Warsaw, 6 April 2020

468/2020/PSP

Ms Ksenija Turković
The European Court of Human Rights
President of the First Section
Council of Europe
67075 Strasbourg-Cedex
France

Ref. *Poklikayew v. Poland*
Application No. 4907/18

Dear Ms President,

Pursuant to the letter of Mr Abel Campos, the Section Registrar of the First Section of the European Court of Human Rights (hereinafter also referred to as "ECtHR", "Court") dated 19 March 2020, granting leave to make written submission to the Court by the 9 April 2020, the Helsinki Foundation for Human Rights (hereinafter also referred to as "HFHR") with its seat in Warsaw, Poland, would like to respectfully present its written comments on the case of Oleg Poklikayew against Poland (application no. 4907/18) with attachments.

Due to numerous restrictions related to the coronavirus epidemy, in particular suspension of delivery of international letters to many European countries (including France) by the Polish Post, these written comments are sent only via fax and e-mail.

On behalf of the Helsinki Foundation for Human Rights,

Helsińska Fundacja Praw Człowieka
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Warsaw, 6 April 2020

Poklikayew v. Poland
Application no. 4907/18

WRITTEN COMMENTS
BY
THE HELSINKI FOUNDATION FOR HUMAN RIGHTS

EXECUTIVE SUMMARY

- The present case concerns Belarusian national who was expelled from Poland in March 2012 on the basis of the classified material. Polish authorities refused the applicant's lawyer's request to examine the classified part of the case file without giving further reasons for this decision owing to matters of national security.
- According to the UN and EU human rights standards, the national security interests cannot justify expulsion of aliens without providing them with the fundamental guarantees of the fair trial. One of such guarantees is the right of defence which cannot be effectively exercised without access to case files.
- The Polish law disproportionately restricts rights of aliens in the proceedings concerning their expulsion on the grounds of national security. Such aliens are totally deprived of the right to access the classified material in the case files. What is more, decisions issued in such cases may have limited reasoning and are immediately enforceable.
- The currently in force regulations were criticized by the Polish legal scholars and the Commissioner for Human Rights. The latter argued that the Polish legislation does not satisfy the European standard and appealed to the Minister to consider introduction necessary legislative changes.
- In the recent years in Poland there were number of highly controversial cases where lawfully residing aliens were expelled on the grounds of national security 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") submits these written comments pursuant to the leave granted by the President of the First Section of the European Court of Human Rights ("ECtHR" or "Court") on 19 March 2020.

2. HFHR is a non-governmental organization established in 1989 in order to promote human rights and the rule of law as well as to contribute to the development of an open society in Poland and abroad. As part of its activities, the HFHR represents parties and prepares submissions in proceedings before national and international courts and tribunals. The HFHR

has long-standing expertise in submitting third-party interventions to the ECtHR and in representing victims of human rights violations in proceedings before the Court. We have submitted *amicus curiae* briefs not only in cases brought against Poland (e.g. *A.K. v. Poland*, no. 904/18; *Grzęda v. Poland*, no. 43572/18), but also in cases taken against other states involving legal problems important for the protection of human rights in Poland (e.g. *Levada Centre against Russia*, no. 16094/17; *Muhammad and Muhammad v. Romania*, no. 80982/12; *Ástráðsson v. Iceland*, no. 26374/18).

3. The HFHR believes that the present case concerns problems of the utmost importance for the protection of the rule of law in Poland and in other European countries. In a situation in which an alien has no access to classified case files (containing evidence that - according to the authorities - the alien poses a risk to security) and factual justification of the expulsion decision is limited, he has no real possibility of exercising his procedural rights enshrined in the Convention. In particular, he has no real possibility to submit reasons against his expulsion in the administrative and judicial proceedings. Therefore, in the HFHR opinion, states are obliged to find a proper balance between protection of state secrecy and a duty to protect and respect fundamental human rights. From that perspective, the current law in Poland is far from satisfactory and so the future ruling of the Court may lead to an increase of human rights standards in Poland.

