



Permanent Mission
of the Republic of Poland
to the United Nations Office
at Geneva

4200/201-2/2018

The Permanent Mission of the Republic of Poland to the United Nations Office at Geneva presents its compliments to the Office of the UN High Commissioner for Human Rights.

With reference to a joint communication sent by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; and the Special Rapporteur on the situation of human rights defenders, the Permanent Mission of the Republic of Poland has the honour to transmit to the Office of the High Commissioner for Human Rights response to the abovementioned letter.

The Permanent Mission of the Republic of Poland to the United Nations Office at Geneva avails itself of this opportunity to renew to the Office of the UN High Commissioner for Human Rights the assurances of its highest consideration.



Geneva, 6 November 2018

**Office of the UN High Commissioner for Human Rights
Geneva**

Odpowiedź na list Specjalnych Sprawozdawców ONZ ds. promocji i ochrony wolności opinii i wypowiedzi, ds. wolności pokojowych zgromadzeń i stowarzyszeń oraz ds. sytuacji obrońców praw człowieka, dotyczący działań polskiej administracji wobec organizacji pozarządowej *Open Dialog Foundation* oraz deportacji pani Ludmiły Kozłowskiej

Q 1:

Please provide any additional information and/or any comment(s) you may have on the above-mentioned allegation.

A:

The Ministry of Foreign Affairs would like to thank to the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, to the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association; and to the to the UN Special Rapporteur on the situation of human rights defenders for the joint communication and hereby is pleased to convey its reply to the abovementioned letter.

Referring to the information provided in the communication in the description of the factual basis of the case, it is important to clarify that Mr. Bartosz Kramek did not mention judicial reform in his post on Facebook page.

Q 2:

Please explain the legal basis for the Ministry of Foreign Affairs' reference to "illegal activities" and requests for the Open Dialog Foundation to remove "illegal content" from its website in response to the organisation's criticism of proposed judicial reform and subsequent support for protests. Please explain how such an approach is compatible with Poland's international human rights obligations and in particular, with article 19 of the International Covenant on Civil and Political Rights which guarantees the rights to freedom of opinion and expression.

A:

The cause for undertaking oversight activities towards the Open Dialogue Foundation was the fact that on 21 July 2017 Mr. Bartosz Kramek posted on his FB account a text entitled „*Niech państwo stanie: wyłączmy rząd!*” (“Stop the State: turn off the government!”). This post included a call for actions that violate the law, i.e. tax evasion:

„Warto rozważyć otwartą i zakrojoną szeroko akcję czasowego powstrzymania się od płacenia podatków i innych należności na rzecz skarbu państwa pod hasłem np. Nie płacę na PiS. Oczywiście można i należy to przemyśleć w szczegółach. Pamiętajmy, że chodzi o presję - zmuszenie rządu do opamiętania, bądź jego pokojowa zmiana.”.

(“It is worth considering an open and broad campaign to temporarily stop paying taxes and other dues to the State Treasury under the slogan e.g. I am not paying for PiS [Prawo i Sprawiedliwość – Law and Justice, the ruling party – translator’s note]. Naturally one should think over its details. Let us bear in mind that this is about putting pressure – forcing the government to reflect or its peaceful change.”).

The above quote is an instigation to commit an offence of tax evasion, while a further part of the article is an instigation to commit an offence of harassment of specific people. Pursuant to Art. 54 of the Act of 10 September 1999 – Fiscal Criminal Code (consolidated text of the Journal of Laws of 2017, item 2226) “tax evasion is a punishable fiscal offence.” Instigating a prohibited act is an offence pursuant to Art. 18(2) of the Act of 6 June 1997 – Criminal Code (consolidated text of the Journal of Laws of 2017, item 2204).

The article, *Niech państwo stanie: wyłączmy rząd!* (Stop the State: turn off the government!) was published by Mr. Bartosz Kramek on his personal FB profile, whose settings include his first and family name. However, it should be noted that this profile cannot be treated solely as Mr. Kramek’s personal profile reflecting his private opinions since, according to the information about the profile’s owner, Mr. Kramek is the President of the Board of the Open Dialogue Foundation and he also “manages the Open Dialogue Foundation page.”

The Open Dialogue Foundation has posted Mr. Bartosz Kramer’s private message in full on its official FB page and included its own comment, which reads:

In the Ministry of Foreign Affairs’ opinion, the above fully warrants the measures taken by the MFA in its capacity as the Foundation’s overseeing body since the above represents a violation of the legal order in force.

According to the Art. 19(3) of the International Covenant on Civil and Political rights, the exercise of the rights of freedom to expression may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary for respect of the rights or reputations of others or for the protection of national security or of public order, or of public health or morals. As it has been highlighted, the article published by Mr. Kramek contains instigations to commit two offences under the law of the Republic of Poland.

