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Warsaw, 27 December 2018

To:

Regional Administrative Court in Warsaw

through

Head of the Office for Foreigners
ul. Taborowa 33, 02-699 Warszawa

Complainant:

Lyudmyla Kozlovska
Represented by her Attorney
Advocate Maciej Górski
Kancelaria Adwokacka
ul. Wiejska 12 lok. 9, 00-490 Warszawa

/addresses in the files of the case /

Ref. No.: DL.WWC.4171.963.2018.AB
Fixed fee: PLN 100 (§ 2(1)(1) of the Regulation of the Council of Ministers of 16.12.2003 on the amounts of fees and detailed rules for their collection on entries in proceedings before administrative courts)

COMPLAINT
against the decision of the Head of the Office for Foreigners
of 20 November 2018
given in Case Ref. No. DL.WWC.4171.963.2018.AB

Acting for and on behalf of the Complainant Lyudmyla Kozlovska (Power of Attorney with the proof of payment of the stamp duty attached), under art. 50 § 1 of the Law on Proceedings before Administrative Courts (p.p.s.a.), art. 52 § 1 p.p.s.a. in conjunction with art. 53 § 1 p.p.s.a. and art. 3 § 2(2) p.p.s.a. **I complain in whole** against the decision of the Head of the Office for Foreigners of 20 November 2018, given in Case Ref. No. sygn. akt DL.WWC.4171.963.2018.AB, served upon the Complainant on 27 November 2018.

I **plead** against the contested decision the violation of:

1) **art. 8 § 1, art. 11. and art. 124 § 2 of the Code of Administrative Procedure (k.p.a.)** through incorrect drafting of the legal rationale for the decision, not containing information about which of the authorities mentioned in art. 440(1) of the Act of 12 December 2013 on Foreigners (Dz.U. 2018 item 2094 – hereinafter “Act on Foreigners”) filed an application to enter the particulars of Lyudmyla Kozlovska in the list of foreigners

whose stay on the territory of the Republic of Poland is undesirable (hereinafter "list") which renders it impossible to establish the legal grounds for the entry on the list and its conformity with the law;

2) **art. 7, art. 77 § 1 k.p.a. and art. 80 k.p.a.** through the lack of comprehensive gathering and consideration of the entire evidentiary material and its incorrect assessment made in breach of public interest and the equitable interest of citizens, consisting in an erroneous conclusion that the entry or stay of Lyudmyla Kozlovska on the territory of the Republic of Poland is a threat to the state's security;

3) **art. 217 § 1 i § 2 pkt 2 k.p.a. and art. 219 k.p.a.** through the refusal to issue a certificate that the particulars of Lyudmyla Kozlovska are not included in the list and the Schengen Information System for the purposes of denial of entry, despite the fulfilment of the prerequisites for the deletion of particulars and issuance of a certificate with the contents as requested;

4) **art. 444(1)(3) in conjunction with art. 435(1)(4) and art. 443(1)(3) of the Act on Foreigners** through the refusal to delete the Complainant's particulars from the list and Schengen Information System for the purposes of denial of entry, even though the particulars had been included therein and are kept in breach of the provisions of the Act, because the entry and stay of Lyudmyla Kozlovska on the territory of the Republic of Poland do not pose a threat to the state's security;

5) **art. 10 § 1 and 2 of the Code of Administrative Procedure (k.p.a.) in conjunction with art. 81 k.p.a.** through preventing the Complainant from referring to the evidentiary material gathered in her case;

6) **art. 21 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: "SIS II Regulation") through the incorrect conclusion that the basis for the entry of Lyudmyla Kozlovska's particulars is relevant, appropriate and important enough to justify the entering of the Complainant's particulars in the SIS II, in a situation where there are no appropriate prerequisites therefor, through which the Authority violated the principle of proportionality;

7) **art. 24(1) and art. 23(1) in conjunction with art. 20(2)(k) of the SIS II Regulation**, through their incorrect application and inclusion of the particulars of Lyudmyla Kozlovska in the SIS II based on a substantive and technical activity rather than an individual

administrative decision;

8) **art. 42 of the SIS II Regulation** through the failure to apply the same and failure to inform the Complainant that her data had been included in the SIS II in a situation where the Authority should have informed the Complainant about the alert in the written form of an administrative decision;

9) **art. 47 of the Charter of Fundamental Rights of the European Union of 26 October 2012** (2012/C 326/02 – hereinafter "Charter of Fundamental Rights") through depriving the Complainant of an effective remedy before the Court and a fair and open consideration of the case to the extent to which the placing of the Complainant's data in the list was based on a substantive and technical activity rather than an administrative decision;

10) **art. 13 Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950** (hereinafter "Convention") through the failure to apply the same and omission to provide the statement of grounds for the decision concerning the factual circumstances behind the decision, which renders it impossible to file an effective remedy and prevents due review through the instances of the contested decision;

11) **art. 436(1)(1) of the Act on Foreigners and art. 8(1) and (2) of the Convention** through placing the Complainant's particulars in the list disregarding the fact that the Complainant is the wife of a Polish national – Bartosz Kramek – and her entry and stay on the territory of the Republic of Poland does not threaten the state's security, through which an illegitimate intervention was made into the right to the family and private life of the Complainant.

Having regard to the foregoing, **I file for**:

1) repealing – under art. 145 § 1(1)(a) and (c) p.p.s.a. – the contested decision in whole,
2) repealing – under art. 135 p.p.s.a. – the preceding decision, i.e. the decision of the Head of the Office for Foreigners of 1 October 2018, No. DL.WWC.4171.963.2018.SW, in whole,
3) ordering that the particulars of the Complainant should immediately be deleted from the list and the Schengen Information System for the purposes of denial of entry,
4) examining – under art. 106 § 3 p.p.s.a. – supplementary evidence attached hereto concerning their contents, which is necessary for clarifying major concerns and which will not protract the proceedings in the case,

5) awarding – under art. 200 p.p.s.a. – a refund of the costs of the proceedings, including the costs of legal representation, according to the prescribed regulations.

In the view of the Head of the Office for Foreigners having omitted to provide a factual statement of grounds for the decision, and the lack of access for the Complainant to the classified evidentiary material being the basis for entering her personal data in the list and in the Schengen Information System for the purposes of denial of entry and, consequently, the impossibility to assess the same, **I file for** the Court to familiarise itself with the said material and assess its legality and credibility, in order to review the correctness of the findings made by the Head of the Office for Foreigners.

Having regard to the stipulations of plea No. 7 and the concerns regarding the interpretation of the term "decision", being the basis for entering the personal data of the foreigner in the Schengen Information System, **I file for** the Court to consider a reference to the Court of Justice of the European Union under art. 267 of the Treaty on the Functioning of the European Union for a preliminary ruling: as to whether the taking of the "decision" referred to in art. 24(1) of the SIS II Regulation is to be understood exclusively as an individual administrative act given with respect to a foreigner or whether EU law provides for the establishment in national law of a regulation allowing a public authority of a EU Member State to act with respect to an individual without issuing an administrative act and without formally notifying the person to whom it pertains.

