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Application no. 37691/20
A.S. v. Poland

WRITTEN COMMENTS
BY
ASSOCIATION FOR LEGAL INTERVENTION

I. INTRODUCTION

This third-party intervention is submitted by the Association for Legal Intervention (Stowarzyszenie Interwencji Prawnej, SIP), pursuant to the leave granted by the President of the First Section of the European Court of Human Rights (ECtHR) under Rule 44 §3 of the Rules of the Court.

SIP is a Polish professionalised non-governmental organization established in 2005 with the aim of combating social exclusion as well as protecting and advancing the rights of foreigners, including asylum seekers and migrants. In the recent years, SIP has been focusing on cases concerning migrants who have been ordered to leave a hosting state due to national security considerations. Responding to the increasing number of third-country nationals being ordered to leave Poland on the grounds associated with national security, SIP has been more and more involved in return (and related) proceedings initiated against these persons in Poland, including the proceedings based on Article 329a of the Aliens Act of 12 December 2013 (hereinafter: the Aliens Act).

The case *A.S. v. Poland* has been communicated to the Government of Poland on 6 July 2022. It concerns a Tajik national lawfully residing in Poland who was issued with a return decision due to his alleged engagement in terrorism or espionage. The decision of the Minister of the Interior and Administration was based on a classified request of the Internal Security Agency. Minister relied on Article 329a of the Aliens Act that gives him the power to issue automatically enforceable return decisions against suspected terrorists and spies. The applicant challenged the return decision and the following decision not to suspend his expulsion before the administrative courts. Initially, his expulsion was

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prevented only by the interim measure indicated by the European Court of Human Rights ECtHR. He was detained for six months. In his complaint to the Court, the applicant claims that his return to Tajikistan would violate Article 3 of the ECHR, that he had no access to a remedy with automatic suspensive effect in breach of Article 13 in conjunction with Article 3 of the ECHR and that his detention was ordered and prolonged in violation of Article 5(4) of the ECHR.

This third-party intervention focuses on national, EU and international law and case-law concerning procedural safeguards in the return proceedings initiated on the grounds associated with national security. It offers insight into three main subject-matters: the access to classified files and the right to information about the relevant factual elements underlying a return decision, an automatic suspensive effect of a remedy available in return proceedings, and a rigorous scrutiny of the claims based on Article 3 of the ECHR in return proceedings,

II. POLISH LAW AND PRACTICE

The *A.S. v. Poland* case is illustrative of the far-reaching Polish practice regarding third-country nationals considered to be a threat to national security. In the recent years, the increasing number of third-country nationals were denied a residence permit or international protection and/or returned to their country of origin on the grounds associated with national security.

Under the Aliens Act, there are two possibilities to order a return of a third-country national considered to be a threat to national security. One is based on Article 302(1)(9) of the Aliens Act. It states that a return decision is issued by the Border Guard when it is required for reasons of national defense or security or the protection of public safety and order or the interest of the Republic of Poland. Second is based on Article 329a of the Aliens Act that has been added to national legislation in 2016. Under the latter provision, the Minister of the Interior and Administration, on motion of a specified authorities, issues a return decision as regards a third-country national about whom there is a fear that he may conduct terrorist or espionage activities, or who is suspected of committing one of these offences.

Both provisions are used in practice in Poland. In years 2016-2021, 2.676 return decisions based on Article 302(1)(9) of the Aliens Act has been issued, including 1.141 decisions only in 2021. In the same period, the Minister of the Interior and Administration issued 20 return decisions based on Article 329a of the Aliens Act. The Minister accepted all motions to issue those decisions that he received in this period. Thus, in the period of 2016-2021, in total, as many as 2.696 persons were ordered to leave Poland due to national security considerations.

Return proceedings concerning third-country nationals considered to be a threat to national security (both based on Article 302(1)(9) and Article 329a of the Aliens Act) raise multiple human rights concerns. While those concerns are the same as regards both return

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proceedings, the comments below focus on the procedure based on Article 329a of the Aliens Act, which is at the heart of the *A.S. v. Poland* case.

Firstly, return decisions ordering suspected terrorists and spies to leave Poland; thus, based on Article 329a of the Aliens Act, rely on classified documents to which the third-country national concerned or his/her lawyer have no access. Only courts and administrative authorities can access classified information and documents, but evidentiary procedure before the courts is limited.