Q 3:

Please provide an update on the status of Ms. Kozlovska’s appeal of the decision to withhold information on the issuing of her residency status based on the alleged designation of this information as classified and potentially causing “serious damage to the Republic of Poland”.

A:

On 1 March 2018, Ms. Lyudmyla Kozlovska, a Ukrainian citizen, submitted a request to the Governor of Mazovia Province to be given a long-term resident’s European Union residence permit.

In the course of proceedings initiated by this request, the Governor of Mazovia Province by decision No WSC-II-E.6153.339.2018 of 18 July 2018 and acting pursuant to Art. 74 of the Act of 14 June 1960—the Code of Administrative Procedure (Journal of Laws of 2017, item 1257, as amended) in conjunction with Art. 8 of the Act of 5 August 2010 on the protection of confidential information (Journal of Laws of 2018, item 412), refused the foreign national the right to inspect the case file to the extent in which it comprises confidential documents with the Secret clause, to make notes based on it, and copies or excerpts thereof. The decision of the Governor of Mazovia Province was served on the foreign national's attorney on 23 July 2018. On 1 August 2018 a complaint was filed against this decision (the date of receipt at the Mazovia Province Governor's Office). By a letter of 9 August 2018, the complaining party was summoned by the Head of the Office for Foreigners pursuant to Art. 64 (2) of the Code of Administrative Procedure to remove the complaint's formal defect by sending, within 7 days of summons receipt, the original power of attorney to lodge an appeal on behalf of the party and to represent the party before the Head of the Office for Foreigners, under pain of the complaint being unprocessed, because the power of attorney included in the case file authorised the attorney only to represent the foreign national before the Governor of Mazovia Province. The summons of 9 August 2018 was served on the addressee on 20 August 2018, while on 27 August 2018 the identified formal defect of the complaint was removed by the foreign national's attorney.

Considering the possibility of processing the substance of the case, on 3 September 2018 the Department of Foreigners of the Mazovia Province Governor's Office was asked to send the confidential documents affected by the contested decision to the Office for Foreigners. Immediately when such materials are available, the complaint will be processed by the Head of the Office for Foreigners.

Q 4:

Please explain the legal and factual basis for the decision to include Ms. Kozlovska in the Schengen Information System (SIS) in order to prevent her entry into the countries of the Schengen Zone until 31 July 2021.

A:

On 31 July 2018, the Head of the Office for Foreigners entered the data of the Ukrainian citizen Lyudmyla Kozlovska in the list of foreigners whose stay in the territory of the Republic of Poland is undesirable, later referred to as the "list." This act was performed pursuant to Art. 435 (1) (4) of the Act of 12 December 2013 on Foreigners (Journal of Laws of 2017, item 2206, as amended) to the extent in which this provision refers to the grounds of state security, upon request by one of the bodies authorised under Art. 440 (1) of the Act on Foreigners to request that data should be entered in the list, i.e. the Head of Internal Security Agency. The Office for Foreigners received the requesting authority's letter on 30 July 2018, with the foreign national's photograph attached. Also, it should be borne in mind that the request's statement of factual reasons was included in a separate document containing confidential information with the Secret clause, which was transferred from the Internal Security Agency to the Classified Registry of the Office for Foreigners.

According to Art. 438 (1) (8) of the Act on Foreigners, the foreign national's data shall be included in the list for a period until 26 July 2023.

As a result of the fulfilment of obligation under Art. 443 (1) (3) of the Act on Foreigners, to the extent in which this provision invokes the grounds of state security as circumstances giving rise to the keeping of the data in the list, in conjunction with Art. 24 (1) and (2) of Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II) (Official Journal of the EU L 381 of 28.12.2006, p. 4), later referred to as "Regulation 1987/2206," the foreign national's data were transmitted by the Head of the Office for Foreigners to the Schengen Information System on 31 July 2018 for the purposes of refusing entry for a period corresponding to the duration of the validity of the entry of the foreign national's data in the list. The data are processed for the purposes of refusing entry or stay (Art. 24 (1) of Regulation 1987/2006).

Until today, the foreign national's data have not been erased from the list or the Schengen Information System. The validity of the entry of the foreign national's data in the list has not been suspended, either.

It should be also indicated that the factual grounds for entering the foreign national's data in the list (and consequently also in the Schengen Information System for the purposes of refusing entry) follow from the document containing confidential information that was assigned the Secret clause. Poland further explains that according to Art. 447 (2) of the Act on Foreigners, the right to inspect documents concerning the entering of data in the list is not granted to a foreign national whose data have been entered there under Art. 435 (1) (4) of the Act on Foreigners. As a result, the Office for Foreigners may not disclose herein any factual circumstances that gave rise to the aforementioned act of entering the data by the Head of the Office for Foreigners. Thus, the Head of the Office for Foreigners may not provide information about the factual grounds for transmitting the foreign national's data to the Schengen Information System for the purposes of refusing entry, referred to in paragraph 4 of the joint report.

