Kancelaria Adwokacka
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Warsaw, 15 October 2018

To: **Head of the Office for Foreigners**
ul. Taborowa 33, 02-699 Warsaw

Appellant:
Lyudmyla Kozlovska
represented by her Attorney
Advocate Izabela Banach
Kancelaria Adwokacka
ul. Wiejska 12 lok. 9, 00-490 Warsaw

Ref. No. DL.WWC.4171.963.2018.SW

APPLICATION FOR
re-examination of the case

Acting for and on behalf of the Applicant, Lyudmyla Kozlovska (Power of Attorney in the files of the case), under Article 127 § 3 of the Code of Administrative Procedure (k.p.a.), I appeal against the decision of the Head of the Office for Foreigners of 1 October 2018, given in case Ref. No. DL.WWC.4171.963.2018.SW, delivered to the Attorney on 8 October 2018 and file for re-examination of the application of 17 August 2018.

I assert against the appealed decision:

1) breach of Art. 77 § 1 k.p.a. in conjunction with Art. 80 k.p.a. 435 para. 1 point 4 of the Act on Foreigners of 12 December 2013 having an effect on the result of the case, consisting in an erroneous assessment of the evidence concerning the fulfilment of the prerequisite set forth in Art. 435 para. 1 point 4 for entry onto the list of foreigners whose stay on the territory of the Republic of Poland is undesirable,

2) breach of Art. 435 para. 1 point 4 of the Act on Foreigners of 12 December 2013 through the Authority's failure to indicate which of the prerequisites pertained in the case of Lyudmyla Kozlovska: – reasons of defence, state security, protection of public security and order or the interest of the Republic of Poland,

3) breach of Art. 24 (1) 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) through its erroneous application and inclusion of the data of Lyudmyla Kozlovska in SIS II based on a substantive-technical action rather than an individual administrative decision,

4) breach of Art. 21 of SIS II through making an incorrect assessment and finding that the case and basis for entering the data of Lyudmyla Kozlovska, are adequate, relevant and important enough to warrant the entering of the Appellant's data in SIS II in the situation where there are no appropriate prerequisites for that exist through which the Authority breached the principle of proportionality,

5) breach of Art. 436 para. 1 point 1 of the Act on Foreigners of 12 December 2013 through inappropriate application and finding that even though the Applicant is married to a Polish national her data could be entered in the Schengen Information System for reasons of defence or security of the state or the protection of security and public order,

6) breach of Art. 444 para. 2, Art. 447 para. 1 and Art. 447 para. 2 in conjunction with Art. 435 para. 1 point 4 of the Act on Foreigners of 12 December 2013, by preventing the Applicant from familiarising herself with the evidence gathered in the case based on which the authority gave the aforementioned decision due to the conclusion that her familiarising herself with said evidence could expose the state defence or security or the protection of public order or the interest of the Republic of Poland,

7) breach of Art. 444 para. 1 point 3 of the Act on Foreigners of 12 December 2013 through the erroneous finding that the prerequisites for deleting the Applicant's particulars from the Schengen Information System did not occur,

8) breach of Art. 7 k.p.a. in conjunction with Art. 77 § 1 k.p.a. in conjunction with Art. 80 k.p.a., by the failure to apply the same and failure to sufficiently explain the facts of the case in a situation where the Authority is obliged to gather and examine, in a comprehensive manner, the entire evidence and give a decision only based on the entirety of the evidence,

9) breach of Art. 8 § 1 k.p.a. in conjunction with Art. 107 § 1 k.p.a. through inappropriate substantiation of the decision due to the use by the Authority of excessively general statements and conclusions and through that failure to explain in a precise manner the statement of grounds for the case.

Having regard to the foregoing, pursuant to Art. 127 § 3 k.p.a. and Art. 219 k.p.a., I file for repealing the decision of the Head of the Office for Foreigners of 1 October 2018 given in the case Ref. No. DL.WWC.4171.963.2018.SW, re-examination of the application of Lyudmyla Kozlovska of 17 August 2018, and then for deleting the data of the Applicant from the Schengen Information System and issuing a relevant certificate in this regard.

Statement of reasons

By the decision of 1 October 2018, the Head of the Office for Foreigners given in the case Ref. No. DL.WWC.4171.963.2018.SW refused to issue for the Applicant a certificate to the effect that her personal data are not in the list of foreigners whose stay on the territory of the Republic of Poland is undesirable and in the Schengen Information System.

One cannot possibly agree with the appealed decision.

