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Dimitris Avramopoulos

Commissioner

Migration, Home Affairs and Citizenship

European Commission

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RE: Polish laws violating rights of defence in migration and asylum cases

Dear Mr Avramopoulos,

On behalf of the Helsinki Foundation for Human Rights (HFHR), I'm writing to you to express our serious concerns about the Polish asylum and migration laws, which in our opinion are inconsistent with the European Union and human rights law.

The problem concerns the rights of defence in proceedings pending before Polish administrative authorities and courts in migration and asylum cases. Polish national law provides that in such cases, in order to safeguard national security, foreigner being a party of

the proceedings may be refused access to classified material of the case. Also in such cases factual reasons of the decision may be limited. This provision is applied in various types of proceedings, such as: granting a permit to stay, returns, granting international protection.

Due to such limitations, the foreigner and his/her representative are not informed about the factual reasons of the decision. Therefore, they have no possibility to contest the grounds on which the decision in question is based and to make submissions on the evidence relating to the decision. According to the Polish administrative courts jurisprudence, provisions of Polish law do not violate the EU law and the Convention on the protection of human rights.

We believe that such provisions violate rights of defence enshrined in Article 47 of the Charter of Fundamental Rights of the European Union. According to the jurisprudence of the Court of Justice of the EU, “in exceptional cases, when the grounds of a decision cannot be disclosed to the party proceedings because state security reasons, techniques and rules which accommodate, on the one hand, legitimate State security considerations and, on the other hand, the need to ensure sufficient compliance with the person’s procedural rights, such as the right to be heard and the adversarial principle shall be applied. 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” (judgment C-300/11, ZZ v. Secretary of State for the Home Department).

In the past, there were several examples of cases of expulsion of foreigners under secret evidence, e.g. the case of Ameer Alkhwaly, a citizen of Iraq, a doctoral student of the Jagiellonian University deprived of liberty and expelled on the basis of secret materials. In a similar case of Chakib Marakchi, a citizen of Morocco who runs a family life in Poland, was refused a permit to stay in Poland and expelled from the country. In this case, an application to the European Court of Human Rights has been lodged (application No 32462/15). One of such cases has been communicated to the Polish authorities by European Court of Human Rights (Orujov v. Poland, application No 15114/17).

Recently, two other cases have attracted public attention. Lyudmila Kozlovska, a citizen of Ukraine, is head of the Open Dialogue Foundation. Her data was entered to the SIS II system by the Polish authorities and she was later expelled from the EU territory by the Belgian authorities. Azamat Bayduyev, a citizen of the Russian Federation of Chechen origin, was expelled from Poland on the basis of the Minister of Interior’s decision. After his return to Chechnya, he was detained by local authorities and his current place of residence is unknown.

Without questioning the need to protect security, we are afraid that making decisions on the basis of secret evidence may lead to abuse and violations not only of procedural rights but also the right to family life or prohibition of torture.

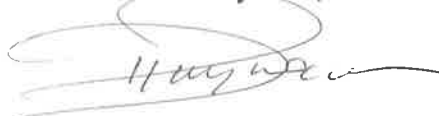
HFHR undertook actions aimed at ensuring compliance of the Polish law with the standard required by the EU law. We submitted several motions to the Polish courts to make requests for a preliminary ruling to the Court of Justice of the EU to give preliminary rulings in this matters. We also made recommendations to the government about required changes in the Law on Foreigners. These activities brought no effect. Therefore today the HFHR lodged a formal complaint in this respect to the European Commission. The complaint contains a detailed analysis of the mentioned provisions and its lack of compliance with the EU law.

Therefore, in the context of the increased number of decisions issued in migration matters and based on secret evidence without guarantees of rights of defence I respectfully request you to undertake steps needed to bring Polish asylum and migration laws into compliance with its obligations under the EU law, including the initiation of infringement proceedings.

We are ready to discuss this issue with you as well as answer any questions that may arise.

Yours sincerely,

Danuta Przywara,



President of the Board



Cc:

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