

Warsaw, 31.08.2018

## **Request for deletion of Lyudmyla Kozlovska's data from the Schengen Information System II**

### **JUSTIFICATION**

On 13 August 2018, Lyudmyla Kozlovska was detained during passport control at the Brussels Zaventem airport in Belgium. According to the information provided by the border services, the Applicant's data were entered into the Schengen Information System II by an authority in Poland on 31 July 2018, with the demand that she be absolutely prevented from entering the Schengen area.

First of all, it should be pointed out that the inclusion of Lyudmyla Kozlovska into the register of undesirable persons is unfounded and does not reflect the actual state of affairs or the provisions of law. In the case of the Applicant, none of the prerequisites indicated in Article 435 of the Act on Foreigners of 12 December 2013 (Journal of Laws of 2013, item 1650) that could constitute the basis for the entry occurred. Lyudmyla Kozlovska is not subject to any criminal proceedings, nor has she committed any crime or misdemeanour which could result in such far-reaching actions being taken.

Lyudmyla Kozlovska comes from Ukraine and has been living in Poland since 2007, originally on the basis of visas, and since 2009 on the basis of residence permits. For many years, the Applicant has been involved in carrying out activities promoting human rights within the framework of the Open Dialog Foundation, in which she occupies the post of the President of the Board. The statutory objectives of the Foundation include primarily the defence of human rights and strengthening of democratisation processes and the rule of law on the territories of post-Soviet states. Since 2017, the Foundation has also been raising the issue of the rule of law in Poland on the international arena, and in the area of independence of the judiciary and respect for civil rights in particular. The Applicant has organised numerous international election observation missions and human rights monitoring missions in Ukraine, Russia and Kazakhstan. In addition, she has coordinated activities promoting both the reform of INTERPOL, whose mechanisms are abused by authoritarian states, and the imposition of sanctions on persons responsible for human rights violations in the post-Soviet area. Under her management, the Foundation also organised actions in support of the Ukrainian Dignity Revolution

(EuroMaidan) and in support of those in need and those who suffered as a result of the Russian aggression against Ukraine in 2014.

The Applicant is a graduate of the Faculty of Finance at the State Technical University in Sevastopol and The School of Arts and Humanities at the University of Wales in Bangor, as well as a holder of a scholarship granted by the Polish government; she attended postgraduate studies at the Department of European History of the College of Polish and Ukrainian Universities (an educational institution established, among others, by The Maria Curie-Skłodowska University and John Paul II Catholic University of Lublin). My Principal, being a civil society activist, was involved in the activities of the Foundation for Regional Initiatives and the PORA movement (The Black Pora!). Moreover, in 2004, she was an active participant of the Orange Revolution in Ukraine, and, between 2005 and 2006, a leader of the campaign for the removal of the Russian Black Sea Fleet from Sevastopol. In the past, she has also been a coordinator of international projects at the Dialog for Development Foundation and worked for the state agency 'Human Resources Development Centre' [Centrum Rozwoju Zasobów Ludzkich] at the Ministry of Labour and Social Policy in Poland. Currently, she is actively working in the field of human rights protection, carrying out activities in the European Parliament, the Council of Europe, the Organisation for Security and Cooperation in Europe, and the United Nations.

Despite the fact that the Applicant has been staying in Poland for almost 12 years, and has been operating within the Foundation since 2009, the administrative authorities have never had any doubts as to the legitimacy and possibility of her stay on the territory of Poland, or her activity.

Privately, Lyudmyla Kozlovska is a family member (the wife) of a Polish citizen, Bartosz Kramek, a citizen of the European Union. Together, they rent a flat in Warsaw.

In connection with the expiry of the existing residence permit in August 2018, my Principal submitted an application to be granted the status of a long-term resident of the European Union in the Mazovian Voivodeship Office in Warsaw. By virtue of a decision of 18 July 2018, the Mazovian Voivode banned Lyudmyla Kozlovska from inspecting the documents, making notes, copies or extracts containing classified information which had been classified as 'secret'. The decision contained only brief information that the disclosure of the files 'would cause serious damage to the Republic of Poland'. The first instance authority did not indicate any grounds or motives for its decision. To date, however, no decision has been issued concerning the possibility of extending the stay or

refusing to grant such a permit. A lack of information concerning the grounds for the refusal to review the files of the proceedings deprives the individual of the possibility of defending his or her fundamental rights.

