HELSINKI FOUNDATION FOR HUMAN RIGHTS

Hungarian Helsinki Committee

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The Registrar
European Court of Human Rights
Council of Europe
67075 Strasbourg Cedex
France

By fax: 0033 3 90 21 43 10 and post

Application no. 53371/18
Adin ŞENER against Poland

WRITTEN SUBMISSIONS ON BEHALF OF THE INTERVENERS:

HELSINKI FOUNDATION FOR HUMAN RIGHTS (HFHR)
and
HUNGARIAN HELSINKI COMMITTEE (HHC)

pursuant to the Registrar's notification dated 9 July 2021 on the Court's permission to intervene under Rule 44 § 3 of the Rules of the European Court of Human Rights

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SUMMARY

- The present case concerns a Turkish citizen who was included in the Register of Undesirable Foreigners and in the Schengen Information System (SIS) ('Registers') and was refused entry to Poland. As a result, he is unable to exercise family life with his wife and daughter who are Polish citizens and reside in Poland. His name was entered in the Registers for the reasons of national security and public order. The applicant complains that the information on which the decision was based to include him in the Registers was secret, and therefore not disclosed to him.
- According to the EU human rights standards, foreigners should be provided with certain procedural guarantees in national security cases. One such guarantee is the right to defence, but this cannot be effectively exercised without at least limited knowledge of the reasons behind decisions issued in respect of them.
- The Polish law disproportionately restricts rights of aliens in the migration proceedings based on the grounds of national security (including in cases concerning entry and removal of foreigners' data from Registers). Such foreigners are deprived of the right to access the classified material in the case files. Moreover, decisions issued in such cases may have limited reasoning. Furthermore, the data of these foreigners may be entered into the Registers without a separate appealable decision, and without informing the foreigner that their data was entered into these Registers.
- National regulations were criticised by Polish legal scholars and the Commissioner for Human Rights. The latter argued that the Polish legislation does not satisfy European standards, and appealed to the Minister of the Interior and Administration to consider introducing necessary legislative changes.
- In the recent years, there have been a number of highly controversial cases in Poland where data of lawfully residing foreigners was entered into the Registers, who were expelled or refused asylum or denied the right to stay in Poland on national security grounds based on classified documents. Some of these examples show that the Polish law may be abused by the authorities.

1. INTRODUCTION

1. The Helsinki Foundation for Human Rights (HFHR) and Hungarian Helsinki Committee (HHC) believe that the present case is of utmost importance not only for Poland, but also for other European countries. In recent years, there have been a number of similar cases in Poland, Hungary and other European states where foreigners were refused entry, returned, refused international protection and whose data was entered into the SIS based on security reasons.[1] Decisions issued in these cases are usually based on classified documents. Foreigners are not informed about the factual background of the decisions and are not given the opportunity to review the most important case evidence. In particular, they have no real possibility to submit reasons to remove their data from the Registers in the administrative and judicial proceedings. Therefore, in the HFHR's and HHC's opinion, states are obliged to find a proper balance between protection of national security and a duty to protect and respect fundamental human rights; such as the right to defence, the right to an effective judicial remedy, the right to family life, etc. From that perspective, the current law in Poland is far from satisfactory. Therefore, the

[1] See *The Right to Know - Comparative Report on Access to Classified Data in National Security Immigration Cases in Cyprus, Hungary and Poland*, September 2021, https://helsinki.hu/en/wp-content/uploads/sites/2/2021/09/Advocacy-Report-Right-To-Know.pdf.

future ruling of the Court may lead to an improvement of human rights standards in Poland, Hungary and other European countries that might face similar issues.

2. The present submission is divided into two sections. The first section presents relevant EU standards. The second section analyses the Polish national context concerning restrictions of procedural safeguards in administrative and judicial administrative proceedings concerning migration cases; including entry and removal of foreigners' data to/from Registers.