Q 5:

Please explain why Ms. Kozlovska was allegedly not informed of the reason for her inclusion on the SIS database and was denied access to the official request which led to her inclusion on the database and the decision to deport her from the Schnegen area. Please inform us whether and how Ms. Kozlovska will be given access to this information in line with Article 109 of the Schengen Convention, and please provide details on the possibility and modality to appeal this decision.

A:

The legal basis for transmitting the foreign national's data to the Schengen Information System was inferred from Art. 24 (1) and (2) of Regulation 1987/2006. According to Art. 24 (1), "data on third-country nationals in respect of whom an alert has been issued for the purposes of refusing entry or stay shall be entered on the basis of a national alert resulting from a decision taken by the competent administrative authorities or courts in accordance with the rules of procedure laid down by national law taken on the basis of an individual assessment. Appeals against these decisions shall lie in accordance with national legislation." According to Art. 24 (2) of Regulation 1987/2006, "an alert shall be entered where the decision referred to in paragraph 1 is based on a threat to public policy or public security or to national security which the presence of the third-country national in

question in the territory of a Member State may pose. This situation shall arise in particular in the case of:

- a) a third-country national who has been convicted in a Member State of an offence carrying a penalty involving deprivation of liberty of at least one year;
- b) a third-country national in respect of whom there are serious grounds for believing that he has committed a serious criminal offence or in respect of whom there are clear indications of an intention to commit such an offence in the territory of a Member State."

According to the provisions of Polish law, which are consistent with Regulation 1987/2006, transmitting a foreign national's data to the Schengen Information System for the purposes of refusing entry is only a consequence of a prior entry of his or her data in the list only in connection with specific circumstances which are referred to in Art. 443 (1) of the Act on Foreigners, which obligates the Head of the Office for Foreigners to enter the data in the list. At the same time, however, Art. 435 (2) of the Act on Foreigners provides that a foreign national's data may be entered in the list without his or her knowledge and consent. In this respect, i.e. in respect of "the rules of procedure" which govern the taking of "a decision" giving rise to a "national alert," the above-quoted Art. 24 (1) of Regulation 1987/2006 refers to a Member State's national legislation. The notion of a "decision" needs to be understood in a specific way, as one that is typical of European Union law rather than the one defined in such regulations as Art. 104 (1) and (2) of the Code of Administrative Procedure. The actions taken so far by the Head of the Office for Foreigners reflected his conviction that the notion of decision referred to in Art. 24 (1) of Regulation 1987/2006 should be understood as a form of activity performed by a Member State's public authority towards an individual, and not as an administrative act, and that it thus does not require a formal notification to the affected person. The fact that the wording of Art. 24 (1) of Regulation 1987/2006 is slightly different from Art. 96 (1) of the Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of States of the Benelux Economic Union, the Federal Republic of Germany, and the French Republic on the gradual abolition of checks at their common borders, which was replaced by this provision, should not mean that the construction of issuing an alert in the Schengen Information System changed much. The "decision" giving rise to a "national alert" should still be taken on the basis of national rules of procedure. However, a new clause was added, according to which national legislation should also regulate "appeals against these decisions." Regulation 1987/2006, however, did not provide for any details of such appeal's construction, referring the whole appeal procedure to a Member State's national law. In particular, it does not decide whether the alert should necessarily be controlled before being issued on the basis of a "decision," referred to in Art. 24 (1) of the Regulation. We also need to take into account that Art. 444 (1) of the Act on Foreigners grants a foreigner the possibility to submit a request to the Head of the Office for Foreigners to remove the data if they have been entered or are stored in violation of the Act. The proceedings provided for in Art. 444 (1) (3) of the Act on Foreigners, which can be qualified as follow-up proceedings whose goal is to review compliance with the law that regulates the entry of data in the list of foreigners whose stay in the territory of the Republic of Poland is undesirable, and the storage of such data, may also be treated as such "appeal procedure." As a consequence of finding a legal defectiveness in entering or storing data in the list, such data should be erased from the list and from the Schengen Information System. We should also bear in mind that under the proceedings referred to in Art. 444 (1) of the Act on Foreigners, according to Art. 445 of the Act, provisions of the Code of Administrative Procedure with regard to certificates apply (Chapter VII). Accordingly, a refusal to erase the data is

communicated in the form of a decision, which is referred to in Art. 219 of the Code of Administrative Procedure. The decision may be contested before a provincial administrative court under Art. 3 (2) (2) of the Act of 30 August 2002 – Law on Proceedings before Administrative Courts (Journal of Laws of 2017, item 1369, as amended).