Secondly, no information about the relevant factual elements, which have led to the suspicion that a third-country national is engaged in terrorism or espionage, is given to him/her or his/her lawyer. Reasoning of the decisions and judgments is scarce and limited to the basic statement that a person concerned is suspected of being involved in terrorist or spy activities. Effective defence in those circumstances is impossible. Moreover, due to the scarcity of the reasoning, it is not feasible to assess whether the court duly exercised its power to examine the grounds underlying the issued decisions. In fact, it cannot be known to what extent the court verified the authenticity, credibility and veracity of the classified documents and information. The Polish law in question does not offer any safeguards aimed at protecting third-country nationals against arbitrariness on the part of the authorities.

Thirdly, there is no automatic suspensive effect attached to a remedy available against the return decision issued on a basis of Article 329a of the Aliens Act. Thus, the third-country national suspected of terrorism or espionage can be deported just after the return decision is issued and before the national court decides on his/her appeal. The returnee can apply for a suspension to an administrative court, however the power of the court to suspend the deportation based on Article 329a of the Aliens Act has been questioned.[1]

Lastly, in the 'Article 329a' proceedings, the Minister of the Interior and Administration (and sometimes also administrative courts[2]) ignores or does not scrutinize in a sufficient manner the returnee's claims concerning a risk of inhuman or degrading treatment upon removal. In particular, the Minister of the Interior and Administration is of opinion that rules concerning humanitarian stay and tolerated stay in Poland do not apply in the 'Article 329a' proceedings. Meanwhile, those two stays are granted when the return would be effected to a state where a returnee would be at risk of being tortured or experiencing inhuman or degrading treatment or punishment within the meaning of the ECHR. Excluding the possibility to grant both the humanitarian and tolerated stay in the 'Article 329a' proceedings means that claims concerning the risk of a violation of Article 3 of the ECHR upon return are not taken into consideration at all during this procedure.

[1] See e.g. Provincial Administrative Court in Warsaw, Decision of 12 August 2020, no. IV SA/Wa 1347/20, and Provincial Administrative Court in Warsaw, Decision of 3 September 2020, no. IV SA/Wa 1346/20.
[2] See e.g. Provincial Administrative Court in Warsaw, Judgment of 12 November 2020, no. IV SA/Wa 1347/20.

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All of the above-mentioned major flaws of the 'Article 329a' proceedings have shown in the case of Azamat Bayduev.[3] He was deemed a threat for national security in Poland and issued with a return decision based on Article 329a of the Aliens Act. He had no possibility to challenge the findings that he was a threat to national security as he had no access to classified documents that were a basis for ordering him to leave. The reasoning of the return decision was not disclosed to him as well. The Minister of the Interior and Administration did not consider the risk upon removal of Mr Bayduev being subject to tortures or inhuman or degrading treatment or punishment. The lawyer of Mr Bayduev appealed against the return decision, but it did not stop his deportation. Upon his return to Russia, Mr Bayduev was apprehended by the police and placed in detention where he was, with high probability, subjected to torture. Over one year after his expulsion, the Provincial Administrative Court in Warsaw revoked the Minister's decision ordering the Mr Bayduev's return, indicating that the Minister should have considered whether Mr Bayduev would be ill-treated, in violation of Article 3 of the ECHR, upon his removal to Russia. The court, however, found a practice of non-disclosure of documents and information in the 'Article 329a' proceedings acceptable.[4]

This judgment of the Provincial Administrative Court in Warsaw is in fact illustrative for the Polish courts' approach to access to confidential documents and information in return proceedings initiated in connection with national security.[5] The courts acknowledge that it may be difficult to challenge a return decision when it lacks a full reasoning and is based on information and documents that has not been disclosed to a returnee. However, in the national courts' opinion, appeal administrative proceedings are not formalized and second-instance administrative authorities have to consider the legality of the return decision in full, irrespective of whether the party has presented arguments against this decision or not.

[3] More information about this case: Amnesty International, 'Russia: Chechen refugee forcibly disappeared after being unlawfully deported from Poland', 3 September 2018, available at: https://www.amnesty.org/en/latest/news/2018/09/russi-chechen-refugee-forcibly-disappeared-after-being-unlawfully-deported-from-poland/.

[4] Provincial Administrative Court in Warsaw, Judgment of 5 November 2019, no. IV SA/Wa 2086/18, available at: https://orzeczenia.nsa.gov.pl/doc/2DFFB93EA9.