2. EU LAW STANDARDS ON THE RIGHT TO DEFENCE AND ON PROCEDURAL SAFEGUARDS RELATING TO MIGRATION CASES INVOLVING NATIONAL SECURITY

2.1. Access and use of classified information in administrative procedures

3. Article 47 of the Charter of Fundamental Rights of the EU (hereinafter: the Charter) provides the right to an effective remedy and to a fair trial. The guarantees contained in this Article apply to all cases based on EU law, including cases concerning the entry of foreigners' data in SIS II.[2] Guarantees enshrined in Article 47 of the Charter were interpreted in the jurisprudence of the Court of Justice of the European Union (hereinafter: CJEU).
4. In judgment C-166/13, *Mukarubega*,[3] the CJEU stated that observance of the rights of the defence is a fundamental principle of EU law in which the right to be heard in all proceedings is inherent. According to the CJEU, the right to be heard in judicial and administrative proceedings 'guarantees every person the opportunity to make known his views effectively during procedure and before the adoption of any decision liable to affect his interests adversely'. The CJEU also stated that 'the purpose of the rule that the addressee of an adverse decision must be placed in a position to submit his observations before that decision is adopted, is to enable the competent authority effectively to take into account all relevant information. In order to ensure that the person concerned is in fact protected, the purpose of that rule is, inter alia, to enable that person to correct an error or submit such information relating to his or her personal circumstances as will argue in favour of the adoption or non-adoption of the decision, or in favour of its having a specific content'.[4] On the other hand, the right to defence also imposes obligations on the authorities. Accordingly, the authorities must pay due attention to the observations submitted by the applicant, carefully and impartially examine all the relevant aspects of the individual case, and give a detailed statement of reasons for their decision.[5]
5. In judgement C-300/11, *ZZ*,[6] the CJEU held that the failure to fully and precisely disclose the grounds on which a decision is taken must be assessed in conformity with the requirements under Article 47 of the Charter, and with respect to the requirements according to which limitations of rights shall genuinely meet the respective objectives,

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[2] These cases are regulated by 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).

[3] C-166/13, *Mukarubega v. Préfet de Police, Préfet de la Seine-Saint-Denis*, 5 November 2014, §§43-47.

[4] See also C-249/13, *Boudjlida v. Préfet des Pyrénées-Atlantiques*,11 December 2014, C-383/13 PPU, M. G., N. *R. v. Staatssecretaris van Veiligheid en Justitie*, 10 September 2013, §35.

[5] C-166/13, *Mukarubega*, §48, C-269/90, *Technische Universität München v. Hauptzollamt München-Mitte*, 21 November 1991, §14.

[6] CJEU, C-300/11, *ZZ. v. Secretary of State for the Home Department*, 4 June 2013, §§50-54.

and shall be subject to the principles of necessity and proportionality as set out in Article 52(1) of the Charter.[7]

6. The CJEU stated that: 'it may prove necessary, both in administrative proceedings and in judicial proceedings, not to disclose certain information to the person concerned, in particular in the light of overriding considerations connected with State security' (§54). However, 'in the light of the need to comply with Article 47 of the Charter, that procedure must ensure, to the greatest possible extent, that the adversarial principle is complied with, in order to enable the person concerned to contest the grounds on which the decision in question is based and to make submissions on the evidence relating to the decision and, therefore, to put forward an effective defence. In particular, the person concerned must be informed, in any event, of the essence of the grounds on which a decision (...) is based, as the necessary protection of State security cannot have the effect of denying the person concerned his right to be heard (...)' (§65).[8]
7. Importantly, the CJEU makes the distinction between the 'essence of the grounds' on which the decision is based, and the evidence underlying the grounds. With regard to the former, the mere allegation of a national security threat is insufficient and it is necessary to reveal at least a minimum reasoning. The CJEU gives some further guidance on what the 'essence of the grounds' might entail in the *Kadi II* judgment; i.e. which information provided to the person concerned is satisfactory for the protection of their right of defence.[9] Accordingly, firms, persons and the exact times of events or any other allegation concerning the applicant's conduct giving rise to the threat of national security must be unequivocally identified by the authorities.[10]
8. In contrast, such a partial disclosure is not applicable to the evidence underlying the grounds if that would 'compromise state security in a direct and specific manner, in that it may, in particular, endanger the life, health or freedom of persons or reveal the methods of investigation specifically used by the national security authorities and thus seriously impede, or even prevent, future performance of the tasks of those authorities'.[11]
9. The effectiveness of the judicial remedy under Article 47 of the Charter requires that, as a general rule, the applicant must be provided the information and the grounds related to their person on which the decision on the rejection/withdrawal of their application/status is based. The cognisance of that information is necessary to make it possible for the applicant 'to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in his applying to the court with jurisdiction, and in order to put the latter fully in a position in which it may carry out the review of the lawfulness of the national decision in question (...)'.[12] Once the case is at the court, the applicant must have the right to