In this context it needs to be noted that the foreign national has already launched such proceedings. On 31 August 2018, Ms. Kozlovska's attorney lodged a request with the Head of the Office for Foreigners to erase her data from the list and from the Schengen Information System. The request was submitted on a form annexed to the Regulation of the Minister of the Interior of 23 April 2014 on the template of a request to provide a foreign national with information included in the list of foreigners whose stay in the territory of the Republic of Poland is undesirable, or in the Schengen Information System for the purposes of refusing entry, and to correct or erase the data entered in the list or in the System (Journal of Laws of 2014, item 549). Currently, the Head of the Office for Foreigners is examining the request.

In this context it needs to be noted that pursuant to Art. 24 (1) of Regulation 1987/2006, the national law offered the foreign national a possibility to initiate appeal procedure against the "decision" giving rise to a national and SIS alert for the purposes of refusing entry, and that she has already seized this opportunity.

It should be made clear that Art. 109 of the Convention Implementing the Schengen Agreement, which was invoked in paragraph 5 of the joint report, ceased to be in force on 9 April 2013 by operation of Art. 52 (1) of Regulation 1987/2006 and Art. 68 (1) of Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II). As regards issues within the scope of the Treaty on the Functioning of the European Union, it was replaced by Art. 41 of Regulation 1987/2006. Under Art. 41 (1), "the right of persons to have access to data relating to them entered in SIS II in accordance with this Regulation shall be exercised in accordance with the law of the Member State before which they invoke that right." As has already been mentioned, the procedure to be followed by a foreign national to access the details of a SIS alert for the purposes of denying entry has been laid down in Art. 444 (1) of the Act on Foreigners. The procedure also codifies the right to have the data corrected or to have the data deleted if they are unlawfully stored, which is set out in Art. 41 (5) of Regulation 1987/2006. It does not result from this provision, however, that it could substantiate an effective request to disclose the facts which gave rise to a decision to issue a national alert, in the cases when such decision is based on a threat to public policy, public security or national security, according to Art. 24 (1) of Regulation 1987/2006.

Q 6:

Please explain the legal basis of the Minister of Foreign Affairs's decision to file a motion demanding the appointment of a trustee replacing the current Management Board of the Open Dialog Foundation. Please also explain the basis on which the Minister decided to appeal the Regional Court of Warsaw's decision to reject the motion based on procedural faults.

A:

The Ministry of Foreign Affairs asked Ms. Lyudmyla Kozlovska, President of the Management Board of the Foundation (with a copy of the request sent to Mr. Bartosz Kramek) to clarify why Mr. Bartosz

Kramek's letter calling for actions that violate the law (cf. reply to question No. 2) had been posted on the Foundation's official FB page. Clarification was also sought as to why Mr. Bartosz Kramek's private posts contain information about his function on the Board of the Foundation.

After receiving insufficient explanations, pursuant to Art. 14(1) of the Foundations Act of 6 April 1984, the Ministry of Foreign Affairs, acting in its overseeing capacity, requested the Open Dialogue Foundation to immediately remove content calling for undertaking illegal activities, including activities addressed to State authorities, from the Internet sites managed, belonging to and/or run by the Foundation.

In view of the non-compliance by the overseen foundation with the request made by the overseeing body, the Ministry of Foreign Affairs, acting pursuant to Art. 14(2), in conjunction with Art. 14(1) of the Foundations Act requested the District Court for the Capital City of Warsaw to establish and register by court receivership in the Open Dialogue Foundation by submitting a relevant motion in this regard.

In a decision dated 7 December 2017, a court clerk in the District Court for the Capital City of Warsaw dismissed the above motion.

Due to the fact that court proceedings in the Polish legal order have two instances, a party to proceedings has the right to appeal against them and request that its case be re-examined by a court of second instance. Consequently, acting pursuant to Art. 398(22) of the Code of Civil Procedure, the Ministry of Foreign Affairs appealed against the court clerk's decision of 7 December 2017 and as a result of that appeal, the said decision did not stand.

Following an examination of the appeal against the court clerk's decision, the District Court for the Capital City of Warsaw issued a decision on 17 April 2018 to dismiss the MFA's motion and, as a result, the case was closed.

In the opinion of the court, a post on the private profile belonging to a member of the Foundation's Board is not identical with the position taken by the Foundation and for this reason the court dismissed the motion without negating the right of the overseeing body/the Minister of Foreign Affairs to file the motion as a rule, and without calling into question the possibility of undertaking oversight steps in general.

We would also like to stress that the MFA has sent all of its correspondence to the governing bodies of the Foundation Open Dialog and that the correspondence did not contain any personal references to Ms. L. Kozlovska.