[5] The Polish administrative courts' approach in this regard has been determined on a basis of the analysis of the courts' judgments published at the official website: https://www.orzeczenia-nsa.pl/, as well as judgments delivered in cases assisted by the lawyers of the Association for Legal Intervention that has not been published at the official website. It relies in particular on the judgments concerning Article 329a of the Aliens Act: Provincial Administrative Court in Warsaw, Judgment of 14 March 2018, no. IV SA/Wa 3078/17, Provincial Administrative Court in Warsaw, Judgment of 11 May 2018, no. IV SA/Wa 353/18, Provincial Administrative Court in Warsaw, Judgment of 13 December 2018, no. IV SA/Wa 2659/18, Provincial Administrative Court in Warsaw, Judgment of 5 November 2019, no. IV SA/Wa 2086/18, Supreme Administrative Court, Judgment of 7 July 2021, no. II OSK 3056/20, Supreme Administrative Court, Judgment of 6 September 2022, no. II OSK 457/21. However, taking into account that in the period of 2016-2021, in total, only 10 appeals have been submitted to the court against return decisions based on Article 329a of the Aliens Act, this analysis takes also into account the more extensive national jurisprudence concerning Article 302(1)(9) of the Aliens Act as well as other provisions that enable depriving of protection or residence permit due to national security considerations. The approach of administrative courts in all cases that invoke national security is in fact similar.

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Moreover, the decisions of the Minister of Interior and Administration based on Article 329a of the Aliens Act may be further challenged before administrative courts. Those courts can access and assess confidential information and documents and it is a sufficient procedural guarantee in those proceedings. Furthermore, the returnee is informed about the main reason of his deportation, i.e. the fact that he is suspected of terrorism or espionage.

However, this reasoning omits that, in 'Article 329a' proceedings, a second-instance appeal authority is the same as a first-instance. Minister of Interior and Administration decides on a return in the first instance and afterwards considers an appeal from its own decision. It is hardly an effective remedy and it is illusory to expect that the decision would be changed upon appeal in those circumstances. Moreover, the administrative courts can indeed access and assess confidential data and information, but it is not possible to know to what extent the court in fact verified the authenticity, credibility and veracity of the classified documents and information. The reasoning of the judgment in this regard is most often meager or lacking. No safeguards aimed at protecting third-country nationals against arbitrariness are offered by Polish law in this regard. Furthermore, a third-country national is not informed in any way why he/she is suspected of terrorism or espionage.

Polish administrative courts argue in some cases as well that the non-disclosure of information and documents is allowed under Article 12(1) of the Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals. This provision states: 'The information on reasons in fact may be limited where national law allows for the right to information to be restricted, in particular in order to safeguard national security, defence, public security and for the prevention, investigation, detection and prosecution of criminal offences.' Moreover, the courts occasionally mention the Court of Justice of the European Union's (hereinafter: CJEU) judgment of 4 June 2013 in the case C-300/11 *ZZ,* but they apply an overly restrictive interpretation of this judgment. Moreover, in some cases, Polish courts indicated that the procedural protection offered by the CJEU in this judgment is based on Article 47 of the Charter of Fundamental Rights of the EU (hereinafter: CFREU), so it does not apply to cases concerning Article 329a of the Aliens Act.[6] It shows the lack of understanding of EU law.

In the judgments concerning decisions issued in connection with national security considerations, Polish courts rarely rely on the ECtHR's jurisprudence. If they do, then they refer to the Grand Chamber's judgment of 19 September 2017 in the *Regner v. the Czech Republic* case, no. 35289/11. For instance, the Supreme Administrative Court, in its judgment of 7 July 2021, no. II OSK 3056/20,[7] claimed that the ECtHR in the *Regner* case concluded that Article 6 of the ECHR is not violated when a person concerned cannot access all files of his/her case, but the court deciding on his/her case have a full access to those files. National courts must have unlimited access to all confidential documents, must

[6] See e.g. Provincial Administrative Court in Warsaw, Judgment of 5 November 2019, no. IV SA/Wa 2086/18, available at: https://orzeczenia.nsa.gov.pl/doc/2DFFB93EA9.
[7] Available at: https://orzeczenia.nsa.gov.pl/doc/9159697023

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be able to decide on all facts of the case and cannot be limited in their examination to arguments given by a party of the proceedings. In the *Regner* case, the ECtHR was satisfied that those conditions were fulfilled in the Czech Republic. According to the Supreme Administrative Court, the Polish and Czech proceedings are similar as regards access to confidential information and documents.

The *Regner v. the Czech Republic* case seems to be a leading ECtHR's case in the Polish courts' case-law concerning national security considerations in migration and asylum proceedings. However, this case does not concern migration or asylum issues, but the deprivation of access to confidential data in the work environment. Moreover, it pertains to Article 6 of the ECHR that, according to the ECtHR's jurisprudence, is not applicable to migration and asylum cases.[8]