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[7] See also T-53/03, *BPB v. European Commission*, 8 July 2008, §§31, 37, 40-41.

[8] This statement was reiterated in other CJEU judgments, including: *M. v. Minister for Justice, Equality and Law Reform*, C-277/11, §§82-88; joined cases C-584/10 P, C-593/10 P and C-595/10 P, *European Commission v. Yassin Abdullah Kadi*, 18 July 2013, §§111-129. It must be noted that the CJEU also referred to this standard in a case not involving migration issues, i.e. C-437/13, *Unitrading Ltd v. Staatssecretaris van Financiën*, 23 October 2014, §§19-21. Consequently, these standards apply to all cases concerning classified information, based on EU law, where Article 47 of the Charter is applicable.

[9] C-300/11, *ZZ*, §§68-69; joined cases C-584/10 *P*, C-593/10 *P* and C-595/10 P, *Kadi*.

[10] Joined cases C-584/10 *P*, C-593/10 *P* and C-595/10 *P*, *Kadi*, §§141, 143, 145, 147, 149.

[11] C-300/11, *ZZ*,§66.

[12] C-300/11, *ZZ*. §53; CJEU, joined cases C-584/10 *P*, C-593/10 *P* and C-595/10 P, *Kadi*, §100; C-222/86, *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v. Georges Heylens and others,* [1987] ECR 4097, §15.

examine all the documents or observations submitted to the court for the purpose of influencing its decision, and to comment on them'.[13]

10. According to the CJEU, if the parties to the procedure cannot have an opportunity to examine the facts and documents on which decisions concerning them are based, and on which they are therefore unable to state their views, this infringes their right to an effective legal remedy.[14] Therefore, according to Article 47 of the Charter, as interpreted in CJEU case law, in cases related to the entry or removal of data from the SIS II, foreigners should have the right to be informed of the essence of the grounds based on which their data was entered there. It is not sufficient if the court has a right and obligation to access and assess the documents constituting the basis for data entry in the register. Such information enables foreigners to make an effective defence in their case, correct an error or submit relevant information relating to their personal circumstances.

2.2. The nature and scope of the judicial review with regard to legality of the lawfulness of the classified data

11. Pursuant to the *ZZ* judgment, the **effective judicial review** with regard to the reasons invoked by the national authority regarding state security and the legality of the decision must entail the following measures: The national court must verify whether the data in question were lawfully classified as 'confidential' information; i.e. it must examine if state security stands in the way of disclosure. The domestic court examines all the grounds and the related evidence on which the decision was based. The court must determine whether reasons of state security stand in the way of such disclosure by carrying out an independent examination of all the matters of law and fact relied upon by the competent national authority; i.e. there is no presumption that the reasons invoked by a national authority exist and are valid. If the court concludes that there is no state security interest that would require the classification of the information in question, it authorises the national authorities to make a disclosure. If the authority does not disclose the information despite the instruction of the court, the court examines the legality of the decision by disregarding the undisclosed information.[15]
12. Provided that state security stands in the way of disclosure by claiming that disclosure of the information would genuinely jeopardise state security, the court must ensure that the person concerned is informed of the essence of the grounds which constitute the basis of the decision in question, and to draw conclusions from any failure to comply with that obligation to inform them.[16]

13. The interveners would also like to draw the Court's attention to *The Right to Know – A Legal Template on EU and International Law Regarding Disclosure of Classified Information in Asylum and Return Procedures Based on National Security Grounds*,[17] which presents the relevant EU law and CJEU case law, as well as the pertinent provisions of the ECHR and the applicable ECtHR case law.