Statement of reasons

Facts of the case

Lyudmyla Kozlovska comes from Ukraine, and has been staying in Poland since 2007, originally on the basis of visas, and since 2009 on the basis of residence cards. For many years now, the Complainant has been engaged in activities to support human rights within the Open Dialogue Foundation (hereinafter "Foundation") where she is President of the Management Board. The statutory aims of the Foundation include primarily defence of human rights and strengthening of democratisation and the rule of law within post-Soviet states. Since 2017, the Foundation has been raising on international fora the issue of the rule of law in Poland, in particular regarding the independence of the administration of justice and respect for civil rights. The Complainant has organised numerous international missions to observe elections and missions monitoring the observance of human rights in, *inter alia*, Ukraine, Russia and Kazakhstan. Further, she has coordinated activities in support of a reform of Interpol, whose mechanisms are abused by authoritarian states and activities

aimed at imposing sanctions on persons liable for violations of human rights in post-Soviet areas. The Foundation she manages has also organised campaigns to support the Ukrainian Revolution of Dignity (so-called Euromaidan) and for people in need and suffering damage as a result of the Russian aggression against Ukraine in 2014.

Privately, Lyudmyla Kozlovska is a member of a family – the wife of a Polish national – a national of the European Union – Bartosz Kramek. They rent an apartment together in Warsaw. Even though the Complainant had stayed in Poland for nearly 12 years, and has engaged, since 2009, in activities within the Foundation, never before have administrative authorities had concerns about her occupational activity or the justifiability and possibility of her staying on the territory of Poland and the Schengen area.

On 13 August 2018, at Brussels airport, the Complainant was denied entry into the Schengen area and was informed that her personal data had been placed in the Schengen Information System. Lyudmyla Kozlovska had not been given any information on the factual grounds for making the alert. The Complainant learned about the alert only when trying to cross the border of the Schengen area. At the time, the Complainant still had her temporary stay card issued by the Mazowiecki Voivode (Wojewoda Mazowiecki) (valid until 13 August 2018) and a valid Ukrainian passport.

Evidence:

- authenticated copy of the Complainant's temporary stay card
- authenticated copy of the Complainant's passport

As a result of the Complainant’s personal data being entered in the Schengen Information System, Lyudmyla Kozlovska was expelled to Kiev by the Belgian services and had no possibility of returning home and to her husband in Poland.

By the decision of 20 November 2018, issued in the case Ref. No. sygn. akt DL.WWC.4171.963.2018.AB, the Head of the Office for Foreigners, having re-examined the matter, upheld the decision of 1 October 2018 (No. DL.WWC.4171.963.2018.SW) to deny the Complainant Lyudmyla Kozlovska a certificate with the requested stipulations, i.e. that her personal data were not included in the list of foreigners whose stay on the territory of the Republic of Poland was undesirable and in the Schengen Information System for the purposes of denial of entry.

The contested decision cannot possibly be agreed with.

Ref. Plea 1

The legal rationale for the contested decision was made in an incorrect manner, preventing the establishment of the legal grounds for the entry in the list and its conformity with the law. Even though the Complainant's application for deletion of the alert was examined two times, the Head of the Office for Foreigners did not indicate what the basis for placing the data on the list had been. The authority limited itself to a conclusion that the Complainant's data were accurate and were not included or stored in breach of the statutory provisions but did not state what entity had filed the request to place them therein.

In accordance with art. 440(1) of the Act on Foreigners, a foreigner's data shall be placed on the list by the Head of the Office *ex officio* or upon a request from one of the authorities enumerated there, i.e. Minister of National Defence, minister competent in foreign affairs, Chief Commander of the Police, Chief Commander of the Border Guards, Head of the Internal Security Agency, Head of the Intelligence Agency, Head of the National Fiscal Administration, President of the Institute of National Remembrance – Commission for the Investigation of Crimes against the Polish Nation or a voivode. The catalogue of the entities listed in the law is a closed one. At the same time, the argumentation on p. 23 of the contested decision that the stipulations of the Act on Foreigners do not provide for the obligation to approve any application filed pursuant to art. 440(1), require the finding that in the analysed matter the data of Lyudmyla Kozlovska were not placed in the list on an *ex officio* basis but upon an application. Hence, if the basis for the alert was an application by one of the entities listed in art. 440(1) of the Act on Foreigners, the Authority was obliged to advise who had filed such application. The gaps in this regard make it impossible to conclude whether the alert was made in accordance with the law, i.e. whether the application had originated from an entity qualified to do so. The legal significance of the alert and its consequences in the form of intervention into the right to free movement and the right to family and private life of the Complainant, as well as an assumption as to the political nature of the alert, support the absolute obligation for the Authority to explain the full legal grounds for placing the data in the list.

Even though the Authority omitted to provide the factual rationale for the decision relying, in that regard, on art. 6(1) of the Act on Foreigners (the justifiability of which the Complainant also challenges), no legal regulation allowed the omission of the drafting of the legal rationale for the decision it gave. Undoubtedly, an element of such rationale should have been identification of the entity that had made the application to place the data of Lyudmyla Kozlovska on the list. The gaps in this regard form a breach of the rule of conducting the procedure in a manner that would increase its participants' trust in public authorities, as well as the principle of persuasion.

In accordance with the provisions of Art. 11 k.p.a., public administration authorities should explain to the parties the prerequisites they follow in dealing with a matter. The principle of persuasion links closely to the principle of deepening trust in state authorities expressed in art. 8 § 1 k.p.a. What follows from the cited principle is the obligation set upon administrative authorities to provide a comprehensive rationale for their decision to convince the parties to the procedure (see e.g. judgment of the Regional Administrative Court (WSA) in Szczecin of 11 August 2016, sygn. akt II SA/Sz 538/16, LEX No. 2116289). Besides, it follows from well-established case-law that the statement of grounds for a decision should be a decisive element in the party's belief in the accuracy of the decision. The principle of persuasion will not be implemented, on the other hand, if the authority is silent about certain statements, does not refer to facts relevant to the matter concerned or fails to present, in a comprehensive manner, an interpretation of the applicable law (judgment of the WSA in Wrocław of 15 June 2016, sygn. akt III SA/Wr 1308/15, LEX No. 2103244; judgment of the WSA in Kraków of 15 June 2016, sygn. akt III SA/Kr 28/16, LEX No. 2094542). In order to comply with the provisions of art. 11 k.p.a. it is required to provide a comprehensive interpretation of the applicable law and explain what arguments the Authority had relied on.

In accordance with the judgment of the Regional Administrative Court in Warsaw of 9 October 2015, given in case Ref. No. sygn. akt II SA/Wa 257/15: "*A major component of a decision which is given correctly is the statement of grounds therefor. It should inform a party, in a comprehensive manner, about the motivation which guided the authority deciding in the matter. Indeed, a party may effectively defend his/her interests when he/she is aware of the complete prerequisites for the decision which was taken. (…) Leaving out in the statement of grounds the factual or legal circumstances which may be significantly relevant for the decision in the matter, and the absence thereof in particular, creates a prerequisite for concluding about the authority having violated administrative procedure regulations to a degree having a significant effect on the outcome of the matter.*" The foregoing should also be referred to as applying to the substantiation of the decisions referred to in art. 124 § 2 k.p.a.