4. The present written comments are divided into two sections. The first presents relevant international standards. The second analyses the Polish national context concerning restrictions of the procedural safeguards in administrative and judicial administrative proceedings concerning expulsion of aliens.

2. INTERNATIONAL STANDARDS ON THE RIGHT TO DEFENCE AND ON PROCEDURAL SAFEGUARDS RELATING TO EXPULSION OF ALIENS

2.1. EU law standard on right of defence and right to be heard

5. Article 47 of the Charter of fundamental rights of the European Union (hereinafter: CFREU) provides right to an effective remedy and to a fair trial. Guarantees enshrined in this provision were interpreted in the jurisprudence of the Court of Justice of the European Union (hereinafter: CJEU).

6. In the judgment C-166/13, *Mukarubega*, 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." 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." (paras 43-47; see also case C-249/13 *Boudjlida*).

7. In the judgement C-300/11, *ZZ v Secretary of State for the Home Department*, 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" (para 54). However the CJEU stated that "..., 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 (...)" (para 65). This statement was also reiterated in other CJEU judgments, including: *M. v Minister for Justice, Equality and Law Reform*, C-277/11 paras. 82-88; *Kadi*, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P (Grand Chamber), paras 111-129. It must be noted that the CJEU also referred to this standard in case not involving migration issues, i.e. C-437/13, *Unitrading*, paras 19-21. Therefore, mentioned standard has a general character and applies to any case based on EU law, including cases concerning expulsion of aliens.

8. Therefore, according to the Article 47 of the CFREU as interpreted in the CJEU case law, the alien who is subjected to expulsion should be informed of the essence of the grounds on which decision issued in his/her case was based, regardless whether the court had access to classified documents or not. Such information enables alien to take effective defense in his/her case, correct an error or submit relevant information relating to his or her personal circumstances.

2.2. UN standard on procedural safeguards relating to expulsion of aliens

9. International Covenant on Civil and Political Rights in Article 13 provides procedural safeguards relating to expulsion of aliens. It states that an alien may be expelled 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.

10. The UN Human Rights Committee addressed the matter of procedural safeguards relating to expulsion of aliens in case *Ahani v Canada*, communication No. 1051/2002. In this case, an Iranian's national asylum application had been rejected based on classified materials. During proceedings in Canada the applicant was provided by the national court with a summary redacted for security concerns reasonably informing him of the claims made against him. In its communication, the UN HRC stated that in the circumstances of national security involved, the Committee is not persuaded that the process was unfair to the complainant. However, the UN HRC also stated that in respect of claims concerning a risk of substantial harm in case of expulsion the proceedings were unfair as the complainant had not been provided with the full materials on which the authorities based its decision and an opportunity to comment in writing thereon (paras 10.5 – 10.8).

11. Similar issue was considered by the UN Committee Against Torture in case *Bachan Singh Sogi v. Canada*, communication No. 297/2006. In this case, the Canadian authorities used evidence that for security reasons was not divulged to the complainant. The UN CAT stated in its communication that "the complainant did not enjoy the necessary guarantees in the pre-removal procedure. The State party is obliged, in determining whether there is a risk of torture under article 3, to give a fair hearing to persons subject to expulsion orders." (paras 10.4 – 10.5).

3. POLISH NATIONAL CONTEXT

3.1. General characteristics of the relevant Polish national law provisions

12. Right to the access to 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 provides that the right of access does not apply to case files containing information classified as "secret" or "top secret", as well as to other files which the public administration body excluded from access on grounds of important state interest. It should be emphasized there is no exceptions to this limitation. Case files excluded from access to party proceedings can not be disclosed even to a representative holding general authorisation of access to classified information.