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[13] C-300/11, *ZZ*, §55.
[14] C-300/11, *ZZ*, §56.
[15] C-300/11, *ZZ*, §58-61, 63-64.
[16] C-300/11, *ZZ*, §68.
[17] https://helsinki.hu/en/legal-template/.

3. POLISH NATIONAL CONTEXT

3.1. General characteristics of the relevant provisions in Polish national law

14. It must be noted that under Article 24(1) of Regulation 1987/2006, foreigners' data shall be entered into SIS II on the basis of a decision taken by the competent administrative authorities or courts in accordance with the rules of procedure laid down by national law, and taken on the basis of an individual assessment. Under these provisions, such a decision is subject to appeal.
15. However, where security considerations are at stake, Polish law allows a foreigner's data to be entered without a separate decision (such data may be entered as a result of the analysis of secret evidence in possession of the authorities). A foreigner's data may also be included in the Registers without a foreigner's knowledge and consent.[18]
16. The foreigner may apply to the Head of the Foreigner's Office to have their name removed from the Registers. In such cases, the factual reasons for entering a foreigner's data into the Registers are not disclosed to them, and they have no access to case documents.[19]
17. In this type of case, general provisions of administrative law are also applicable. Right to access the case files in the administrative proceedings is provided in Article 73(1) of the Code of Administrative Procedure ('CPA'). However, Article 74 of the CPA stipulates that the right to access does not apply to case files containing information classified as 'secret' or 'top secret', nor to other files which the public administration body excluded from access on grounds of important state interest. There are no exceptions to this limitation. Case files excluded from access cannot be disclosed even to a representative holding a general authorisation of access to classified information.
18. Polish law provides further limitations of procedural guarantees in migration-related cases (including entering data into the Registers). According to Article 6(1) of the Foreigners' Act 'The authority issuing the decision or an order in the proceedings conducted pursuant to the provisions of the Act, may refrain from drafting their reasoning in the part concerning factual justification, if it is required by national defence or security or protection of public safety and order'.
19. According to Supreme Administrative Court jurisprudence, the limitations provided in the Polish law do not violate constitutional or international human rights standards.[20] The main argument contained in Polish administrative court case law is that the obligation of the court to fully assess all the circumstances of the case is a sufficient guarantee of the rights of a foreigner.
20. Recent case law indicates that in migration cases based on EU law (including cases involving security considerations), a standard based on Article 47 of the Charter, resulting from the case law of the CJEU (C-300/11, *ZZ*) should be applied. Therefore, in such cases a foreigner must be informed of the essence of the grounds on which a decision is based. However, the Supreme Administrative Court accepted the situation in which a foreigner was informed in a very general way that his stay in Poland poses a threat to national security (the Court pointed out that the administrative decision stated that there was a fear that the applicant might carry out terrorist activities, that the applicant had concealed his stay in other EU countries and that he had failed to address the issue of his contacts with persons living there indicated in the decision. The Court

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[18] Articles 435.1(4), 435(2) of the Foreigners' Act of 12 December 2013.
[19] Article 444 and 447(2) of the Foreigner's Act.
[20] For example, judgment of 5 April 2019, case no. II OSK 3210/18.

also found that the decision referred to a letter from the German authorities confirming that the return decision was justified).[21] Thus, it seems that despite the change in the case law, the practice has not significantly changed.

21. It must be also noted that according to research conducted in this respect, the described provisions are one of the most restrictive regarding the rights of defence in the EU. 'In France, Germany, Italy, Portugal, Slovenia and Spain, the parties to court proceedings have full access to case files and decisions must contain reasons in law and in fact'.[22]

