

Mandates of 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

REFERENCE:
AL POL 4/2018

7 September 2018

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the rights to freedom of peaceful assembly and of association; and Special Rapporteur on the situation of human rights defenders, pursuant to Human Rights Council resolutions 34/18, 32/32 and 34/5.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the judicial harassment of the non-governmental organisation, **the Open Dialog Foundation**, and the deportation of **Ms. Lyudmyla Kozlovska** from Belgium to Ukraine, following a request by the Polish authorities via the Schengen Information System (SIS) database, to deny Ms. Kozlovska access to the countries of the Schengen zone.

Ms. Kozlovska is a Ukrainian national and President of the Open Dialog Foundation, a non-governmental organisation established in Poland in 2009, which has among its statutory objectives the protection and promotion of human rights, democracy and rule of law in the post-Soviet area.

According to the information received:

In July 2017, in response to the Polish Government's judicial reform proposals, civil society organisations, including the Open Dialog Foundation, participated in peaceful protests and expressed criticism of the proposed reforms.

On 21 July 2017, Mr. Bartosz Kramek, Head of the Foundation Board of the Open Dialog Foundation and the husband of Ms. Kozlovska, declared his opposition to the proposed judicial reforms in a post on his personal Facebook page. On 21 July 2017, the Open Dialog Foundation shared Mr. Kramek's post on its website and also issued an official statement, expressing its concerns for the independence of the judiciary in light of the proposed reforms to the judicial system. The statement furthermore expressed the organisation's official support for protests in opposition to the reforms.

On 27 July 2017, the Ministry of Foreign Affairs demanded an explanation from the Open Dialog Foundation as to why it was calling for "illegal activities" and "personal attacks." In follow-up correspondence from 7 August 2017, the Ministry of Foreign Affairs also requested that the Open Dialog Foundation

remove all of the “illegal content” from its website and social media accounts within three days.

On 7 August 2017, at the request of the Minister of Foreign Affairs, the fiscal authorities launched a fiscal and customs inspection of the Open Dialog Foundation. The inspection led to weekly inspections and interrogations of staff of the Open Dialog Foundation at the Office of the Fiscal Administration in Warsaw.

On 30 August 2017, in an interview for Gazeta Polska, the Prime Minister claimed that the protests in opposition to the proposed judicial reforms were not spontaneous but rather “well directed and financed.” She stated that particular organisations are working for “influential foreign interest groups” and when questioned specifically on the Open Dialog Foundation, allegedly stated that the Minister of Foreign Affairs had informed the prosecutor’s office on the matter of the “unlawful actions” of the Open Dialog Foundation.

On 3 October 2017, the Open Dialog Foundation was informed by the Regional Court of Warsaw that the Minister of Foreign Affairs had filed a motion demanding the appointment of a trustee replacing the current Management Board of the Open Dialog Foundation. The Court set a seven-day deadline for the provision of the Foundation’s official statement on the matter. At the request of the court, the Foundation submitted its official position on the matter, alleging numerous irregularities in the Minister’s motion. On 7 December 2017, the Court rejected the Minister’s motion due to procedural faults. The Minister appealed the decision.

On 1 March 2018, Ms. Kozlovska filed an application for long-term EU residency status with the Mazovian Voivodeship Office in Warsaw. Ms. Kozlovska has resided in Poland for the past ten years and her current residency permit is due to expire in 2018.

On 23 July 2018, Ms. Kozlovska received a letter from the Mazovian Voivode dated 18 July 2018, informing her that pursuant to Article 74 of the Act of 14 June 1960 - Code of Administrative Procedure and in connection with Article 8 of the Act of 5 August 2010 on the protection of classified information, access to a part of the case file on the issuance of her residency status was withheld due to the fact that it contains information which, if disclosed, would cause “serious damage to the Republic of Poland.” Ms. Kozlovska appealed the decision and is reportedly waiting for the case to be reviewed. She has received no further information on her appeal or the status of her residency permit.

On 13 August 2018, Ms. Kozlovska was detained by Belgian border police during passport control at Zaventem Airport in Brussels. On 31 July 2018, Ms. Kozlovska had been included in the Schengen Information System (SIS) database, upon the request of the Ministry of Internal Affairs of Poland, in order

to prevent her from entering the countries of the Schengen zone. The ban will remain in force until 31 July 2021.

Ms. Kozlovska was 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 Schengen area.

On 14 August 2018, at 1.55 pm, Belgian border police placed Ms. Kozlovska on a direct flight to Kiev where she currently remains.

While we do not wish to prejudge the accuracy of these allegations, we would like to express our serious concerns about your Excellency's Government's request for Ms. Kozlovska to be included on the Schengen Information System (SIS) database and her subsequent deportation from Belgium to Ukraine. We express particular concerns that the reasons to include Ms. Kozlovska on this database remain undisclosed.

We are concerned at the allegations of judicial harassment against the Open Dialog Foundation following both Mr. Kramek's aforementioned Facebook post of 21 July 2017 and the subsequent, similar post on the Open Dialog Foundation's website. We are dismayed that the organisation was allegedly subjected to a campaign of judicial harassment and defamatory statements in retaliation against its peaceful support for protests in opposition to the proposed judicial reforms. Such judicial harassment allegedly comprised of a wide variety of tactics from burdensome fiscal and customs inspections and violations of the organisation's freedom of expression through demands to remove "illegal content" from its website.