It is to be concluded that without relying on the applicable paragraph of art. 440(1) of the Act on Foreigners indicating the entity applying for the data to be included on the list, the Head of the Office for Foreigners did not assess the alert for conformity with the law and did not substantiate it, which is a major gap in the decision resulting in the need to repeal the same.

Ref. Pleas 2-4

Not only did the Authority fail to collect and gather the evidentiary material in a comprehensive manner, but it provided an incorrect assessment thereof, in breach of public interest and the equitable interest of citizens.

The placing of Lyudmyla Kozlovska on the list of undesirable persons is unfounded and is not reflected in either the factual condition or in the law. In the case of the Complainant, none of the prerequisites under art. 435 of the Act on Foreigners that could be the basis for the alert occurred. No criminal proceedings are pending against Lyudmyla Kozlovska; she has not committed any crime or offence that could result in the undertaking of such far-reaching actions.

As indicated by the provisions of art. 435(1)(4) of the Act on Foreigners, the list of foreigners whose stay on the territory of the Republic of Poland is undesirable and the Schengen Information System can store the data of persons only for reasons such as a threat to state defence and security and the public policy of the Republic of Poland. As the Authority noted in the contested decision, the basis for the alert was supposed to be an alleged threat to state security. Contrary to the assertions of the Head of the Office for Foreigners, the entry and stay of Lyudmyla Kozlovska on the territory of the Republic of Poland does not threaten the state's security in any way. **Never before (i.e. for nearly 12 years) have administrative authorities ever had any concerns as to the justifiability of the Complainant's stay on the territory of Poland and her activities, despite numerous verifications of the Complainant in that regard** (both when the Foundation was given, in 2014, by the Minister of Internal Affairs, license No. B-088/2014 to engage in economic activities concerning trade in certain products for military or police use, or during inspection activities conducted in 2016 by the Capital City Commander of the Police, and then the Minister of Internal Affairs and Administration). A number of authorities, including the Minister of Economy, the Head of the Military Counterintelligence Agency, and the Capital City Commander of the Police provided their positive opinion on the very award of the license to the Foundation. The helmets and vests purchased by the Foundation under the license were provided free of charge, as humanitarian aid to protect the lives and health of Ukrainian soldiers in connection with the continued aggression against Ukraine, which was confirmed by a post-inspection report drafted by the Ministry of Internal Affairs and Administration (MSWiA) of 21 December 2016.

At no stage of her stay on the territory of Poland and in the Schengen area did the Complainant undertake any activities that might cause the fulfilment of the prerequisite of a direct threat to the Republic of Poland or any other state. On the contrary – in earlier years, the activities of the Foundation the Complainant manages were supported on a

number of occasions by both central and local government authorities, deputies to the Sejm of the Republic of Poland or members of the European Parliament. This was demonstrated, *inter alia*, through the financing of, and providing assistance to certain projects and initiatives of the Foundation (such as, for instance, the centre for help for Ukraine "Ukrainian World" run in Warsaw in 2014–2016 by the Foundation).

It needs to be emphasised that the placing and storing of the Complainant's data in the list and in the Schengen Information System for the purposes of denial of entry was done in breach of the provisions of the law, because the entry and stay of Lyudmyla Kozlovska on the territory of the Republic of Poland does not pose a threat to the state's security. In this state of affairs, the Authority is obliged to delete the data upon an application of the Complainant and to issue a certificate that the particulars of Lyudmyla Kozlovska are not included in the list and in the Schengen Information System for the purposes of denial of entry.

The circumstance that Lyudmyla Kozlovska does not pose a threat to the security of the Republic of Poland or any other state, and that the inclusion of her data on the list and in the SIS seems to be politically motivated, is confirmed by the response of other countries to this occurrence, and the numerous and firm statements of experts, politicians and media in Poland and throughout the world. The situation of the Complainant has been described, *inter alia*, in the Washington Post, Financial Times, Kyiv Post, Daily Mail, New York Times, ABC News, Politico Europe, Voice of America, EUobserver, EurActiv and many others. On 22 August 2018, the Helsinki Human Rights Foundation made a statement on the abuse of the SIS by Poland.

Evidence:

- position of the Helsinki Human Rights Foundation *(source: http://www.hfhr.pl/wp-content/uploads/2018/08/Sprawa-Ludmiły-Kozłowskiej-–-system-SIS-II-a-prawo-do-obrony-1.pdf, access on 27 December 2018)*

In August 2018, at 10 places in Poland, citizens' protests took place to defend the Complainant. More than 30,000 EU nationals and numerous prominent representatives of many spheres of public life throughout Europe signed a petition initiated by Lech Wałęsa – former President of Poland and Nobel Prize laureate – addressed to representatives of EU Member States, appealing to give Lyudmyla Kozlovska citizenship of their country or otherwise enable her to enter the Schengen area.

Evidence:

- petition #BringHerBack *(source: https://www.change.org/p/bringherback-domagamy-się-powrotu-ludmiły-kozłowskiej-do-ue, access on 27 December 2018)*

An intervention in the matter of Lyudmyla Kozlovska was also made by the Ombudsman.

Evidence:

- announcement of the Ombudsman *(source: https://www.rpo.gov.pl/pl/content /rpo-podjal-sprawę-wydalenia-ludmily-kozlowskiej, access on 27 December 2018)*

On 27 August 2018, leading Ukrainian human rights organisations issued a joint statement concerning the inclusion of the Complainant's data in the SIS.

Evidence:

- joint statement of Ukrainian human rights organisations *(source: http://ccl.org.ua/en/statements/the-appeal-of-ukrainian-human-rights-organisations-regarding-the-inclusion-of-the-head-of-the-open-dialog-foundation-in-the-schengen-information-system-sis-list/, access on 27 December 2018)*

In addition to the foregoing, on 11 September 2018, upon a motion from the Bundestag, Lyudmyla Kozlovska was given entry to the territory of Germany under a special visa issued "in the national interest" by the German authorities. The Complainant's speech in the Bundestag on the dismantling of the rule of law in Poland and in Hungary was given on 13 September 2018. On 26 September 2018, the Complainant also spoke at an open session

of ALDE at the European Parliament, having obtained a Belgian visa upon a request from Belgian members of the European Parliament – Guy Verhofstadt, Rebeccia Harms and Michał Boni. On 4–6 October, the Complainant chaired a delegation of the Foundation to London, and the British government confirmed the validity of her long-term visa issued despite the SIS prohibition. On 8 October 2018, having received a visa from the French authorities, the Complainant spoke at two events at the Council of Europe. On 22 November 2018 Lyudmyla Kozlovska addressed the British House of Commons in a discussion panel on the rule of law in Poland and in Hungary, organised by the Foreign Policy Centre. On 23 November 2018, the Complainant chaired the panel on "The changing role of parliaments in the defence of human rights and the rule of law" in the UN in Switzerland, devoted to human rights, democracy and the rule of law. In November and into December 2018, the Complainant was also invited to speak in the Italian Senate, the Parliament of Austria, in the Sorbonne, Paris and during a parliamentary event in Hungary.

It is to be noted that – in accordance with the communications and public statements made by representatives of central government administration – all allied countries, including UE countries, supposedly received from the Polish side classified information on the actual grounds for the allegations *in fact* formulated against the Complainant, which were supposedly the basis for including her particulars in the Schengen Information System. It can therefore be supposed that in the view of the competent authorities of the aforementioned third countries that information had not been deemed to be sufficiently credible and justified.

