The case of Lyudmyla Kozlovska – the SIS II vs. the right to defence

The detention and obligation to leave the country on the basis of an alert in the SIS II

For several days now, the media have been reporting that Lyudmyla Kozlovska, the president of the Open Dialog Foundation, has been detained in Brussels. According to the information provided by Lyudmyla Kozlovska's husband[1], the detention was a result of an entry of her name into the second-generation Schengen Information System (SIS II) by Polish authorities, which was intended to refuse her entry or stay. The SIS II alert was based on an expert opinion issued by Agencja Bezpieczeństwa Wewnętrznego [the Internal Security Agency] (hereinafter referred to as the 'ABW') in the ongoing proceedings[2] concerning the granting of an EU long-term residence permit in Poland to Lyudmyla Kozlovska.[3] Due to this circumstance, the detention resulted in an obligation for the applicant to leave the Schengen territory and return to Ukraine. **According to the Helsinki Foundation for Human Rights, the provisions of Polish law which became the basis for the detention and expulsion of Lyudmyla Kozlovska are contrary to the law of the European Union and do not meet the standards of the Council of Europe.**

The issuance of a decision is not obligatory in order to enter the data in the SIS II.

The Helsinki Foundation for Human Rights (hereinafter referred to as HFHR) has been dealing with the problem of the misuse of the SIS II for some time now.[4] The provisions of the Act on Foreigners provide for circumstances in which a foreigner's data is entered and stored in the national register of undesirable persons and when such data are transferred to SIS II.[5] What is crucial, in Poland, the inclusion of a person in the national register of undesirable persons takes place in the form of a substantive and technical action, rather than in the form of an official decision. Moreover, an alert is not always preceded by an administrative decision, which would result in the possibility of applying the standard of administrative and judicial-administrative procedures applicable to the decision, i.e. primarily in the possibility of appealing against the entry and then filing a complaint with the Voivodship Administrative Court in Warsaw, and, subsequently, filing even a cassation appeal with the Supreme Administrative Court.

[1] The entry on Lyudmyla Kozlovska's page on Facebook dated 15 August 2018:
https://www.facebook.com/lyudmyla.kozlovska/posts/10212566954791292

[2] Ibidem

[3] Statement by the Head of the ABW Jan Żaryn dated 20 August 2018 on his Twitter account:
https://twitter.com/StZaryn/status/1031444883712733185/

[4] including the cassation appeal against the judgement of the Voivodship Administrative Court in Warsaw under ref. No. IV SA/Wa 3323/17 dated 6 April 2018, filed with the Supreme Administrative Court.

[5] Art. 435 and art. 444 of the Act on Foreigners of 12 December 2013.

It is also important that the provision of the regulation of the EU Parliament and Council Regulation on the SIS II[6] provides that an alert for refusal of entry or stay shall be entered in the SIS II on the basis of an alert in the national system but resulting from ***a decision*** *issued by the competent administrative authorities or courts on the basis of an individual assessment in accordance with the procedural rules laid down in national law.* Moreover, that Regulation provides[7] that foreigners to whom an alert in the SIS II applies, receive information on that alert in accordance with the EU rules on the protection of personal data[8], and this information shall be handed to them in writing along with a copy of a national decision[9], which constitutes a basis for the alert, or with a reference to such a decision.

The reason for including the foreigner's data in the national register may be a decision on the obligation to return to the country of origin[10] (administrative decision) or even a court judgement sentencing a person to a fine or imprisonment for an intentional or fiscal offence[11] (court judgment). However, it may happen that the alert hasn't been preceded by any decision of the authorities in the form of a decision or a judgment. This is the case, for example, when it is required *based on grounds of national defence or security or the protection of security and public order or an interest of the Republic of Poland"*[12], *or if the foreigner's entry into or stay in the territory of the Republic of Poland is undesirable due to the obligations resulting from the provisions of existing ratified international agreements in the Republic of Poland*[13].

Hence, in the HFHR's view, the provisions of national law in this area are not compatible with the EU law. An examination of the SIS II Regulation shows that an alert in a national register resulting in an alert in the SIS II should always be based on a separate decision and not only on a substantive and technical action, as the EU Regulation does not provide for such a possibility.

No possibility of appealing against an entry in the SIS II register

It should also be pointed out that the SIS II Regulation contains provisions for appeals against the national decisions on which an alert is based, which should be conducted in accordance with national law.[14] Meanwhile, the provisions of the Polish law do not provide for any appeal procedure against the aforementioned entry in the national register in a situation where the entry hadn't been preceded by an administrative decision or a court judgment (in which case the standard appeal procedure used in a given procedure applies), e.g. in the cases indicated above. The provisions of the Act on Foreigners contain solely regulations concerning the procedure of obtaining, correcting and deleting data from the national

[6] Article 24 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 (hereinafter referred to as the SIS II Regulation)).

[7] Art. 42 section 1 of the SIS II Regulation.

[8] Reference to Articles 10 and 11 of Directive of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (applicable until 24 May 2018; from 25 May 2018, references to the repealed Directive shall be construed as references to Regulation (EU) No 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 (hereinafter referred to as GDPR) in accordance with Article 94 of the GDPR

[9] eferred to in Article 24(1) of the SIS II Regulation.