13. Polish law provides further limitations of procedural guarantees in migration (including expulsion) cases. According to Article 6 (1) of the 2013 Aliens Act "The authority issuing the decision or order in 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." Similar provision was in Article 8 (1) of the 2003 Aliens Act. Under these provisions, the factual reasons of the decision are limited to formal elements and did not contain any relevant information about the allegations against the alien. It also limits the scope of instance and judicial review of the expulsion decision. In such a situation neither the appeal body nor the court know which evidence in fact served as the basis of the decision and which facts were found to be proved. It means that they are unable to examine all the circumstances that are relevant for assessing the legality of the decision (Warsaw Regional Administrative Court, judgment of 21 July 2006, case No. V SA/Wa 145/06).

14. According to Article 315 (5) of the 2013 Aliens Act, decision on obligation to return based on national security is immediately enforceable (according to the Article 90 (2) of the 2003 Aliens Act the competent authority may attach an immediate enforcement clause to the expulsion decision, if it's required by security reasons). It means that neither an appeal nor a complaint to the court have suspensive effect. Also the court has no power to suspend such decision (Article 61 § 3 of the Act on Proceedings before Administrative Courts). It must be noted that when the alien is expelled immediately after the decision is issued, he may not be able to submit appeal against the decision and even to appoint a lawyer who could represent him or her in further proceedings. This deprives him/her the procedural guarantees described in art. 1 of Protocol No. 1. It should also be noted that even if the court reverse the decision, then the alien may be not able to effectively benefit from court's protection, particularly if he has been expelled to a country from which he cannot return.

15. It must be also noted, that according to the Polish law, in expulsion cases involving national security, detention of alien is obligatory, and alternatives to detention cannot be applied (Art. 398 (1) and (2) and art. 398a (1) and (2) of the 2013 Aliens Act and art. 102 (1) 2) of the 2003 Aliens Act).[1]

16. According to the Supreme Administrative Court jurisprudence the limitations provided in the Polish law do not violate the constitutional or international human rights standards (i.e.

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1 These provisions are incompatible with Article 15(1) of the so-called EU 2008/115 Return Directive, which requires Member States to consider alternatives to detention in all expulsion cases, also in cases involving national security.

judgment of 30 May 2019, case no II OSK 3559/18). Recent case law indicates that in migration cases based on the EU law (including in expulsion cases involving security considerations) a standard based on Article 47 of the Charter of Fundamental Rights of EU and resulting from the case law of the CJEU (described in judgment in case C-300/11, *ZZ v Secretary of State for the Home Department*) should be applied. Therefore, in such cases an alien 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 the alien was informed in a very general way that his stay in Poland poses a threat to security (judgment of 6 February 2019, case no. II OSK 3002/18). Thus, it seems that despite the change in the case-law, the practice has not changed significantly.

17. It must be emphasized that neither Polish national law, nor the Supreme Administrative Court in its case law concerning expulsion decisions based on security consideration do not distinguish between the legal situation of an alien before and after the expulsion. According to the case-law of the Supreme Administrative Court, restrictions of procedural guarantees apply both before and after the expulsion of an alien. The Supreme Administrative Court explained that since protection of public order and national security justified depriving the alien of his procedural rights before his expulsion, leaving the expelling country does not change the fact that the applicant still poses a threat to those values (i.e. judgment of 29 June 2016, case no. II OSK 2554/14). However such solution raises doubts as to its compliance with Article 1 (2) of Protocol No. 7 which provides for a different level of protection of aliens in expulsion cases based on security considerations, depending on whether he or she has already been expelled or not.

18. It must be also noted that described provisions are one of the most restrictive regarding the rights of defence in the EU, according to research conducted in this respect "similar provisions have been adopted in countries such as Estonia and Greece. In the Czech Republic, Latvia and Lithuania, decisions should give reasons in fact and in law, but may actually be classified in full or in part. 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"[2].