It is to be emphasised that there did not and do not exist any prerequisites of a factual or legal nature for including and storing the Complainant's data on the list of persons undesirable on the territory of Poland. The automatism, following from art. 443(1)(3) of the Act on Foreigners, of placing the data of Lyudmyla Kozlovska also in the Schengen Information System for the purposes of denying entry (as a result of alert in the list), aims against the rights of the Complainant, is contrary to EU law and is consistently criticised on the international arena. The entry or stay of Lyudmyla Kozlovska on the territory of the Republic of Poland and countries of the Schengen area do not threaten in any way the state's security and hence the alerts made without any legal grounds therefor should be deleted forthwith.

Account is also to be had of the wider context relating to the activities of the Foundation, the Complainant and her husband Bartosz Kramek, in relation to the escalation about the constitutional governance and the rule of law in Poland, in which the inclusion of the data of the Complainant in the SIS list may seem to be a response to their journalistic and civil activity.

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 a motion from the Ministry of Foreign Affairs to suspend the Foundation and appoint a statutory administrator. On 12 July 2018, the decision was provided with the validity and finality clause. In the light of, *inter alia*: the above dispute; public speeches made by members of the Council of Ministers (including the Minister Coordinator of Special Services Mariusz Kamiński and the former Foreign Minister Witold Waszczykowski); a fiscal and customs inspection of the Open Dialogue Foundation initiated upon a motion of the Minister Coordinator and the Foreign Minister; and attempts made by PE members from the Law and Justice Party (PiS) to deprive representatives of the Foundation of their accreditation at the European Parliament, there is a concern that the alert relating to the Complainant is not motivated by the reasons specified in the law, but is being applied instrumentally, with the characteristics of a political motivation. It is to be noted that all of the above procedures, statements and activities occurred in 2017 in response to an article critical of the government's policy by the Chair of the Foundation's Council and the husband of the Complainant, Bartosz Kramek.

Ref. Plea 5

The Authority did not enable the Complainant to refer to the material gathered pursuant to art. 10 k.p.a., which grossly violates the interest of the party in the procedure. Neither is there any information on how the hearing of Lyudmyla Kozlovska could influence the development of the procedure and why the Complainant was denied such right.

Despite the fact that the legislator provided for certain exceptions as regards the possibility of excluding the openness of and access to the files of the case for a party, it cannot possibly be accepted that the Authority should not have provided any motivations behind the decision or information on how the evidentiary material had been gathered and whether explanatory proceedings had been conducted at all before the decision was given. The Authority should have gathered the evidentiary material in a comprehensive manner and examined the same in whole and enabled the party to take a position thereon. Due to the near-total absence of a statement of grounds in that regard, one cannot possibly verify whether the Head of the Office for Foreigners took any steps into that direction.

Ref. Plea 6

In accordance with the provisions of art. 21 of the SIS II Regulation, Member States shall determine whether the case is adequate, relevant and important enough to warrant an alert in SIS II. There is no information in the case of Lyudmyla Kozlovska that would enable a

verification of whether making the entry in the SIS II system the authority had in mind **one of the key principles of the functioning of the European Union – that of proportionality**. On the contrary, an analysis of the case leads to the conclusion that the entry in the Schengen Information System was made automatically, as a result of the Complainant's particulars being included in the list of persons undesirable on the territory of the Republic of Poland. Such an action of the Head of the Office for Foreigners is contrary to EU law, which should be applied before any national regulations. It needs to be emphasised that the principle of supremacy of Community law is one of the basic principles of EU law.

In accordance with the established case-law of the Court of Justice of the European Union, any limitation regulated in the act of law concerned should respect the essential provisions of the basic law and set a requirement – subject to the principle of proportionality – for it to be necessary and to actually meet the aims of the general interest recognised by the European Union.

The inclusion of the particulars of Lyudmyla Kozlovska in the Schengen Information System does not meet the aims of the general interest recognised by the European Union, which is confirmed, *inter alia*, by the firm objection by the other Member States (including Germany, UK, Belgium and France) and Switzerland to the actions applied against the Complainant by the Head of the Office for Foreigners.

Ref. Plea 7

Neither can one endorse the argumentation of the Authority as regards the very inclusion of the Complainant's particulars in the SIS II. **The Head of the Office for Foreigners included the Complainant's particulars in the SIS II system under a substantive and technical activity rather than in the form of a decision against which the appeal procedure could be followed**. Lyudmyla Kozlovska was not even informed that her data had been included in the system. The doctrine notes that substantive and technical activities are activities of administrative authorities that, being factual activities, are based in express legal grounds and cause concrete legal effects, and the difference between administrative acts (decisions, rulings) and substantive and technical activities is that **they are factual activities that do not lead to any standard of conduct (**J. Starościak „*Prawne formy działania administracji*", Warszawa 1957, p. 286**).** It is to be emphasised again, however, that in accordance with art. 24(1) of the SIS II Regulation "*Data on third-country nationals in respect of whom an alert has been issued for the purposes of denying entry or stay shall be entered on the basis of a national alert resulting from 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.***"

Art. 23(1) of the SIS II Regulation stipulates that an alert may not be entered without the data referred to in art. 20(2)(a), d), (k) and l). Art. 20(2)(k) of the SIS II Regulation, on the other hand, refers straightforwardly to a decision giving rise to the alert**. In accordance with EU law, the absence of a decision (understood as an individualised administrative act) does not enable an alert to be entered. This rule was broken in the case of Lyudmyla Kozlovska.**

The Authority's argumentation in the contested decision that the term "decision" referred to in art. 24(1) of the SIS II Regulation should be understood as an expression of action of a public authority of an EU Member State with respect to the individual that is not, however, an administrative act and that hence does not require formal notification to the person its applies to is not convincing. If the alert had been preceded by the appropriate individual procedure, as the Authority asserts, Lyudmyla Kozlovska would have had a chance to file the relevant motions as to evidence, participate in the procedure and, above all, refer to the material gathered in her case. If the alert had been entered in the form of a decision or a ruling, the Complainant would have been entitled to appellate procedures in line with the administrative procedure and then based on the Act on the Procedure before Administrative Courts. The procedure for deleting data from the list and from the Schengen Information System through the issuance of a certificate provided for in the Act on Foreigners should be deemed insufficient to ensure full observance of the rights under EU law. This procedure significantly restricts the Complainant's rights in the administrative course of instances, preventing her from becoming familiarised with the evidentiary material and referring to the evidence that was gathered. What is more, the application to have the matter re-examined is considered by the same Authority that gave its decision in the 1st instance, thus failing to provide the Complainant with due protection of her rights.

Analysing EU law in the context of the regulations implemented by the Polish legislator, it is to be concluded that the alert should be entered into the SIS II system under ruling or a decision, rather than under a substantive and technical activity. Such a concept is contrary to the provisions of the SIS II Regulation because the person concerned does not have a chance to appeal against an activity that is so far-reaching in its consequences.

Ref. Plea 8

Lyudmyla Kozlovska did not receive any information that her data had been included in the SIS II. Such a situation is unacceptable under the SIS II Regulation, because in

accordance with art. 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 issuing an individual administrative act in the form of a decision and, further, never was a letter sent informing the Complainant that her data had been included in the SIS II.** As a result of such regulations and actions by the authorities, the Complainant found out about the alert only when trying to cross the border, which resulted in her immediate deportation from the Schengen area.

