general public, have assumed that the latter should take precedence over the former. From the case law of the Court of Human Rights one can draw a clear conclusion that the right to family life is not violated when a foreigner can live in another country undisturbed and that the Convention does not oblige the State in which the foreigner resides to legalise his or her stay only due to the fact that he or she has family relations with a citizen of that State. This would lead to depriving this State of the possibility of exercising control over foreigners coming to Poland and would make the legalisation of their stay conditional only on being married to a Polish citizen. In the Court's opinion, such an interpretation of Article 8 of the Convention is contrary to the principle of protection of citizens expressed in Article 5 of the Constitution and the duty of the State to take care of their safety (...).*" In the opinion of the Head of the Office for Foreigners, the inclusion of the Foreigner's data in the list and in the SIS for the purposes of refusing entry constitutes, in the light of Article 8, section 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms, a legitimate interference with the right to family and private life, which, as already indicated, are not values in which such interference would not be lawful.

Referring to the indication that the Applicant is unable to become familiarised with the evidence in the case on the basis of which the authority issued a decision refusing to remove the data from the list and the SIS – denied the provision of access to it and refused the granting of access to the case file regarding a residence permit, it should be mentioned that the subject of the proceedings is an application for removing the data included in the list of foreigners whose stay on the territory of the Republic of Poland is undesirable and in the Schengen Information System, and the administrative proceedings are conducted pursuant to Article 444 of the Act on Foreigners. These circumstances are irrelevant for the assessment of the lawfulness of the activities in the form of placing the Foreigner's data in the list and in the Schengen Information System for the purposes of refusing entry.

In view of the above, it should be pointed out that the Head of the Office for Foreigners, having reconsidered the case, does not find any grounds for deleting the data of Lyudmyla Kozlovska included in the list of foreigners whose stay on the territory of the Republic of Poland is undesirable, and, consequently, the data in the Schengen Information System for the purposes of refusing entry. In the opinion of the Authority, in relation to Mrs Ludmyla Kozlovska, there is a circumstance referred to in Article 435, section 1, point 4 of the Act on Foreigners, and the data included are true and have not been included and are not stored in violation of the provisions of the Act.

As the Head of the Office for Foreigners cannot grant the request of the party, he again refuses to issue a certificate with the requested content.

In view of the above, it has been decided as in the opening paragraph.

INFORMATION

This provision shall be final in the administrative course of proceedings. This decision may be appealed against to the Voivodeship Administrative Court in Warsaw through the Head of the Office for Foreigners within 30 days of the date of delivery of the decision (Article 53, §1 and Article 54, section 1 of the Act of 30 August 2002 – Law on Proceedings Before Administrative Courts [Polish Journal of Laws of 2017, item 1369, as amended]). This deadline is also considered to have been met if a party files a complaint before its expiry directly to the Voivodeship Administrative Court in Warsaw (Article 53, § 4 of the Act – Law on Proceedings Before Administrative Courts).

The fixed fee for an entry of the complaint amounts to PLN 100 (§ 2, section 1, point 1 of the Regulation of the Council of Ministers of 16 December 2003 on the amount and detailed rules of collecting a fee for an entry in proceedings before administrative courts [Polish Journal of Laws of 2003. No. 221, item 2193, as amended]). The entry shall be paid in cash at the cash desk of the Voivodeship Administrative Court in Warsaw or into the bank account of that court.

The party to administrative court proceedings may be granted the right to financial assistance in whole or in part. The right to full financial assistance includes the exemption from court fees and the appointment of an attorney, legal adviser, tax adviser or patent attorney. The right to partial financial assistance includes only exemption from court fees in whole or in part, or only from charges, or from court fees and charges, or covers only the appointment of an attorney, legal adviser, tax adviser or patent attorney (Article 245, § 1–3 of the Act – Law on Proceedings Before Administrative Courts). An application for granting the right to financial assistance and an application for recognition of the costs of unpaid legal assistance shall be submitted to the competent voivodeship administrative court. A party who does not have a place of residence, stay or registered office within the jurisdiction of the court may file an application with another voivodeship administrative court. The application shall be sent immediately to the competent court (Article 254, § 1 and 2 of the Act on Proceedings Before Administrative Courts). The application for granting the right to financial assistance is submitted on the form according to the template specified in Appendix No. 1 ("PPF" in case of physical persons) or No. 2 ("PPPr" for legal persons or organisational units without legal personality) to the Regulation of the Council of Ministers of 19 August 2015 on the establishment of a template and the manner of making available an official application form for granting the right to financial assistance in proceedings before administrative courts, and the manner of documenting the property, income or family status of the applicant (Polish Journal of Laws of 2015, item 1257, as amended).