Primarily, it should be pointed out that, although the Polish legislator allows refusal of access to the files in cases regarding the granting of a residence permit and this basis is enshrined in the provisions of law, the interpretation of the provision should take into account the constitutional right to be heard and the provisions of the European Convention for the Protection of Human and Citizen's Rights, the Charter of Fundamental Rights of the European Union, and Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. According to Article 13 of the European Convention for the Protection of Human and Citizen's Rights (hereinafter referred to as 'the Convention') of 4 November 1950 (as amended), anyone whose rights and freedoms contained in the Convention have been violated has the right to an effective remedy before a competent state authority. It should also be pointed out that Article 31 of Directive 2004/38 obliges Member States to introduce into their legal orders the measures necessary to ensure that citizens of the Union and their family members have the right of appeal to the courts and, where appropriate, administrative redress against decisions restricting their right to move and reside freely within the Member States on grounds of public policy, public security or public health (see, to that effect, judgment of 4 October 2012 in Case C-249/11 *Bjankow*, paragraph 53). According to Article 31(3) of Directive 2004/38, appeal procedures should include an examination of the lawfulness of the decision and of the facts and circumstances on which the proposed measures were based. *"In order for the person concerned to benefit effectively from the judicial remedies thus introduced by the Member States, the national competent authority should, in the course of the administrative procedure, in accordance with Article 30(2) of Directive 2004/38 – fully and accurately inform him/her of the grounds of public policy, public security or public health on which the decision has been based."*<sup>1</sup> In addition, the Court pointed out that the parties to the proceedings should have the right to become acquainted with all the documents or observations submitted to the court in order to influence its decision, and to respond to them (judgments of the Court of Justice of 14 February 2008 in Case C-450/06 *Varec*, ECR I-581, p. 45); Case C-89/08 of *Commission v. Ireland and Others*, ECR I-11245, paragraph 52; and Case C-472/11 of *Banif Plus Bank* of 21 February 2013, paragraph 30; regarding Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950; Judgment of the ECtHR of 23 June 1993 in

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<sup>1</sup> <https://eur-lex.europa.eu/legal-content/PL/ALL/?uri=CELEX%3A62011CJ0300>

the case of Ruiz Mateos v. Spain). On the other hand, basing the reasoning of an authority's decision on circumstances and documents to which the party has no access may constitute an infringement of the fundamental right to an effective remedy before a court (the aforementioned judgment of Commission v. Ireland and others, paragraph 52 and the case-law cited therein).<sup>2</sup>

In the current situation, Lyudmyla Kozlovska is being deprived of the right to an effective appeal both against the entry in the SIS II itself, as well as against the decision of the Mazovian Voivode that prevents her from becoming acquainted with the files of the residence proceedings. Polish regulations do not provide for such a possibility, due to the fact that the entry is only a substantive and technical activity. Such shaping of the regulations is contrary to the law of the European Union. The Helsinki Foundation for Human Rights (HFPC) draws attention to this in its position.<sup>3</sup>

The only information available to the Applicant concerning the basis for entering her data in the register comes from media reports. The press release of the Spokesperson of the Minister of Special Services Coordinator dated 20 August 2018 (i.e. one week after the Applicant's detention) indicates that the basis for entering Lyudmyla Kozlovska's data into the Schengen Information System II was the issuance by the Head of the Internal Security Agency of a negative opinion in the proceedings for granting a residence permit for a long-term resident of the European Union. The justification stated that "*the negative opinion prepared by the Internal Security Agency's Counterintelligence Department is related, among others, to serious doubts concerning the financing of the Open Dialog Foundation, managed by Lyudmyla Kozlovska, which may have further legal consequences*". It is impossible to agree with such a position of the body.

Although it is difficult to refer to such terse information, it should be stressed that the Foundation operates on the basis of the provisions of the Act on Foundations of 6 April 1984 (Journal of Laws 1984, No. 21 item 97) and, based on them, it submits its financial statements. In addition, the Foundation publishes both factual and financial reports for each year of its operation and publishes them on its official website.