3.2. Potential abuse of limitations of procedural safeguards in expulsion cases

22. In the opinion of the interveners, the secrecy surrounding migration cases based on security considerations may lead to abuse. Even if the judges enjoy full access to all the case files, such judicial control still cannot be considered effective. The materials presented to the national court by the authorities may not be reliable or may omit the essential circumstances of the case. They may also contain incorrect information. On the other hand, only the concerned person has full knowledge about the circumstances of their own case, and may correct information provided by the authorities, or present facts in a different light. Therefore, this may affect judicial assessment of the case. For example, the concerned person may provide an alibi, indicate that they were unaware that some of their actions may be associated with activities that pose a threat (e.g. they passed information to their friends or relatives without knowing they belong to a terrorist organisation), or they may indicate they were forced to cooperate with people who pose a threat, etc.[23] Therefore, the national court may not be able to perform a thorough review of the circumstances of the case which are not known to the court.
23. It must also be noted that in cases concerning foreigners recognised as posing a threat to national security, despite the provisions of Polish law, usually no criminal proceedings are instituted.[24] It seems that in a situation where a foreigner has been recognised as a person who could pose, for example, a terrorist threat, criminal proceedings should be instituted. This situation gives rise to the supposition that the authorities bypass the guarantees arising from criminal law in this way, and use the described provisions to abuse the rights of foreigners.
24. In this context, it is worth noting that not all procedural regulations in Poland provide similarly restrictive rules with regards to access to case files containing classified materials. According to Article 156(4) of the Polish Code of Criminal Procedure 'If there is a risk of revealing classified information with the clause «secret» or «top secret», inspections of the files, making excerpts and copies, shall take place under conditions defined by the president of the court or by the court. Certified excerpts and copies shall not be provided unless the Act stipulates otherwise'. Therefore, the Code of Criminal Procedure gives the defendant a possibility to present their point of view and to refute prosecutor's arguments. This safeguard also prevents the risk of abuse of using the secret materials in the proceedings. On the other hand, disclosing secret investigative methods to a defendant has not been found to have caused a security threat.

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[21] Judgment of 6 February 2019, case no. II OSK 3002/18.

[22] J. Chlebny, 'Public Order, National Security and the Rights of Third-Country Nationals in Immigration Cases', *European Journal of Migration and Law*, Vol. 20, Issue 2, 30 May 2018.

[23] See *A. and Others v. UK*, Appl. no. 3455/05, 19 February 2009, §220.

[24] Article 303 of the Polish Code of Criminal Procedure states that if there is a reason to suspect that a criminal offence has been committed, a decision on instituting an investigation shall be issued either upon receiving a notice of a criminal offence or *ex officio*.

25. It is worth mentioning a criminal case before the Regional Court in Bialystok, where four Russian nationals of Chechen origin were charged with supporting the so-called Islamic State in Syria (IS). Translated transcripts from their phone conversations ('summaries') were presented as evidence by the prosecutor. These 'summaries' contained alleged statements of the defendants concerning their financial support for the IS. In turn, defendants argued that they did not mention IS in the wiretapped phone conversations. Therefore, they argued that the act of indictment was prepared on the basis of improperly translated transcripts of phone conversations. It seems that the defendants were only able to effectively challenge the prosecutor's arguments because they had knowledge about the evidence on which the charges were based. In its judgment, the Regional Court in Bialystok stated that during the proceedings it was discovered that the 'summaries' contained errors and words or phrases added by the person who made them and which were not actually used in the telephone conversation. The Regional Court emphasised that the defendants noticed the incorrect translation of their phone conversations.[25]
26. The judgment of the Regional Court in Bialystok was upheld by the Court of Appeals in Bialystok. The Court of Appeals pointed out the 'incorrect translation of the evidence constituting the basis for charges, i.e. materials from operational control in the form of "summaries" of telephone conversations of the accused'. The Court of Appeals also stated that 'while listening to the recorded conversations, the court received explanations from the defendants to the most accurate, most reliable understanding of "decoding" the actual content of these conversations (...)'. Eventually, three of the accused were convicted for supporting the so-called 'Caucasus Emirate in Chechnya', while the fourth one was acquitted.[26] In this case, the access to classified documents guaranteed the defendants a genuine opportunity to express their opinion and challenge the authorities' arguments. It led to an effective challenge of the accusations brought against the defendants, and prevented abuse by the authorities.[27]
27. Practice shows that in some cases involving security considerations, using the classified documents can lead to the risk of abuse. Attention should also be paid to the case of Ludmiła Kozłowska, President of the Open Dialogue Foundation. Ludmiła Kozłowska is Ukrainian, married to a Polish national. She was considered an unwanted person by the Polish authorities, who entered her data into the Registers and issued her a decision on refusal of stay in Poland. However, the German authorities issued her a visa and the Belgian authorities issued her a residence permit. Thus, the German and Belgian authorities did not recognise that her stay constituted a threat to national security.[28]