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

19. In our opinion, the secrecy surrounding these cases may lead to abuse. Even if the judges enjoy full access to all files of the case, such judicial control still cannot be considered as effective. The materials presented to the national court by the authorities may not be reliable or may omit the essential circumstances of the case. It may also contain incorrect information. On the other hand, only the concerned person has full knowledge about the circumstances of his/her case and may correct information provided by the authorities or present them in a different light, which may affect judicial assessment of the case. For example, the concerned person may provide an alibi, indicate that he/she was unaware that some of his/her 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 terrorist organizations), they may indicate they were forced to cooperate with people who pose a threat, etc. (see A. and Others v. UK, application no. 3455/05, § 220). Therefore, the national court may not be able to perform thorough review of the circumstances of the case which are not known to him.

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2 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.

20. It must be also noted, that in cases concerning the expulsion of aliens recognised as posing threat to security, usually no criminal proceedings are instituted, despite the provisions of Polish law (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). It seems that in a situation where an alien has been recognized as a person who could pose, for example, a terrorist threat, then criminal proceedings should be instituted. This situation gives rise to the supposition that in this way the authorities bypass the guarantees arising from criminal law and use the described provisions to abuse the rights of aliens.

21. In this context it is worth note that not all procedural regulations in Poland provide similarly restrictive rules with regards to access to case files with 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 possibility to present his/her 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, such a possibility has not been found to have caused a threat to security by disclosing secret investigative methods to defendant.

22. In this point it needs to be referred to a criminal case run 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 used as evidence presented by the prosecutor. These "summaries" contained alleged statements of the defendants concerning their financial support for the IS. In turn, defendants argued that in the wiretapped phone conversations they did not mentioned about the IS. Therefore they argued that the act of indictment was prepared on the basis of improperly translated transcripts from the phone conversations. It seems that only because the defendants had knowledge about the evidence the charge was based on, they could effectively challenge prosecutor's arguments in this respect. In its judgment the Regional Court in Bialystok stated that during the proceedings, it turned out that the "summaries" contain errors and words or phrases added by the person who made them, which were not used in the telephone conversation. The Regional Court emphasized that the defendants noticed incorrect translation of their phone conversations (judgment of 7 August 2017, case no. III K 113/16).

23. The judgment of the Regional Court in Bialystok was upheld by the Court of Appeals in Bialystok. The Court of Appeals pointed out that "incorrect translation of the basic 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 them were convicted for supporting the so-called The Caucasus Emirate in Chechnya, while the fourth of them was acquitted (judgment of 26 June

2018, case no. II AKa 26/18).[3] In this case, the access to classified documents guaranteed the defendants genuine opportunity to express their opinion and challenge the authorities' arguments. It led to effective challenging the accusations brought against the defendants and prevented abuse by the authorities.

24. Practice shows that in some instances expulsion of an alien for security reasons on the basis of classified documents can lead to the risk of violating his or her rights in their country of origin. In the Polish context, in 2018 it resulted in the forcible expulsion of Azamat Bayduev who, based of classified documents, was deemed a threat to national security. Mr Bayduev upon his return to Russia was apprehended by the police and placed in detention where he might be subjected to torture.[4] The applicant was not presented with the reasons why he was considered a threat to national security although Polish news agencies published information in this regard in mass media after his deportation.[5]

25. In another widely discussed in Poland case of Ameer Alkhawlany, PhD student of Jagiellonian University was expelled to Iraq. According to the Polish authorities he contacted his friends living in Western Europe who were believed as Islamic radicals, and expulsion decision was issued by the Border Guards. However Mr Alkhawlany stated that reason of his expulsion was that he refused to cooperate with Polish security service.[6] To secure expulsion proceedings he was deprived liberty and detention decision also was based on classified materials. The Regional Court in Przemyśl when considering an appeal against the decision on detention extension, drew attention to serious irregularities that occurred previously during the detention proceedings. The Regional Court stated that that neither the body applying for detention nor the courts considering the case did not have in the case files any reliable information that Mr Alkhawlany posed a threat to security. Therefore the Regional Court in Przemyśl requested the security service to provide relevant materials. Upon receiving requested information the Regional Court stated that they were laconic and threat indicated by the security service was hypothetical therefore it could not constitute grounds for deprivation of 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[7]. During further expulsion proceedings the Supreme Administrative Court upheld the expulsion decision.