Ref. Pleas 9-10

Even though formally the Complainant has the right to file this complaint, in actual reality she does not have a chance to refer to the material based on which the decision, that is so harmful to her was given. A decision by an administrative authority is arbitrary and forms an exceptional intervention into the private and family life and fundamental human rights. It is to be emphasised that the issuance of the decision in such a form raises considerable concerns because Lyudmyla Kozlovska does not have the possibility of finding out about its factual grounds.

It is to be noted that the statement of grounds for the contested decision, however extensive it is, is nearly in its entirety a citation and quoting of several legal regulations and judgments. There is no adequate individualisation of the statement of grounds for the decision for the case of Lyudmyla Kozlovska, and there is no referencing of the cited regulations to the facts of the case. The Authority has the right to exclude openness of and restrict access to the files in justified cases, but this can be done in exceptional, strictly specified circumstances. Even though it should be accepted that not all information must be included in the statement of reasons if it was provided with the "secrecy" clause, still the statement of grounds should contain information that would enable both substantive review of the contested decision and a reference to be made, to a minimum degree at least, to the activities that had been performed in the case.

The Complainant has been deprived of this right in its entirety.

In accordance with art. 13 of the Convention, everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity. In accordance with the view expressed by M.A. Nowicki ("*Wokół konwencji europejskiej. Komentarz do Europejskiej Konwencji Paw Człowieka*") "*A remedy should, at the*

same time, enable the examination of the contested decision for its legal grounds and substantive justification." A party who files a remedy should be able to refer to the decision of the Authority and such possibility exists only if the party gets to know the legal and factual substantiation and the motives behind such decision. In the current situation, the Complainant is deprived of the right to reliable appeal against the decision given in her case. Even if it were assumed that the law did not order the issuance in the case of Lyudmyla Kozlovska of an individual administrative act being the basis for entering her data in the list (even though such presumption would be contrary to EU law), the Complainant was deprived of any review of the decision given in her case because there is no reference in the contested decision to at least the authority that requested that the alert be entered on the list. It is not therefore clear whose position (even not assuming the form of an administrative decision) the Complainant is supposed to challenge.

It is to be noted that in the judgments given in the Cases C.G. and others v. Bulgaria (judgment of 24 April 2008, application No. 1365/07), the European Court of Human Rights found that the protection of state security could justify the introduction of procedural restrictions that are necessary for ensuring that classified information is not disclosed in the matter concerned. The Court noted at the same time that **restrictions introduced by the state may not lead to total abandonment of effective remedies.** In the said decision, the Court noted that there should be a form of adversarial appeal procedure – if required, with the participation of a special representative who is admitted access to secret materials. The need to ensure this type of protection for the individual was also mentioned by the Court in other judgments, i.e. the judgment of 20 June 2002 in the Case Al. – Nashif v. Bulgaria (application No. 50963/99) in its judgment of 17 July 2012 in the Case Othman v. United Kingdom.

The Court of Justice of the European Union made similar considerations concerning access to an effective remedy referring to the regulation contained in art. 47 of the Charter of Fundamental Rights of the European Union, which stipulates that "*Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article*." In its judgment of 4 June 2013 in Case C-300/11 (ZZ v. Secretary of State for the Home Department)[1] the Court noted that **if judicial review is to be effective, the person concerned must be able to ascertain the reasons upon which the decision taken in relation to him is based, either by reading the decision itself or by requesting and obtaining notification of those reasons.** At the same time, taking note of reasonable interests of the

[1] Analysis of the judgments made by the Ombudsman in his letter to the Minister of Internal Affairs and Administration Ref. No. XI.533.2.2016 concerning the situation of foreigners in procedures with the "secrecy" clause and possibilities of effective appeal

state's security, the Court noted that the national court should, in such cases, have methods at its disposal to reconcile that with the need to guarantee to a party to a sufficient degree the observance of its procedural rights such as the right to be heard, and "court review".

In accordance with established views of the Court of Justice of the European Union, any restriction should respect the essential content of the basic right concerned and set the requirement for it – subject to the principle of proportionality – to be necessary and to actually meet the aims of the general interest recognised by the Union (this is what the Court found in the judgments: of 17 March 2011 in Joined Cases C-372/09 and C-373/09 Peñarroja Fa, ECR p. I-1785; and also of 17 November 2011 in Case C-430/10 Gaydarow, ECR p. I-11637, par 41; of 15 October 1987 in Case 222/86 Heylens and others, Rec. p. 4097, par 15; and also of 3 September 2008 in Joined Cases C-402/05 P and C-415/05 P Kadi and Al Barakaat International Foundation v. Council and Commission, ECR. p. I-6351, par. 337).

Further, the Court noted that the parties to the **procedure should have the right to familiarise themselves with all documents or comments submitted to the court in order to influence its decision and to refer thereto** (judgments: of 14 February 2008 in Case C-450/06 Varec; of 2 December 2009 in Case C-89/08 P Commission v. Ireland and others; of 21 February 2013 in Case C-472/11 Banif Plus Bank, par. 30.) **In turn, reliance of the statement of grounds for a court judgment on factual circumstances and documents of which the parties or one party could not have become aware, and concerning which they could not therefore have taken a position, would be in breach of the basic right to an effective remedy before the court** (said judgment Commission v. Ireland and others., par. 52 and the case-law cited therein).

The Court also found that it is the responsibility of the competent national authority to present, in accordance with national procedural rules, **evidence in support of that the state's security was actually threatened as a result of a full and detailed notification of the party concerned about the reasons forming the basis for the decision** issued under art. 27 of Directive 2004/38 and the related evidence (see, by correspondence, judgment of 15 December 2009 in Case C-284/05 Commission v. Finland, ECR p. I-11705, par. 47, 49). In view of the foregoing, the Court concluded that **there is no presumption of the existence and justifiability of the reasons cited by the national authority.** It is therefore important for the party concerned to always be notified of the essential reasons that are the basis for the decision on denial of entry given under art. 27 of Directive 2004/38, because **the necessary protection of state security may not result in depriving the party concerned of the right to be heard, thus making the party's right to file an appeal, under art. 31 of the Directive, ineffective**. Even though these considerations pertain to a decision to deny entry and provisions of the Directive that, as such does not apply in the present case, the case-law

issued on its basis should apply by correspondence to the present case due to the fact that the decision given in the case of Lyudmyla Kozlovska has equally far-reaching consequences.

The Court also noted a number of times that respecting, to the widest extent possible, the adversarial principle, a party should be enabled to challenge the reasons under which the contested decision was issued and to present remarks on the evidence gathered against him or her. **Lyudmyla Kozlovska did not get any chance to refer to the material gathered in the case, not even to its open portion.**

All information concerning the inclusion of the Complainant in the Schengen Information System is fragmentary and in fact obtained by the Complainant only from media communications concerning her case. The Complainant was never informed about the procedure that resulted in her personal data being entered into the Schengen Information System base. The lack of access thereto in fact deprived the Complainant of the possibility of verifying the decisions made in her case and hence it is impossible for the Complainant to refer to any pleas addressed against her.