We are further concerned about the use of defamatory and vague "foreign interest group" discourse from high-level officials in relation to the Open Dialog Foundation, which also included allegedly unfounded assertions that the organisation's peaceful activities in the defense and promotion of human rights in Poland, were in fact "unlawful actions." Statements by high level officials which refer to NGOs as being subservient to "foreign interest groups" serve to stigmatise and discredit the work of organisations such as Open Dialog Foundation. We are concerned that such statements may create an increasingly hostile environment for NGOs and may result in a curtailing of their civil and political rights, such as the rights to freedom of expression and freedom of assembly and of association. We are concerned that an environment conducive to such stigmatising discourse would exert a chilling effect on organisations such as Open Dialog Foundation who serve an important public interest role, which may sometimes include criticism of Government policy from a human rights perspective.

Finally, we are concerned that the judicial harassment against the Open Dialog Foundation and attempts to stifle its human rights activities and those of Ms. Kozlovska and Mr. Kramek, has culminated in the allegedly unfounded decision to have the President of the Open Dialog Foundation, Ms. Kozlovska, deported from the Schengen area in a decision that will reportedly remain in effect until 31 July 2021. We fear that the decision to deport Ms. Kozlovska was taken with the parallel intention to exert a chilling

effect on the human rights activities of her husband and colleague, Mr. Kramek, and of the Open Dialog Foundation as a whole.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would therefore be grateful for your observations on the following matters:

1. Please provide any additional information and/or any comment(s) you may have on the above-mentioned allegations.
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 reforms 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.
3. Please provide an update on the status of Ms. Kozłowska'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."
4. Please explain the legal and factual basis for the decision to include Ms. Kozłowska in the Schengen Information System (SIS) in order to prevent her entry into the countries of the Schengen Zone until 31 July 2021.
5. Please explain why Ms. Kozłowska 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 Schengen area. Please inform us whether and how Ms. Kozłowska 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.
6. Please explain the legal basis of the Minister of Foreign Affairs' 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.

We would appreciate receiving a response within 60 days. Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

Please accept, Excellency, the assurances of our highest consideration.

David Kaye
Special Rapporteur on the promotion and protection of the right to freedom of opinion
and expression

Clement Nyaletsossi Voule
Special Rapporteur on the rights to freedom of peaceful assembly and of association

Michel Forst
Special Rapporteur on the situation of human rights defenders

Annex

Reference to international human rights law

In connection with above alleged facts and concerns, we would like to refer your Excellency's Government to Article 13 of the International Covenant on Civil and Political Rights (ICCPR), ratified by Poland on 18 March 1977, which states that "an alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."

Article 17 of the ICCPR also states that "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home (...)"

Article 2 paragraph 3(a) of the ICCPR further calls on parties to the Covenant to ensure that "any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity." Article 2 paragraph 3(b) further calls on states to ensure that "any person claiming such a remedy shall have their right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy."

We would also like to draw the attention of your Excellency's Government to Article 19 of the ICCPR, which guarantees freedom of expression and opinion to everyone. Article 19(2) guarantees "freedom to seek, receive, and impart information of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

While the right to freedom of expression is not absolute, under ICCPR Article 19(3), restrictions on expression are only appropriate under narrow circumstances. Restrictions must be provided by law, and necessary and proportionate to protect the rights or reputations of others or for the protection of national security, public order, or public health and morals.

We would also like to draw your Excellency's Government's attention to Article 21 and 22 of the ICCPR of ICCPR that guarantee, respectively, the rights to freedom of peaceful assembly and of association. We recall that, that, in accordance with the ICCPR no restriction may be placed on the exercise of the rights to freedom of peaceful assembly and of association other than those that are prescribed by law and that are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

We further underline that Resolution 24/5 of the Human Rights Council Reminds States of their obligation to respect and fully protect the rights of all individuals to assemble peacefully and associate freely, online as well as offline, including in the context of elections, and including persons espousing minority or dissenting views or beliefs, human rights defenders, trade unionists and others, including migrants, seeking to exercise or to promote these rights, and to take all necessary measures to ensure that any restrictions on the free exercise of the rights to freedom of peaceful assembly and of association are in accordance with their obligations under international human rights law.

In connection with the above alleged facts and concerns we would like to refer your Excellency's Government to the fundamental principles set forth in the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, also known as the UN Declaration on Human Rights Defenders. In particular, we would like to refer to articles 1 and 2 of the Declaration which state that everyone has the right to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels and that each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms.

Furthermore, we would like to bring to the attention of your Excellency's Government the following provisions of the UN Declaration on Human Rights Defenders:

- Article 5(a) stipulates that everyone has the right to “form, join and participate in non-governmental organizations, associations or groups.”
- Article 6 (a) states that everyone has the right to know, seek, obtain, receive and hold information about all human rights and fundamental freedoms, including having access to information as to how those rights and freedoms are given effect in domestic legislative, judicial or administrative systems” and Article 6 (c) upholds the right of everyone to study, discuss, form and hold opinions on the observance, both in law and in practice, of all human rights and fundamental freedoms and, through these and other appropriate means, to draw public attention to those matters.
- Article 9 guarantees that “in the exercise of human rights and fundamental freedoms (...), everyone has the right, individually and in association with others, to benefit from an effective remedy and to be protected in the event of the violation of those rights.”
- Article 12 (2) calls on the State to “take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary

action as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration.”

Finally, we would like to draw your Excellency’s Government’s attention to Poland’s obligations under the European Convention of Human Rights, ratified by Poland on 19 January 1993. In particular, we would like to highlight Article 8 (2) of the Convention which states that with regards the right to respect for private and family life, “there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”