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3 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 (last access: 01.04.2020); Polish Radio Bialystok, *Białostocki sąd skazał Czeczenów oskarżonych o wspieranie terrorystów* http://www.radio.bialystok.pl/wiadomosci/index/id/146766 (last access 01.04.2020); Radio Poland, *Polish court finds three Chechens guilty of supporting terrorism,* http://archiwum.thenews.pl/1/10/Artykul/319853 (last access: 01.04.2020).

4 More information about this case: Amnesty International: *Russia: Chechen refugee forcibly disappeared after being unlawfully deported from Poland,* https://www.amnesty.org/en/latest/news/2018/09/russi-chechen-refugee-forcibly-disappeared-after-being-unlawfully-deported-from-poland/, (last access 01.04.2020).

5 rmf24.pl *Żaryn: Polska nie może godzić się na radykalne postawy cudzoziemców,* https://www.rmf24.pl/fakty/polska/news-zaryn-polska-nie-moze-godzic-sie-na-radykalne-postawy-cudzoz,nId,2639057 (last access 01.04.2020).

6 Radio Poland, *Polish MPs to Probe Iraqi Suspected of Ties with Islamic Radicals: Report,* www.thenews.pl/1/10/Artykul/279991,Polish-MPs-to-probe-Iraqi-suspected-ofties-with-Islamic-radicals-report .(last access 01.04.2020).

7 Decision of the Regional Court in Przemyśl, case No II Kz 19/17.

However, despite the provision of Article 1 (2) of Protocol No. 7, after expulsion, he was still not provided with procedural guarantees resulting from art. 1 clause 1 of Protocol No. 7. 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, this judgment was issued when Mr Alkhawlany was not present on territory of Poland, therefore the further proceedings were to be discontinued.[8]

26. Attention should also be paid to the case of Ludmiła Kozłowska, President of the Open Dialogue Foundation, Ukrainian national and wife of the Polish national. She was considered an unwanted person by the Polish authorities who issued her 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 not recognizing that her stay constitutes a threat to security.[9]

27. These examples show that provisions of the Polish law may be abused by the authorities. Moreover it also indicates that provisions where the court has access to classified materials of the case does not provide an effective opportunity to benefit from procedural guarantees described in art. 1 of Protocol 7 and art. 13. 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."[10]

28. In the HFHR opinion only providing the alien with at least limited information on the factual grounds of decisions can ensure that the procedural guarantees are respected. It seems that institution of the so-called special advocate also does not ensure that the procedural guarantees are respected. In its jurisprudence the Court stated that "the special advocate could perform an important role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing by testing the evidence and putting arguments on behalf of the detainee during the closed hearings. However, the special advocate could not perform this function in any useful way unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate." It must be noted that the Court found a violation of the Convention in a situation where the judicial authority had access to classified documents. (A. v. United Kingdom, § 220).

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8 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/ (last access 01.04.2020); *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/ (last access: 01.04.2020) , 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* (last access 01.04.2020).

9 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/ (last access 01.04.2020); 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* (last access 01.04.2020), 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 (last access 01.04.2020)

10 It must be stated that Regner v. Czech Republic judgment is not applicable to the present case as it concerns complaints of violation of Art. 6 of the Convention, which is not applicable to migration cases (Maaouia v. France, § 41).