In the first place, it is to be emphasised again that the entering of Lyudmyla Kozlovska onto the register of unwanted foreigners is unfounded and is not reflected in either the factual situation or the law. In the Applicant's case, none of the prerequisites set forth in Art. 435 of the Act on Foreigners of 12 December 2013 (Dz.U. /Journal of Laws/ 2013 item 1650) that would be the basis for the alert has occurred. No criminal proceedings are pending against Lyudmyla Kozlovska, she has not committed any offence or petty offence which could result in undertaking such far-reaching actions.

As indicated by the provision of Art. 435 para. 1 point 4 of the Act on Foreigners, data of persons may be stored in the list of foreigners whose stay on the territory of the Republic of Poland is unwanted and in the Schengen Information System only for reasons such as a threat to the state defence and security and the public order of the Republic of Poland. Undoubtedly, the stay of Lyudmyla Kozlovska on the territory of the Polish

state does not breach any of the aforementioned prerequisites. The Applicant has been staying in Poland since 2007, originally under visas and since 2009 under residence cards. **The administrative authorities never had doubts before as to the justifiability of the Applicant's stay on the territory of Poland and her activities despite numerous verifications of my Client in this regard.**

It is to be recalled again that the Foundation operates under the provisions of the Act on Foundations of 6 April 1984 (Dz.U. 1984, No. 21 item 97) and files its financial statements thereunder. Additionally, on its official website the Foundation also publishes both substantive reports and financial statements for each year of its operation. Moreover, in 2014, the Foundation manager by the Applicant was granted a license issued by the Minister of Internal Affairs No. B-088/2014 to pursue business activities to trade in specific products for military or police use, the award of which involved going through the verification procedure set forth under the law. During the examination of the application for the license, the Foundation was **provided with positive opinions of a number of authorities, including the Minister of Economy, Head of the Counter-Intelligence Service and the Chief of the Police for the Capital City of Poland.**

Next, in relation to the license, in 2016 the Foundation successfully went through inspection activities performed by the **Chief of the Police for the Capital City and then the Minister of Internal Affairs and Administration.** No irregularities were identified during the inspection and the report on the completion of the inspection by the Ministry of Internal Affairs and Administration of 21 December 2016 noted, *inter alia*, that: "*It was established during the inspection that all helmets and vests purchased by the Foundation had not been sold but had been provided free of charge as humanitarian aid to protect the life and health of Ukrainian soldiers. The said materials were provided in relation to the ongoing conflict between Ukraine and Russia and their recipients were persons who had been conscripted or joined the fights and had to equipment to protect their life and health*."

The foregoing notwithstanding, a customs and fiscal inspection has been going on in the Foundation for more than a year now during which several tens of witnesses have been heard and a lot of documents have been secured. During the course of these activities, until the present day no irregularities have been identified in the functioning of the Foundation, and no one has been presented with any charges. The procedure was extended again, until 7 November 2018. Also, on 17 April 2018, the District Court for the capital city of Warsaw, XII Commercial Division of the National Court Register gave a decision in which it dismissed the motion from the Ministry of Foreign Affairs concerning the suspension of the Foundation and appointment of a

statutory administrator. On 12 July 2018, the decision was provided with the finality clause.

Any doubts on customs and fiscal accounts of the Open Dialogue Foundation should be clarified by the competent fiscal authorities. These activities have not been completed yet. Even if the customs and fiscal inspection conducted with respect to the Foundation were to identify any irregularities, the Foundation will have the right to appeal against its findings. Also, having legal personality, the Foundation should not be automatically identified with a member of its Management Board – it is the Foundation that should become the object of the procedure, if any, in the first place. Envisaging such an option, the competent authorities should secure the possibility for the members of its governing and supervising bodies, including my Client, to participate in the activities to be performed in the future (e.g. hearings).

It is also to be noted that the Authority has not indicated which of the prerequisites set forth in Art. 435 para. 1 point 4 of the Act on Foreigners pertains in the case of Lyudmyla Kozlovska – defence (or) state security, (or) protection of security and public order (or) the interest of the Republic of Poland. Because the note and her residence files have been made secret, Lyudmyla Kozlovska has exceptionally limited possibilities to defend her rights. Hence, the legal rationale and the legal grounds for the alert itself should be demonstrated exceptionally precisely. It is not without reason that in the provision of Art. 435 para. 1 point 4 of the Act on Foreigners the legislator applied a disjunctive – excluding alternative. Hence, the Authority should point out which of the prerequisites pertained in the case of the Appellant.