It should be noted that in 2014, the Foundation, managed by the Applicant, was granted license No. B-o88/2014 to conduct business activity in the area of trade in certain products for military or police use. The license was issued by the Minister of Internal

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<sup>2</sup> Ibidem

<sup>3</sup> <http://www.hfhr.pl/wp-content/uploads/2018/08/Sprawa-Ludmiły-Kozłowskiej---system-SIS-II-a-prawo-do-obrony-1.pdf>

Affairs; consequently, the granting of the license was a result of passing the verification procedure provided for in the regulations. During the consideration of the application for granting the license, the Foundation was positively assessed by a number of state bodies, including the Minister of Economy, the Head of the Military Counterintelligence Service and the Capital Police Commander.

Subsequently, in connection with the license obtained, in 2016, the Foundation successfully passed an audit conducted by the Capital Police Commander and, later, by the Minister of Internal Affairs and Administration. No irregularities were detected during the audit, and the report on the completion of the audit of the Ministry of Internal Affairs and Administration of 21 December 2016 indicated, among other things, that: *"During the audit, it was established that all helmets and vests purchased by the Foundation were not sold, but donated free of charge, as humanitarian aid to protect the lives and health of Ukrainian soldiers. The aforementioned materials were handed over in connection with the ongoing conflict between Ukraine and Russia, and their recipients were people called up into the army or participating in the battles, who hadn't had any equipment protecting life and health."*

Regardless of the above, for over a year now, the Foundation has been undergoing a customs and tax inspection, in which several dozen witnesses have already been questioned and a large number of documents have been seized. In the course of the activities in question, no irregularities in the functioning of the Foundation have been revealed and no criminal charges have been brought against anyone to this day. The proceedings in question were extended once again, until 7 November 2018. Moreover, on 17 April 2018, the District Court for the Capital City of Warsaw, 12th Commercial Division of the National Court Register, issued a decision dismissing the motion of the Ministry of Foreign Affairs concerning the suspension of the Foundation's activity and the appointment of a forced administrator. On 12 July 2018, the decision was granted the writ of execution.

Doubts concerning customs and tax settlements of the Open Dialog Foundation should be clarified by the relevant tax authorities. However, these activities have not been completed. Even if the customs and tax audit being carried out in the Foundation indicated any irregularities in November 2018, the Foundation would have the right to appeal the results of the audit. The Foundation, which has legal personality, should not be automatically identified with a member of its Board; the Foundation should primarily become the subject of potential proceedings. Anticipating such a possibility, the relevant authorities should even secure the possibility of participation of members of its

management and supervisory bodies, including my Principal, in possible future activities (e.g. interrogations).

It should also be noted that the entry in the Schengen Information System was not preceded by any decision of the authorities in the form of a decision or a judgment. As indicated in its statement by the Helsinki Foundation for Human Rights: *"According to the HFHR, national legislation in this area is not compatible with EU law. The analysis of the SIS II Regulation shows that an entry in the national list resulting in an entry in the SIS II should always be based on a separate decision and not merely on a substantive and technical action, as the EU Regulation does not provide for such a possibility. (...) In the opinion of the Helsinki Foundation for Human Rights, the provisions of Polish law which constituted the basis for the detention and expulsion of Lyudmyla Kozlovska are contrary to the law of the European Union and do not meet the standards of the Council of Europe."*

Any information available to the Applicant concerning the entry of data into the Schengen Information System database has been obtained only from media reports concerning the case in question. On 10 May 2018, Lyudmyla Kozlovska submitted a request concerning the processing of personal data contained in the Schengen Information System. According to the body's response, as of 19 May 2018, the Applicant's data were not included in the Schengen Information System. The Applicant was never informed of an ongoing procedure which resulted in her personal data being entered into the Schengen Information System database. The lack of access to this information basically deprived the Applicant of the possibility to verify the decisions issued in her case, and, therefore, it is not possible for her to respond to any potential objections as to the possibility of her staying in the territory not only of Poland, but also of the entire European Union.

For many years, Lyudmyla Kozlovska has been working in the field of protection of human and civil rights and strengthening democratic processes, including in Poland since 2017; the decision of the body which deprived her of her fundamental rights, is thus all the more unjustified, as the fundamental rights are guaranteed by the European Convention for the Protection of Human and Citizen's Rights, the Charter of Fundamental Rights of the European Union, Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, as well as the Constitution of the Republic of Poland.

Due to the fact that entering the Applicant's data into the register of undesirable persons is lacking a justified factual and legal basis, I kindly request that her name be removed from the Schengen Information System II.

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Attorney