3.3. Doctrine and Human Rights Commissioner position

29. The currently in force regulations concerning restrictions of the access to case files in the administrative proceedings were criticized by some Polish legal scholars. In particular, in the paper published in 2014 Jacek Chlebny argued that the analysed provisions of the Article 74 of the Code of Administrative Procedure do not satisfy standards of ECHR and the EU law because "they do not contain a mechanism that would reconcile conflicting interests arising from the parties' right to of access to full case files and the need to protect classified information."[11] Because of that, he recommended adoption of certain changes aimed at enhancement of 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 granted with the security clearance. Special legal representatives would be appointed by court upon the motion of parties to proceedings in which classified documents are used. 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 sessions of courts.[12]

30. Similarly, Julia Wojnowska-Radzińska argued that complete denial of access to case files to the alien subject to the decision on expulsion is disproportionate because it prevents the person concerned from establishing on the basis of what documents the decision was issued. The author underlined that the mere fact that the decision may be challenged to administrative court does not compensate all negative effects resulting from denial of access to case files by the party. That is because without access to case files the foreigner and his/her legal representative cannot effectively question documents upon which the decision was issued in the court. Moreover, there is no possibility for the foreigner to review whether the administrative court carries out the proportionality in a proper way. In order to reconcile the necessity to protect the national security and at the same time respect fundamental procedural rights of foreigners in the expulsion proceedings, the author suggested introduction of "special advocates" – idea inspired by the Canadian law. Special advocates would be appointed by the court and granted security clearance. They would have access to confidential documents and could represent alien on the closed sessions of courts, what would ensure that the rights of aliens are properly protected.[13]

31. Problems with the current legislation were noted also by the Polish Commissioner for Human Rights (Ombudsman). 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, such solution does not protect aliens effectively against the arbitrariness of administrative authorities. Decisions issued on the basis of classified documents may deeply interfere with the aliens' right to protection of private and family life protected 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 because although the alien is not deprived of possibility to challenge the unfavourable decision, without access to case files of both parties, the appeal

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11 J. Chlebny, *Odmowa dostępu do akt w sprawie administracyjnej*, "Państwo i Prawo" 2014, no. 10, p. 105.
12 Ibid., p. 104-109.
13 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.

proceedings would not have an adversarial character. The Commissioner concluded that the Polish legislation does not satisfy the European standard because it does not provide aliens 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 position with regard to signalled problems and to consider introduction necessary legislative changes.[14]

3.4. Activities aimed at introduction of legislative changes

32. Regrettably, so far no legislative proceedings aimed at ensuring that Polish law meets the standard of international law have been initiated. 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.[15] HFHR also submitted several motions to the Polish courts to make request to the Court of Justice of the EU to give preliminary ruling in this matters, however the courts dismissed them (i.e. judgment of 9 September 2016, case no. II OSK 61/15). On September 2018 HFHR lodged complaint to the European Commission for alleged breach of union law by Poland in this respect.[16]

4. SUMMARY

33. The Polish law totally deprives aliens subject to expulsion proceedings of the access to classified documents in the case files. Such regulation disproportionately restricts their procedural guarantees, especially taking into account other procedural rules applicable in the expulsion proceedings (ie. immediate enforceability of decisions on the expulsion due to national security reasons). In the HFHR opinion, in order to ensure that aliens can exercise their procedural guarantess, they must be provided with at least limited information on the factual grounds of decisions. Only the concerned person has knowledge about the facts of his/her case and is able to effectively challenge the allegations against him/her. The mere fact that the 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 worth to underline that the disproportionate nature of the said restrictions and their inconsistency with the EU law and the international human rights standards were noted by the Polish legal scholars and the Commissioner for Human Rights.

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14 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 (last access 01.04.2020).

15 Helsinki Foundation for Human Rights, *Amendments to the Foreigners Act – HFHR comments*, https://www.hfhr.pl/en/amendments-to-the-foreigners-act-hfhr-comments/ (last access: 01.04.2020)

16 Helsinki Foundation for Human Rights, *Helsińska Fundacja Praw Człowieka złożyła skargę do KE ws. przepisów przewidujących tajne materiały w sprawach cudzoziemskich*, https://www.hfhr.pl/helsinska-fundacja-praw-czlowieka-zlozyla-skarge-do-ke-ws-przepisow-przewidujacych-tajne-materialy-w-sprawach-cudzoziemskich/ (last access 01.04.2020).