Neither is it possible to endorse the arguments of the Authority concerning the entering of the Appellant's data in the SIS II. Indeed, the Authority entered the Appellant's data in the SIS II system under a substantive-technical action rather than in the form of a decision against which the appellate procedure could be followed. Lyudmyla Kozlovska was not even notified that her data had been placed in the system. According to J. Starościak, substantive-technical actions are actions of administrative authorities which, being factual actions, are based on express legal grounds and cause specific legal effects, and the difference between them and administrative acts (decisions, rulings) is that they are **factual actions which do not result in the creation of any standard of conduct**.[1] It is to be emphasised again that in accordance with the provisions of Art. 24 para. 1 of the SIS II Regulation *"Data on third-country nationals in respect of whom an alert has been issued for the purposes of refusing entry or stay shall be entered on the basis of a national alert resulting from*

[1] J. Starościak "Prawne formy działania administracji", Warszawa 1957, p. 286

a decision taken by the competent administrative authorities or courts in accordance with the rules of procedure laid down by national law taken ***on the basis of an individual assessment****. **Appeals against these decisions shall lie in accordance with national legislation**."* If the issuance of the alert had been preceded by the relevant individual procedure, as the Authority asserts, Lyudmyla Kozlovska would have had a possibility to file the relevant motions as to evidence, participate in the procedure and, above all, take a position about the material gathered in her case. Had the alert been issued in the form of a decision or a ruling, the Appellant would have been entitled to appellate procedures in accordance with the administrative procedure and then under the Act on the Procedure before Administrative Courts. Analysing the regulations of EU law, in the context of the regulations implemented by the Polish legislator, an alert should be entered in the SIS II system by a ruling or a decision rather than under a substantive-technical action. Such a concept is contrary to the SIS II Regulation because the person concerned does not have a chance to appeal against an action which has such far-reaching consequences. Besides this, the formula itself of the application for re-examination of the case in the present procedure does not provide the Appellant with due protection because the application for re-examination of the case will be heard by the same authority. According to media reports, the basis for the entry in the SIS II system was the opinion issued by the Internal Security Agency on the President of the Open Dialogue Foundation. The contents of this opinion or even its main assumptions have not been presented until now. If an opinion is the basis for an alert, the legislator should have provided for the procedure of filing an appropriate means of appeal rather than an appeal with the same authority which is a central authority of government administration supervised by the minister competent in internal affairs who also supervises the Internal Security Agency.

What is more, Lyudmyla Kozlovska did not receive any information regarding her data having been entered in SIS II. Such a situation is non-permissible in the light of the SIS II Regulation because in accordance with Article 42 thereof "*Third-country nationals who are the subject of an alert issued in accordance with this Regulation shall be informed in accordance with Articles 10 and 11 of Directive 95/46/EC. This information shall be provided in writing, together with a copy of or a reference to the national decision giving rise to the alert, as referred to in Article 24(1).*" **In the case of Lyudmyla Kozlovska, the alert was entered without the issuance of an individual administrative act in the form of a decision, and, further, no letter was ever even sent to inform the Appellant that her data had been entered in SIS II**. Due to such regulations and actions of the authorities, the Applicant found out about the alert itself only when she tried to cross the border, as a result of which she was immediately deported from the Schengen Area.

In accordance with Article 21 of the SIS II Regulation, before issuing an alert,

Member States shall determine whether the case is adequate, relevant and important enough to warrant entry of the alert in SIS II. In the case of Lyudmyla Kozlovska, there is no information whatsoever to check whether entering the alert in SIS II the authority took account of one of the key principles of the functioning of the European Union – the principle of proportionality.

It is also to be emphasised that the Applicant is the wife of a Polish national. Since her stay does not threaten security or public order, this is a sufficient prerequisite for not entering the Applicant in the Schengen Information System.

Any information on entering the Applicant in the Schengen Information System is fragmentary and in fact obtained by the Applicant from media reports only concerning the case. The Appellant was never informed about the procedure that resulted in her personal data being entered in the Schengen Information System base. The lack of access to this information in fact deprived the Applicant of the possibility to verify the decisions taken in her case and hence my Client cannot possibly take a stance concerning potential assertions against her. In the decision of 1 October 2018, the Head of the Office for Foreigners in fact did not substantiate in any way why the Applicant's stay on the territory of the Republic of Poland was unjustified. Regardless of its extensiveness, the statement of grounds for the appealed decision cites only a number of regulations and fragments of Lyudmyla Kozlovska's application. There are no factual grounds for issuing such a decision.

Due to the fact that the Applicant's data are stored in the list of foreigners whose stay on the territory of the Republic of Poland is undesirable and in the Schengen Information System contrary to the law, they should be deleted under Art. 444 para. 1 point 3 of the Act on Foreigners. These principles expressed in Art. 7 k.p.a., Art. 77 § 1 k.p.a. and Art. 80 k.p.a. are leading principles of the administrative procedure building citizens' trust in the rule of law and in the public administration bodies acting in their name. The principle of persuasion links therefore closely with the principle of deepening citizens' trust in state authorities. Additionally, the absence of sufficient clarification of the matter and identification of the reasons behind the decision is in breach of the party's interest.