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[25] Judgment of 7 August 2017, case no. III K 113/16.
[26] Judgment of 26 June 2018, case no. II AKa 26/18.
[27] More information about this case: Regional Court in Bialystok, *Wyrok w sprawie czterech obywateli narodowości czeczeńskiej oskarżonych w finansowanie terroryzmu*, http://bialystok.so.gov.pl/aktualnosci/778-komunikat-20170807-1.html; Polish Radio Bialystok, *Białostocki sąd skazał Czeczenów oskarżonych o wspieranie terrorystów,* http://www.radio.bialystok.pl/wiadomosci/index/id/146766; *Polish Court Finds Three Chechens Guilty of Supporting Terrorism*, Radio Poland, http://archiwum.thenews.pl/1/10/Artykul/319853.
[28] More information about the case: Helsinki Foundation for Human Rights, *HFHR Issues Statement in Case of Detained Head of Open Dialogue Foundation*, https://www.hfhr.pl/en/hfhr-issues-statement-in-case-of-detained-head-of-open-dialogue-foundation/; wyborcza.pl, *Deportowana z Polski Ludmiła Kozłowska z prawem pobytu w Belgii. Belgowie nie uwierzyli w propagandę rządu PiS,"*https://wyborcza.pl/7,75399,24516066,deportowana-z-polski-ludmila-kozlowska-z-prawem-pobytu-w-belgii.html; polandin.com, *Polish-German Presidents Review of Bundestag Hearing on Hungary, Poland*, https://www.tvp.pl/polandinenglishinfo/news/politics-economy/polishgerman-presidents-review-of-bundestag-hearing-on-hungary-poland/38995487.

Although administrative courts quashed decisions issued in her case, her case is still pending before the administrative bodies and she is not able to return to Poland.[29]

28. In another widely discussed case, Ameer Alkhawlany, a PhD student at Jagiellonian University, had his data was entered in Registers and was subsequently expelled to Iraq. According to the Polish authorities, he contacted friends living in Western Europe who were believed to be Islamic radicals, and an expulsion decision was issued by the Border Guards. However, Mr Alkhawlany stated that the reason for his expulsion was his refusal to cooperate with the Polish Security Service.[30] He was deprived of his liberty during his expulsion proceedings. The detention decision was also based on classified materials. The Regional Court in Przemyśl, when considering the appeal against the decision on detention extension, drew attention to serious irregularities that occurred during the detention proceedings. The Regional Court stated that neither the authority applying for detention extension, nor the courts considering the case had any reliable information in the case files that Mr Alkhawlany posed a threat to national security. Therefore, the Regional Court in Przemyśl requested the Security Service to provide relevant materials. Upon receiving the requested information, the Regional Court stated that they were laconic, and that the threat indicated by the Security Service was hypothetical, therefore it could not constitute grounds for depriving Mr Alkhawlany of his liberty. The Regional Court decided to release Mr Alkhawlany, however, after being released, he was immediately expelled from Poland, under fresh decision of the Minister of the Interior and Administration.[31] Within the proceedings concerning an application for international protection lodged by Mr Alkhawlany, the Supreme Administrative Court overturned the decision refusing him protection and remitted the case. However, since this judgment was issued when Mr Alkhawlany was no longer present in Poland, any further proceedings were discontinued.[32]
29. The above examples demonstrate that provisions of the Polish law may be abused by the authorities. Moreover, they also indicate that where the court has access to classified materials of the case, this alone does not provide an effective opportunity to benefit from procedural guarantees described in Article 13 of the Convention. As indicated in the partly dissenting opinion of Judge Serghides in the *Regner v. Czech Republic* case, 'such an approach could lead to giving ample room to the authorities to restrict human rights or even to encouraging them to abuse human rights, hiding behind the pretext of security and confidentiality'.[33] Therefore, in the opinion of the HFHR and HHC,