In the view of the Head of the Office for Foreigners having omitted to draft the factual rationale for the decision and the lack of the Complainant access to the classified evidentiary material being the basis for the inclusion of her personal data in the list and in the Schengen Information System for the purposes of denial of entry and, consequently, the impossibility to assess the same in this complaint, the motion as first formulated herein for the Court to familiarise itself with the material and assess the same for legality and credibility, in order to verify the correctness of the findings made by the Head of the Office for Foreigners should be deemed justified.

Re. Plea 11

It is to be emphasised that the Complainant is the wife of a Polish national, Bartosz Kramek. Since her stay on the territory of the Republic of Poland poses no threat to the state's security, it is to be concluded that her family bonds provide a sufficient prerequisite for not including the Complainant's data in the list and the Schengen Information System and should constitute a supreme value. Neither may activity of the Head of the Office for Foreigners be deemed to be a legitimate intervention into the right to family and private life in the light of art. 8(2) of the Convention, which may be applied only in strictly specified instances that to not apply to the case of Lyudmyla Kozlovska.

The Authority should have made an individualised assessment of whether the Complainant's presence constitutes an actual, existing and sufficiently serious threat to the

state's security, having regard to the fact of her being separated from her husband who is a national of Poland and permanently residing on the territory of the Republic of Poland. The automatism applied in the matter, consisting in the Authority's failure to make any distinction between a foreigner who is and who is not the spouse of a Polish national and reliance in both cases on the general clause of state security is irreconcilable with the principle of respect for family and private life and EU law. In such cases, the Authority should have considered the situation of the spouse of a Polish national separately, having regard to the respect for the family started by the Complainant, which was unlawfully separated.

* * *

In view of the fact that the entry of the Complainant's personal data into the list and the Schengen Information System for the purpose of denial of entry was made without legal grounds therefor and is deprived of any rational reason in support of that Lyudmyla Kozlovska could threaten the security of the Republic of Poland, the decision in the matter given by the Head of the Office for Foreigners should be repealed and the data of the Complainant that were entered should be deleted forthwith.

Having regard to the entirety of the circumstances referred to above, I file as first stated above.

_____
Maciej Górski
Advocate

Attached:

1. Power of Attorney,
2. Proof of payment of the stamp duty,
3. Proof of payment of the fee on the complaint,
4. Authenticated copy of the temporary residence card for the Complainant,
5. Authenticated copy of a page of the Complainant's passport,
6. Position of the Helsinki Human Rights Foundation,
7. Contents of the #BringHerBack petition,
8. Announcement of the Ombudsman,
9. Joint statement of Ukrainian human rights organisations,
10. Copy of the complaint with attachments.

Brussels, 24 December 2018

POWER OF ATTORNEY

I, the undersigned, Lyudmyla Kozlovska (PESEL: XXXXXXXXXXX):

Hereby grant a power of attorney to

ADVOCATE MACIEJ GÓRSKI
of
Kancelaria Adwokacka
00-490 Warsaw, ul. Wiejska 12 lok. 9,

and authorise him to represent me before administrative courts of law and other state authorities concerning the complaint against the decision of the Head of the Office for Foreigners of 20 November 2018, issued under Ref. No. DL.WWC.4171.963.2018.AB.

This power of attorney comprises an authorisation to grant further powers of attorney.

/signed/
Lyudmyla Kozlovska

The Ombudsman has taken up the matter of expulsion of Lyudmyla Kozlovska.

Date: 2018-08-23

- The Ombudsman has taken up the matter of the Ukrainian national Lyudmyla Kozlovska entered by the Polish authorities into the Schengen Information System, a consequence of which is to be for her to be denied entry into the Schengen area.
- Lyudmyla Kozlovska is President of the Open Dialogue Foundation, an NGO engaged in the defence of the rule of law in Poland.
- The Ombudsman has requested the Office for Foreigners to provide the legal basis for entering the alert, information on which authority applied for that, and the files of the matter.

The Ombudsman is conducting explanatory proceedings on the entry of Lyudmyla Kozlovska's data, Ukrainian national and President of the Open Dialogue Foundation, in the Schengen Information System.

Reference was made in the letter from the Ombudsman Office to the Office for Foreigners to press information. It follows therefrom[1] that the foreigner's data were entered in the SIS by the Head of the Office for Foreigners upon an application from an authority unidentified by the author. A consequence thereof was the deportation of Ms Kozlovska from Belgium to the country of her origin, probably with a prohibition to enter the Schengen area.

The Equal Treatment Team in the Ombudsman Office has requested information about the legal grounds for the foreigner's data having been entered in the SIS and what authority applied for the entry. A request has also been made to send a copy of the complete files of the case at the disposal of the Office for Foreigners, including the application for entering the foreigner's data into the SIS.

If the material contains classified information, the Ombudsman may have access thereto upon the terms and conditions and following the procedure set forth in the regulations on the protection of classified information.

[1] Article "We don't know what we are going to say, we are not there. Institutions which may be involved in the deportation of Lyudmyla Kozlovska have remained tight-lipped", ed. M. Wyrwał, available at https://wiadomosci.onet.pl/tylko-w-onecie/nie-wiemy-copowiemy-nie-ma-nas-instytucje-ktore-moga-miec-zwiazek-z-deportacja/mgevzkm

XI.542.15.2018

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.

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[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

#BringHerBack to the EU!

32,997 have signed. Let's get to 35,000!

Lech Wałęsa **started this petition to** Politicians and governments of EU Member States

WERSJA POLSKA / **English** / Deutsche / Version française / Versione italiana / Українська версія / Версия на русском

#BringHerBack to the EU!

Illiberal governments are dismantling the rule of law and democracy in EU Member States. Let's not let them do the same with the European Union and the Schengen Agreement!

Due to the scandalous abuse of the Schengen Agreement by Polish authorities - using it as a tool for persecution of foreigners and their family members, we appeal to all politicians in the EU for a firm show of solidarity and resistance towards this injustice.

We ask to allow Lyudmyla Kozlovska to return home to the EU, ideally by granting her citizenship of an EU Member State. Such an act of justice would allow her to reconnect with her family in Poland, as well as continue the work of her human rights foundation on EU territory without the risk of future deportation.

The Schengen Agreement reshaped Europe. Moving between European countries has never before been as simple. Border crossings vanished, tourism and economy were boosted, the life of millions of citizens became considerably easier.

Unfortunately, Polish authorities have decided to use this agreement for political persecution. Without providing any grounds nor presenting any accusations, without a court ruling, without means of an effective appeal, with disregard for personal or family circumstances, the Law and Justice (PiS) government uses its Schengen privileges to deport foreigners deemed inconvenient to their rule. The procedure used against civil rights activist Lyudmyla Kozlovska, a Ukrainian national, is - according to European treaties - reserved for criminals, spies or terrorism suspects.

Lyudmyla has been living in Poland for ten years now, being married to a Pole for five. She has never had any run-in with the law, nor in any way has she caused a threat to public security. Her difficulties started when her husband, fellow activist Bartosz Kramek, began to criticise PiS in social media and take part in street protests against that party's assault on the independent judiciary in Poland.