Accordingly, where the Authority conducting the procedure has doubts as to the entering of the Applicant into the Schengen Information System, it should take action, on an *ex officio* basis, required to precisely clarify the factual situation. It is to be emphasised that it was the Authority who had the statutory obligation not only to clarify all doubts concerning the matter through the collection and examination of the entirety of the evidence, but also to duly establish whether the alert issued in the Schengen Information System was made in a correct manner. The Authority should

have taken its decision based on the entirety of the evidence. Even though the statement of grounds for the decision of 1 October 2018 is extensive, the Authority in charge of the procedure did not refer to many issues concerning the present case.

In accordance with the established view of the Court of Justice of the European Union: *Article 30(2) and Article 31 of the Directive in the light of Article 47 of the Charter of Fundamental Rights of the European Union, should be interpreted in such a manner that they require the national court to ensure that non-disclosure to the person concerned by the competent authority, in a full and precise manner, of the reasons being the basis for the decision given under Article 27 of the Directive, as well as the relevant evidence be limited to the required necessity and to ensure that in any case the person concerned* ***be notified of the essential contents of these reasons*** *in a manner taking due account of the required restriction of the evidence.* According to the Court, any limitation should respect the essential contents of the basic right and set the requirement that – subject to the principle of proportionality – it is necessary and that it actually meets the aims of the general interest recognised by the Union (this is what the Court found in its judgments: of 17 March 2011 in Joined Cases C 372/09 and C 373/09 Penarroja Fa, ECR. p. I1785; and also of 17 November 2011 in Case C 430/10 Gaydarow, ECR p. 1II637, para. 41; of 15 October 1987 in Case 222/86 Heylens and others, Rec. p. 4097, para. 15; and also of 3 September 2008 in Joint Cases C 402/05 P and C415/05 P Kadi and Al Barakaat International Foundation vs. the Council and the Commission, ECR p. I6351, para. 337).[2]

Moreover, the Court noted that it is the responsibility of the competent national authority, in accordance with the national procedural regulations, **evidence in support of the premise that the state's security would actually be threatened as a result of full and precise notification of the person concerned about the reasons being the grounds for the decision** given under Article 27 of Directive 2004/38 and the relevant evidence (see, by correspondence, the judgment of 15 December 2009 in Case C 284/05 Commission vs. Finland, ECR. p. h1705, para. 47, 49). In view of the foregoing, the Court found that **there is no presumption of the existence and justifiability of the reasons cited by the national authority**. It is therefore important for the person concerned to be notified of the essential reasons that are the basis for the decision to deny entry given under Article 27 of Directive 2004/38 because **the necessary protection of the state's security may not result in depriving the person concerned of the right to be heard, thus making the person's right to file an appeal, provided for in Article 31 of the Directive ineffective**. Even though these considerations are about a decision to deny entry, because the decision may have such far-reaching consequences, being analogical, these considerations should be transferred to the circumstances of the present case.

[2] Ibidem

The Court has also noted a number of times that respecting the principle of adversariality, the party should be enabled to challenge the reasons for which the disputable decision was given and present remarks on the evidence gathered against her. **Lyudmyla Kozlovska has not been given any possibility to take her position on the material gathered.**

Acting in accordance with the principle of administrative discretion, a public administration body is obliged to demonstrate due to what important interest specifically it excluded access to the files of the case and also why the interest so concretised was in support of excluding these files. In the judgment of the Supreme Administrative Court in Katowice of 8 September 1997, given in the case Ref. No. I SA/Ka 298/96, ONSA 1999/I, item 15, it was found that: "*The notion of important state interest (Art. 74 § 1 k.p.a.) requires to be individualised and concretised in each case when the right of the party to have access to the files of the case. Indeed, its interpretation should take into account that in the* ***regulation it appears in the singular and hence these are not all important state interests, but one, concrete, specific one****. Reliance on the protection of the interest of the citizen – the author of the anonym whose personal data are not known to the authority and classifying the document as confidential on that basis seems to be a misunderstanding.*"

Since the entering of the Applicant's personal data in the Schengen Information System is unlawful, devoid of reasonable grounds and completely unjustified, I file for a repeal of the Decision of the Head of the Office for Foreigners of 1 October 2018, Ref. No. DL.WWC.4171.963.2018.SW and for a re-examination of the Applicant's application of 17 August 2018 and also the deletion forthwith of the Applicant's data from the Schengen Information System.

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Izabela Banach
Advocate

Attachment:
- copy of the application.