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[29] Sąd znowu uchylił postanowienie o wyrzuceniu z Polski Ludmiły Kozłowskiej z Otwartego Dialogu, https://wiadomosci.onet.pl/kraj/sad-znowu-uchyla-postanowienie-o-wyrzuceniu-z-polski-ludmily-kozlowskiej/ef7vq2y?utm_source=wiadomosci.onet.pl_viasg_wiadomosci&utm_medium=referal&utm_campaign=leo_automatic&srcc=ucs&utm_v=2.

[30] *Polish MPs to Probe Iraqi Suspected of Ties with Islamic Radicals: Report,* Radio Poland, http://archiwum.thenews.pl/1/10/Artykul/279991.

[31] Decision of the Regional Court in Przemyśl, case no. II Kz 19/17.

[32] More information about the case: Helsinki Foundation for Human Rights, *HFHR Statement on Ameer Alkhawlany's Obligation to Return*, https://www.hfhr.pl/en/hfhr-statement-on-ameer-alkhawlanys-obligation-to-return/; *Top Administrative Court Decides Cases of Foreigners Named 'Security Risk'*, https://www.hfhr.pl/en/top-administrative-court-decides-cases-of-foreigners-named-security-risk/, Human Rights Commissioner, *NSA: skarga kasacyjna ws. odmowy statusu uchodźcy dla obywatela Iraku - częściowo zasadna,* https://www.rpo.gov.pl/pl/content/nsa-skarga-kasacyjna-ws-odmowy-statusu-uchodzcy-dla-obywatela-iraku-czesciowo-zasadna.

[33] It must be stated that the *Regner v. Czech Republic* judgment is not applicable to the present case as it concerns complaints regarding the violation of Article 6 of the Convention, which is not applicable to migration cases (*Maaouia v. France*, Appl. No. 39652/98, 5 October 2000, §41).

providing the foreigner with at least limited information on the factual grounds of decisions can ensure that the procedural guarantees are respected.

3.3. Doctrine and Human Rights Commissioner's position

30. Polish national regulations concerning restricting access to case files in the administrative proceedings were criticised by some Polish legal scholars. In particular, in a paper published in 2014, prof. Jacek Chlebny argued that the provisions of Article 74 of the Code of Administrative Procedure do not satisfy the standards of the ECHR and EU law because 'they do not contain a mechanism that would reconcile conflicting interests arising from the parties' right to access to full case files and the need to protect classified information'.[34] He recommended adoption of certain changes aimed to enhance the protection of the procedural rights of individuals without threatening the public security. Such a goal could be achieved by the introduction of special legal representatives with security clearance. Special legal representatives would be appointed by a court upon the motion of parties to proceedings in which classified documents are used. The special legal representative would be allowed to have access to classified documents and would represent the interests of the party via, for example, preparation of appeal complaints and participation in closed court sessions.[35]
31. Similarly, prof. Julia Wojnowska-Radzińska argued that complete denial of access to case files to a foreigner subject to an expulsion decision is disproportionate because it prevents the person concerned from establishing the basis on which documents the decision was issued. She underlined that the mere fact that the decision may be challenged at the administrative court does not compensate all negative effects resulting from denying the party access to their case files. Without access to case files, the foreigner and their legal representative cannot effectively question the documents upon which the decision was issued before the court. Moreover, there is no possibility for the foreigner to review whether the administrative court carried out the proportionality in a proper way. In order to reconcile the necessity to protect national security and at the same time respect fundamental procedural rights of foreigners in the expulsion proceedings, she suggested introducing 'special advocates' – an idea inspired by Canadian law. Special advocates would be appointed by the court and granted security clearance. They would have access to confidential documents and could represent the foreigner in closed court sessions. This would ensure that the rights of foreigners are properly protected.[36]
32. Problems with the current legislation were also noted by the Polish Commissioner for Human Rights. He argued that although according to the well-established case law of the Polish administrative courts, the denial of access to case files with classified documents does not violate the principle of proportionality, nor does such a solution effectively protect foreigners against the arbitrariness of administrative authorities. Decisions issued on the basis of classified documents may deeply interfere with the foreigners' right to protection of private and family life under Article 8 of the ECHR, and as such, should be subject to the effective review of independent state authorities. Denial of access to case files may also violate Article 13 of the Convention. That is