I would like to inform you that as of 1 January 2016, the correspondence address appropriate for the Head of the Office for Foreigners has changed to the following: **ul. Taborowa 33, 02 - 699 Warsaw.** In addition, I would like to inform you that since 1 January 2016, the Registry Office of the Office for Foreigners, has also been located at this address. Therefore, if complaints are filed via the Head of the Office for Foreigners via a postal operator, they should now be sent to this address. If the complainant wishes to file complaints in person at the seat of the authority, they should now be filed at the Registry Office of the Office for Foreigners, located at this address.

HEAD OF THE OFFICE
by proxy

C/c:
1. Counsel Izabela Banach, legal representative of Lyudmyla Kozlovska, Law Firm ul. 12/9 Wiejska Street, 00-490 Warsaw
2. a/a

Pursuant to Article 13 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Regulation on the Protection of Personal Data), hereinafter referred to as the 'Regulation', we hereby inform you that the Head of the Office for Foreigners with its registered office in Warsaw at 16 Koszykowa Street, 00-564 Warsaw, is the administrator of the data of persons who,

1. submitted an application subject to registration in the National File of Registers, Records and Specifications in Cases of Foreigners[1];
2. are parties to administrative proceedings conducted by the Head of the Office for Foreigners;
3. have addressed the Office for Foreigners with regard to another case and correspondence is being exchanged with them on that matter.

- Questions concerning your personal data may be sent to the following address: 33 Taborowa Street, Warsaw (02-699), or to e-mail address: rodo@udsc.aov.pl.

- In cases concerning your personal data, you can also contact the Data Protection Inspector at the Office for Foreigners by writing to the e-mail address: iod@udsc.aov.pl.

- The provision of your personal data is a requirement of the statutory provisions governing administrative proceedings conducted by the Head of the Office for Foreigners and is necessary in order to carry out such proceedings. In the event of addressing the Office regarding another case, providing the data is voluntary, but necessary for its consideration.

- Your personal data are processed in order to fulfil a legal obligation incumbent on the data controller and to perform the tasks carried out within the framework of the public authority entrusted to the controller. Processing may be necessary to protect the vital interests of the data subject or another physical person (Article 6, section 1, letter c), d) and e) of the Regulation).

- If your personal data reveal racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership; they constitute genetic data, biometric data, data concerning health, sexuality or sexual orientation, they are processed only when necessary for reasons of important public interest, including the public interest in the field of public health, when it is necessary for the provision of health care and management of health care systems or services, and when it is necessary for archival purposes in the public interest (Article 9, section 2, letter g), h), i) and j) of the Regulation).

- Your personal data may be made available only to entities authorised on the basis of the provisions of law, as well as to entities with whom the Office for Foreigners has concluded agreements to entrust the processing of your personal data.

- Your personal data may be made available to a third country (i.e. outside the European Economic Area) or international organisations in accordance with the principles set out in the provisions of law, only if these countries and international organisations provide appropriate safeguards and provided that they these countries and international organisations provide for enforceable rights of data subjects and effective legal remedies.

Your data cannot be made available or collected from entities with regard to which there are reasonable grounds for believing that they allow persecution or inflict serious harm, or your data from which it is possible to establish that they are persecuting or causing serious harm, in the scope in which it can be

[1] National File of Registers, Records and Specifications referred to in Article 449, sections 1 and 2 of the Act on Foreigners of 12 December 2013 (Polish Journal of Laws of 2017, item 2206, as amended)

determined based on your data that:

1) your case is pending or your case is closed with regard to:
   a) granting international protection or revoking refugee status or subsidiary protection,
   b) granting or revoking asylum to a foreigner,
2) the foreigner was granted or refused refugee status,
3) the foreigner was granted or refused asylum,
4) the foreigner was granted or refused subsidiary protection.

- You have the right of access to your personal data, i.e. the right to obtain confirmation as to whether the controller is processing these data and information concerning such processing, as well as the right to rectify data if the data processed by the controller are incorrect or incomplete; the right to object to data processing and the right to restrict data processing. If the right to restrict processing is exercised, personal data may be processed in order to protect the rights of another physical or legal person, or due to considerations of important public interest of the European Union or of a Member State.

- Your personal data will not be subject to automated processing, decisions in your case will not be issued automatically and your data will not be profiled.

- Your personal data will not be deleted when the case has been registered in the National File of Registers, Records and Specifications in Cases of Foreigners and when they are processed in connection with administrative proceedings to which you are a party. In other cases, they are processed for the period necessary to achieve the purpose of their processing.

- If you consider that the processing of your personal data violates the provisions of the Regulation, you have the right to lodge a complaint with the supervisory authority, which is the President of the Office for the Protection of Personal Data.

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Department for Legalisation of Stay ul.
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Correspondence address:
ul. Taborowa 33, 02-699 Warsaw
DL. WWC.4171.963.2018

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WARSAW
2018-11-20

WARSZAWA 12
22/11/2018
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