Numerous audits performed by the authorities on Lyudmyla's Open Dialog Foundation - an NGO defending human rights in post-Soviet states - have so far failed to produce any evidence of wrongdoing. Law enforcement never pressed any charges and a court has denied the government's motion to place the foundation under receivership.

Polish authorities have therefore reached for a more drastic method of persecution - entering an alert in the Schengen Information System (SIS), resulting in immediate deportation from the Schengen zone. The method and circumstances in which it was done raise serious concerns of infringement of the European treaties by Poland.

We urge politicians and governments of EU Member States to take action in order to prevent authorities' further abuse of the Schengen Agreement - a right granted by the European Union - for political persecution. Europe cannot accept this to set a dangerous precedent. We must defend the fundamental values that our union was founded upon, such as freedom, democracy and the rule of law, as well as those having the courage to fight for them.

#BringHerBack to the EU!

Signed on the 21st of August, 2018 in Brussels

Lech Wałęsa, Nobel Peace Prize Laureate, fmr President of Poland

Anne Applebaum, Journalist, Pulitzer Prize Recepient, Visiting Professor at LSE

Lord Ashdown of Norton-sub-Hamdon, fmr High Representative for Bosnia and Herzegovina

Leszek Balcerowicz, Professor of Economics, fmr Deputy Prime Minister of Poland, fmr National Bank of Poland President

Elżbieta Bieńkowska, European Commissioner for Internal Market

Andrzej Blikle, Professor of Math Science, Entrepreneur, Master in Confectionery

Seweryn Blumsztajn, fmr Polish anti-communist opposition figure & political prisoner

Michał Boni, Member of the European Parliament (EPP, Poland), fmr Digitization Minister

Franziska Brantner, Member of the Deutsche Bundestag (Greens)

Michał Broniatowski, Editor-in-Chief, POLITICO Poland

Yevhen Bystrytsky, Prof.dr. hab. of the Institute of Philosophy at the National Academy of Science, Ukraine

Tom Gerald Daly, Democratic Decay Resource (DEM-DEC), MLS Fellow, Melbourne Law School

Mady Delvaux-Stehres, Member of the European Parliament (ALDE, Luxemburg)

Mark Demesmaeker, Member of the European Parliament (ECR, Belgium)

Tadeusz Diem, fmr Polish Ambassador to Canada & Deputy Defence Minister

Egyptian Commission for Rights and Freedoms

Johannes Feest, German penologist and sociologist of law, Retired professor of criminal law, Bremmen University

Lotta Johnsson Fornarve, Member of the Swedish Parliament (Left Party)

Anna Garmash, President, Ukraine Action

Michał Głowiński, Polish philologist, Professor at The Institute of Literary Research of the Polish Academy of Sciences

Ana Maria Gomes, Member of the European Parliament (S&D, Portugal)

Quentin Guillemain, President, Cosmopolitan Project Foundation

Rebecca Harms, Member of the European Parliament (Greens, Germany)

Laura Harth, Representative to the United Nations, Transnational Nonviolent Radical Party

Patrick Henry, Chair of the Human Rights Committee of the Council of Bars and Law Societies of Europe (CCBE), vice-President of Avocats Sans Frontières (Lawyers Without Borders)

Agnieszka Holland, Polish film and television director and screenwriter

Andrey Illarionov, Senior fellow in the Center of Global Liberty and Prosperity at the Cato Institure, fmr Economic policy advisor to the President of Russia

Jarosław Kaczyński, Polish lawyer, defender of civic activists

Tunne-Väldo Kelam, Member of the European Parliament (EPP, Estonia)

Jędrzej Klatka, Legal Advisor, Chairman of the Committee on Foreign Affairs at the Polish Chamber of Legal Advisors

Tetiana Kozachenko, Ukrainian lawyer, Board Member, Business-Varta, fmr Head of the Lustration department in the Ministry of Justice

Krzysztof Król, fmr Polish anti-communist opposition figure & political prisoner

Tomasz Lis, Editor-in-Chief, Newsweek Polska

Krzysztof Lisek, fmr Polish MP and MEP (EPP)

Yuriy Lukanov, Ukrainian journalist

Alexandru Machedon, President, StarNet Moldova

Domnica Manole, Moldovan Judge of the Appellate Chamber of Chisinau

Marcin Matczak, Professor of Law, Law & Administration Dpt, Warsaw University

Wojciech Mądrzycki, Attorney, fmr Chairman of the Lech Wałęsa Institute

Adam Michnik, fmr Polish anti-communist opposition figure & political prisoner, Editor-in-Chief, Gazeta Wyborcza

Claude Moraes, Member of the European Parliament (S&D, Great Britain), Chairperson of the Committee on Civil Liberties, Justice and Home Affairs

Natalia Morari, Moldovan journalist, President of the Board at TV8

Martin Mycielski, Brussels Correspondent, Gazeta Wyborcza

Andrei Nastase, Mayor of Chişinău, Leader, chairman and cofounder of Dignity and Truth Platform (DA)

Bartłomiej Nowak, Foreign Affairs Secretary, Nowoczesna (Poland)

Sławomir Nowak, fmr Polish Minister of Transport, Construction and Maritime Economy

Evan O'Connell, Paris-based EU affairs expert

Marco Perduca, fmr Italian Senator

Laurent Pech, Professor of European Law, Head of Law & Politics Dpt, Middlesex University

Tetyana Pechonchyk, Chair of the Board, Human Rights Information Centre

Marta Petrusewicz, Professor of History, City University of New York

Peter Pomerantsev, Senior Visiting Fellow, LSE

Alexis Prokopiev, Co-founder of Russie-Libertés

Wojciech Przybylski, Editor-in-chief of Visegrad Insight, Chairman of Res Publica Nowa

Helen Pushkarskaya, Associate Research Scientist, Yale Medical School

Roberto Rampi, Italian Senator (Democratic Party)

Christine Révault d'Allonnes Bonnefoy, Member of the European Parliament (S&D, France)

Małgorzata Rosłońska, President, Association Freedom Equality Democracy, Poland

Wojciech Sadurski, Professor of Law, European University Institute, Sydney Unoversity, Warsaw University

Judith Sargentini, Member of the European Parliament (Groen, Netherland)

Paula Sawicka, Polish NGO activist, Open Republic Association

Helmut Scholz, Member of the European Parliament (Die Linke)

Marietje Schaake, Member of the European Parliament (ALDE, Netherlands)

Joanna Scheuring-Wielgus, Polish MP, Liberal-Social Group

Ryszard Schnepf, fmr Ambassador of Poland to the U.S. & Spain and Deputy Foreign Minister

Radosław Sikorski, fmr Polish Marshal of the Parliament, Minister of Foreign Affairs & Minister of National Defence

Krzysztof Skolimowski, Deputy Mayor of Warsaw-Mokotów

Iegor Soboliev, Ukrainian MP, fmr Head of Anti-corruption Committee

The Socialists and Democrats Group in the European Parliament

Antonio Stango, President of the Italian Federation for Human Rights

Maximilian Steinbeis, Chief Editor, Verfassungsblog

Jaromír Štětina, Member of the European Parliament (EPP, Czech Republic)

Petra De Sutter, Member of the Belgian Parliament (Groen)

Michał Szczerba, Polish MP, Civic Platform

Society of Journalists (Poland)