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[34] J. Chlebny, *Odmowa dostępu do akt w sprawie administracyjnej*, "Państwo i Prawo" 2014, no. 10, p.105.
[35] Ibid., pp.104-109.
[36] J. Wojnowska-Radzińska, *Dostęp cudzoziemca do akt w postępowaniu w przedmiocie zobowiązania do powrotu – uwagi de lege lata i de lege ferenda*, 'Ruch Ekonomiczny, Prawniczy i Socjologiczny' 2019, no. 1, p.69.

because although the foreigner is not deprived of the possibility to challenge the unfavourable decision, without both parties having access to the case files, the appeal proceedings would not have an adversarial character. The Commissioner concluded that the Polish legislation does not satisfy the European standards because it does not provide foreigners with proper guarantees which would mitigate adverse consequences of denial of access to case files. Therefore, he appealed to the Minister of Internal Affairs and Administration to take a position with regard to the identified problems and to consider introducing necessary legislative changes.[37] The Minister of Internal Affairs responded that he did not consider the proposed changes to be absolutely necessary, but he did announce a further analysis of the Commissioner's proposal.[38]

33. Regrettably, no legislative proceedings aimed at ensuring that Polish law meets the standard of international law have been initiated yet. Legislative changes proposed by the HFHR regarding the repeal of provisions allowing the limitation of the factual reasons of the decision were not accepted by the authorities.[39] HFHR also submitted several motions to the Polish courts to refer a preliminary reference to the CJEU on these matters, however the courts dismissed them.[40]

4. CONCLUSION

34. In the view of the interveners, the Polish law deprives foreigners considered a threat to national security of the information regarding the reasons their data was entered into the Registers, and does not allow them access to classified documents pertaining to their own cases. Such a regulation disproportionately restricts their procedural guarantees, especially considering other procedural rules applicable in these proceedings (i.e. the possibility to enter data into the Registers without a foreigner's knowledge). In the HFHR's and HHC's opinion, foreigners must be provided with at least limited information about the factual grounds of entry of their data into the Registers in order to ensure that they can exercise their procedural guarantees. Only the concerned person has knowledge about the facts of their case and is able to effectively challenge the allegations against them. The mere fact that classified documents may be reviewed by the administrative courts does not mitigate all negative consequences resulting from the lack of truly adversarial proceedings. Moreover, the practice shows that the flawed provisions may be abused by the authorities. It is worthwhile to underline that the disproportionate nature of the said restrictions and their inconsistency with EU law and the Convention were noted by Polish legal scholars and the Commissioner for Human Rights.

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[37] Commissioner for Human Rights, *Letter to the Minister of Foreign Affairs and Administration*, 19 August 2016, https://www.rpo.gov.pl/pl/content/wystapienie-do-ministra-spraw-wewnetrznych-i-administracji-w-sprawie-dostepu-do-informacji.

[38] MSWiA w sprawie wprowadzenia do polskiego porządku prawnego instytucji specjalnego pełnomocnika dla cudzoziemców, https://www.rpo.gov.pl/pl/content/mswia-w-sprawie-wprowadzenia-do-polskiego-porz%C4%85dku-prawnego-instytucji-specjalnego-pe%C5%82nomocnika-dla.

[39] Helsinki Foundation for Human Rights, *Amendments to the Foreigners Act – HFHR Comments*, https://www.hfhr.pl/en/amendments-to-the-foreigners-act-hfhr-comments/.

[40] I.e. judgments of 9 September 2016, case no. II OSK 61/15 and of 5 April 2019, case no. II OSK 3210/18.