[10] Article 435(1)(1) of the Act on Foreigners.

[11] Article 435(1)(2a) of the Act on Foreigners.

[12] Article 435(1)(4) of the Act on Foreigners.

[13] Article 435(1)(3) of the Act on Foreigners.

[14] Article 24(1) of the SIS II Regulation.

register or the SIS II register;[15] however, it is equivalent to a procedure provided for in different provisions of the regulation[16] than those indicated earlier.[17]

Security risk as a basis for an entry in the SIS II leaving no possibility for an effective appeal measure

Under this ex-post procedure, after the alert has been issued successfully*, any person may submit to the courts or competent authorities of the Member States, a request under the national law of any of the following Member States for access to information, rectification, erasure or acquisition of information or for compensation in respect of an alert issued for him or her*[18]. It is crucial, however, that in the case when an alert in the national system or SIS II is based *on the reasons of national defence or security, or protection of public security and order, or on the interest of the Republic of Poland*, the Polish Act does not provide for the possibility of obtaining information on the actual basis of the alert.[19] Therefore, even in this case, the posteriori procedure will not allow for the use of an effective legal remedy in order to dispute the factual grounds for such an alert. It may be pointed out, however, that the SIS II Regulation itself allows for restrictions in obtaining such information[20], but **in the HFHR's view, the correct interpretation of the EU law, including, in particular, the right to an effective remedy under the EU Charter of Fundamental Rights[21] and the standard resulting from the case law of the Court of Justice of the European Union in cases concerning national security in the context of foreigners[22], an individual must be informed of the true reasons for a decision issued (also with the use of the procedure specifically provided for it) in order for this person to exercise their fundamental right to defence.**

When files are secret, the legalisation procedures aren't adversarial

In the case of Lyudmyla Kozlovska, the entry in the national register and in the SIS II register was based on the opinion of the ABW included in the file of a separate procedure for obtaining a residence permit, which is still in the process of consideration. **Of course, the opinion itself cannot be appealed against and does not meet the aforementioned standard of a decision.** In turn, some of the key files of the proceedings on the case of the legalisation of stay has been classified as secret[23], as it is allowed by the Code of Administrative Procedure[24] – the authority obligatorily, by way of a decision, refuses access to files classified as 'secret' or 'top secret', as well as to other files excluded by the public administration authority on the grounds of an important state interest. Such a decision of

[15] Art. 444 of the Act on Foreigners.

[16] Art. 43 of the SIS II Regulation.

[17] Art. 24 (1) of the SIS II Regulation.

[18] Art. 43 (1) of the SIS II Regulation.

[19] Art. 444 (2) in conjunction with Art. 435 (1) point 4 of the Act on Foreigners

[20] Art. 42 (2) of the SIS II Regulation

[21] Art. 47 of the Charter of Fundamental Rights.

[22] C-300/11, ZZ vs. Secretary of State for the Home Department, parapgraph 38: Moreover, although it's an obligation of Member States to take measures in order to ensure their external and internal security, the mere fact that a decision is connected with the security of the state must not lead to a lack of a possibility to apply the EU law (see: similar judgement of 15 December 2009 on the case C- 387/05 Commission vs. Italy, The Report of Judgements and Decisions, p. I- 11831, paragraph 45).

[23] The entry on Facebook: https://www.facebook.com/lyudmyla.kozlovska/posts/10212566954791292

[24] Art. 74 § of the Code of Administrative Procedure (hereinafter referred to as CAP).

the authority may be challenged in the appropriate manner provided for the administrative procedure, but such a complaint does not, of course, constitute a polemic with facts which are still unknown to the party, but merely a justification of the fact that parts of the file have been classified as 'secret'. National legislation does not provide for any exception or any possibility for the party or the party's legal representative to have access to such files and, thus, to have access to the factual basis for further substantive decisions and the possibility to refer to them. Therefore, such a complaint cannot be regarded as an effective remedy within the meaning of the law of the European Union[25] and the Council of Europe.[26] For a long time now, the Helsinki Foundation for Human Rights has also been dealing with this issue of the absence of appropriate national legislation providing for a procedure allowing the party or their legal representative to have access to confidential files in administrative proceedings;[27] in our opinion, they do not meet the relevant adversary standard. This problem, which arose on the basis of another case, will soon be considered by the European Court of Human Rights (the case was communicated to the Polish Government on 18 January 2018[28]).

[25] Art. 47 of the Charter of Fundamental Rights of the European Union

[26] Art. 13 of the European Convention on Human Rights

[27] More about the issue in the article: *Wydalony bez prawa do odpowiedzi na zarzuty [Expelled without a right to make a statement regarding the allegations]*, available at: http://prawo.gazetaprawna.pl/artykuly/1105567,etpc-sprawa-ameera-alkhawlany-wydalenie.html

[28] Lawsuit No. 15114/17, Azar Orujov vs. Poland, available at: http://hudoc.*echr*.coe.int/eng?i=001-180766