Alice Stollmeyer, Executive Director, Defending Democracy

Marcin Święcicki, Polish MP, fmr Mayor of Warsaw & Minister for Foreign Economic Relations

Jacob Thaisen, Associate Professor, University of Oslo

Róża Thun, Member of the European Parliament (EPP, Poland)

Bakhytzhan Toregozhina, Public Foundation "Ar.Rukh.Khak" (Kazakhstan)

Alexei Tulbure, fmr Ambassador of Moldova to the United Nations, fmr Permanent Representative of Moldova to the Council of Europe

Jakub Urbanik, Professor of Law, Law & Administration Dpt, Warsaw University

Ana Ursachi, Moldovan lawyer, Founder of the #NuMaTem Movement (EN: I'm Not Afraid)

Julie Ward, Member of the European Parliament (S&D, UK)

Josef Weidenholzer, Member of the European Parliament, Vice-President S&D, Austria

Wojciech Wiślicki, Professor of physics, National Centre for Nuclear Research (Poland)

Kornelia Wróblewska, Polish MP, Nowoczesna

Leyla Yunus, Director of Institute for Peace and Democracy, Chevalier of the French Legion of Honor, European Parliament's Sakharov Prize Finalist

Svitlana Zalishchuk, Ukrainian MP, Sub-Committee on European and Euro-Atlantic Integration Chair

Tomáš Zdechovský, Member of the European Parliament (EPP, Czech Republic)

/ If you or the person/organisation you represent would like to join this list please email us, with your name and title, at BringHerBackPetition@gmail.com / We cannot guarantee publication on the list if signatories. You are of course always welcome to sign the petition online /

Start a petition of your own
This petition starter stood up and took action. Will you do the same?
Start a petition

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Updates

1. Lyudmyla Kozlovska is in danger in Ukraine and needs your help!

   Human rights activist Lyudmyla Kozlovska has been expelled from the EU by the authoritarian Polish government just because her husband, Bartek, ...

Lyudmyla Kozlovska is in danger in Ukraine and needs your help!

   Human rights activist Lyudmyla Kozlovska has been expelled from the EU by the authoritarian Polish government just because her husband, Bartek, dared to oppose the ruling Law & Justice (PiS) party with a critical Facebook post - as was openly admitted by former foreign minister Waszczykowski, who initiated the persecution.

   She is now forced to stay in Kiev, in reach of post-Soviet dictators whom she has spent her life opposing. Being an outspoken critic of the Kremlin, with her Open Dialogue Foundation having defended human rights in Kazakhstan, Moldova [illegible]erian states for 10 years now, every day she spends there poses a risk to her life.

   Tha[illegible]e share this petition and help Lyudmyla get back home to her family and to s[illegible]

   [illegible] #BringHerBack campaign

   Lech Wałęsa
   5 months ago
2. 6 months ago
   Lech Wałęsa started this petition

Reasons for signing

Ombudsman takes up the matter of expulsion of Lyudmyla Kozlovska

23.08.2018,
The Office of the Ombudsman

- **The Ombudsman has taken up the case of a Ukrainian citizen, Lyudmyla Kozlovska, entered into the Schengen Information System by the Polish authorities, an action which results in a ban on entering the Schengen area**
- **Lyudmyla Kozlovska is the president of the Open Dialog Foundation, a non-governmental organisation involved in the defense of the rule of law in Poland**
- **The Ombudsman applied to the Office for Foreigners for the legal basis for the entry, information on what authority asked for the entry, and documentation of the case**

The Ombudsman is conducting explanatory proceedings regarding the fact that data relating to Lyudmyla Kozlovska, a Ukrainian citizen and president of the Open Dialog Foundation, was placed in the Schengen Information System.

The letter of the Office of the Ombudsman to the Office for Foreigners referred to press releases. [[1]] They show that the foreigner's data was placed in the SIS by the Head of the Office for Foreigners at the request of an authority not determined by the author. The consequence of the entry was the deportation of Mrs Kozlovska from Belgium to her country of origin, probably with the ruling of a ban on entry to the Schengen area.

The Ombudsman's bureau's team for equal treatment asked for information on the legal basis on which the foreigners' data were entered into the SIS and which authority applied for this entry. There was also a copy of all documentation regarding the case requested that is at the disposal of the Office for Foreigners, including an application to enter the foreigner's data into the SIS.

If these materials contain classified information, it is possible to disclose them to the Ombudsman according to the terms and manner set out in the regulations on the protection of classified information.

XI.542.15.2018

[1] The article "We do not know, we will not say, we are not in this. Words fail the institutions that could be associated with the deportation of Lyudmyla Kozlovska", ed. M. Wyrwal, available at the link https://wiadomosci.onet.pl/tylko-w-onecie/nie-wiemy-nie-powiemy-nie-ma-nas-instytucje-ktore-moga-miec-zwiazek-z-deportacja/mgevzkm

The appeal of Ukrainian human rights organisations regarding the inclusion of the head of the Open Dialog Foundation in the Schengen Information System (SIS) list

We have been acquainted with the Polish Open Dialog Foundation (hereinafter referred to as the 'Foundation') for many years. The organisation has been actively working on the release of Ukrainian citizens, imprisoned for political reasons in Russia and the occupied Crimea, and has consistently promoted the extension of sanctions against Vladimir Putin and his entourage due to gross violation of human rights. Numerous Ukrainian human rights organisations have direct experience of cooperation with the Foundation.

On 14 August 2018, it became known that the Polish government included the head of the organisation,

a Ukrainian citizen Lyudmyla Kozlovska, in the Schengen Information System (SIS) list. The official justification of this decision is yet to be known. From now on, she isn't allowed to enter not only Poland, where she has lived legally for more than ten years, but also all the countries of the Schengen zone. This decision also may have negative consequences for Lyudmyla's family members living in the EU and the USA.

Prior to this, unconfirmed information about alleged links between the Foundation and Russian special services appeared in the Polish press. The Polish Ministry of Foreign Affairs filed a lawsuit, demanding the compulsory change of leadership of the organisation; however, the demand was twice rejected by the Polish courts. In addition, attempts have been made to revoke the organisation's accreditation at the European Parliament, but the European Commission failed to support them. All these actions were carried out following public callings by the Foundation's leadership to participate in mass protests against the judicial reform that was planned in Poland at that time. New legislative changes in the area of justice, in turn, were criticised by the EU and, for the first time in history, have led to the opening of proceedings against Poland by the European Commission under Article 7 of the Lisbon Treaty.

We consider the placing of Lyudmyla Kozlovska, the head of the Open Dialog Foundation, in the Schengen Information System (SIS) list and depriving her of her right to stay in the Schengen area as a dangerous precedent, which opens the way for a new type of prosecution of civic activists in the EU countries due to their public disagreement with the state policy of individual countries, and we demand that the citizen of Ukraine, Lyudmyla Kozlovska, be excluded from the list which should include persons who constitute a significant danger to the states and society.

Center for Civil Liberties

Ukrainian Helsinki Human Rights Union

Kharkiv Human Rights Protection Group

Center for Human Rights Information

Charitable Foundation 'Vostok-SOS'

Kharkiv Institute of Social Studies

Eastern Ukrainian Center for Civic Initiatives

Public Vetting Committee

Project 'Without Borders'