The respective ECtHR's judgments concerning the procedural limb of Article 3 of the ECHR, Article 13 of the ECHR and Article 1 of the Protocol no. 7 to the ECHR have been overlooked in the Polish administrative courts' jurisprudence. In particular, the Grand Chamber's judgment of 15 October 2020 in the case of *Muhammad and Muhammad v. Romania*, no. 80982/12, remains mostly unnoticed in the Polish courts' case-law. Only in its most recent judgment of 6 September 2022, no. II OSK 457/21, the Supreme Administrative Court – after relying again on the ECtHR's *Regner v. the Czech Republic* case and CJEU's case C-300/11 *ZZ* – mentioned the *Muhammad and Muhammad v. Romania* judgment. It concluded that this judgment does not change the approach of the Polish administrative courts hitherto, because the ECtHR only confirmed there that the procedural guarantees in return proceedings concerning foreigners considered to pose a threat to national security, are not absolute and can be restricted as long as the negative consequences of this restriction are balanced by the effective judicial control and procedural mechanisms. According to the Supreme Administrative Court, these conditions are fulfilled in Poland, mostly because the full access to confidential material is given to the courts deciding on returns ordered due to national security considerations.

III. EU LAW AND THE CJEU'S JURISPRUDENCE

a. Access to confidential information

Article 47 of the CFREU provides for a right to an effective remedy and to a fair trial. Guarantees enshrined in this provision were interpreted in the jurisprudence of the CJEU. In the judgement C-300/11 *ZZ*, CJEU stated that:

[8] ECtHR (GC), *Maaouia v. France*, no. 39652/98 (2000), §40. See also ECtHR (GC), *Mamatkulov and Askarov v. Turkey,* nos. 46827/99 and 46951/99 (2005), §82; ECtHR, *Tatar v. Switzerland*, no. 65692/12 (2015), §61; ECtHR, *A.L. v. the United Kingdom*, no. 32207/16, dec. (2018), §48.

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> 54. Admittedly, 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. (…)
> 65. In this connection, first, 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 (...)".

This was also reiterated in other CJEU judgments, including: case C-277/11 *M.,* paras. 82-88; Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Kadi* (Grand Chamber), paras 111-129. It must be noted that the CJEU also referred to this standard in a case not involving foreigners or migration issues, i.e. case C-437/13, *Unitrading*, paras 19-21. Therefore, this standard has a general character and applies to any case based on EU law, including cases concerning expulsions. Thus, according to the Article 47 of the CFREU and its interpretation by the CJEU, returnees should be informed of the essence of the grounds on which decision issued in their case was based, regardless whether the court had access to classified documents or not.

It must be also noted that EU asylum law also provides similar guarantees of the rights of defence. Article 23 of the Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection provides that Member States shall ensure that a lawyer who represents an applicant, enjoys access to the information in the applicant's file. It also provides that Member States may make an exception where disclosure of information or sources would jeopardise national security. However, in such cases, Member States shall establish in national law procedures guaranteeing that the applicant's rights of defence are respected. In particular, they may grant access to such information or sources to a lawyer who has undergone a security check. According to the Article 46 of 2013/32/EU directive, effective remedy against the negative asylum decision provides for a full and *ex nunc* examination of both facts and points of law, at least in appeals procedures before a court or tribunal of first instance. It means that guarantee of the rights of defence ensured in Article 23 of the 2013/32 directive shall be observed even when the court has access to all the materials of the case, including classified ones.

In its recent judgment of 22 September 2022 in the case C-159/21 *GM*, the CJEU provided interpretation of the Article 23 of the Directive 2013/32/EU. It highlighted that: 'although the second subparagraph of Article 23(1) of Directive 2013/32 allows the Member States, particularly where national security so requires, not to grant the person concerned direct access to all of his or her file, that provision cannot be interpreted, without infringing the principle of effectiveness, the right to sound administration and the right to an effective

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remedy, as allowing the competent authorities to place that person in a situation where neither he or she nor his or her representative would be able to gain effective knowledge, where applicable in the context of a specific procedure designed to protect national security, of the substance of the decisive elements contained in that file' (para. 53).

Moreover, the CJEU criticized the Hungarian authorities' approach that the fact that a case is examined by the court that has access to all files, is a sufficient procedural guarantee. It stated:

> 57. Second, given that it is apparent from the order for reference and the observations of the Hungarian Government that the legislation at issue in the main proceedings is based on the consideration that the rights of defence of the person concerned are sufficiently guaranteed by the power of the court having jurisdiction to have access to the file, it must be pointed out that such an option cannot replace access to the information placed on that file by the person concerned or his or her adviser.
> 58. Thus, aside from the fact that that option is not applicable during the administrative procedure, respect for the rights of the defence does not mean that the court having jurisdiction has available to it all relevant information in order to make its decision, but rather that the person concerned, where appropriate through an adviser, may defend his or her own interests by expressing his or her point of view on that information.
> 59. That assessment is, moreover, borne out by the fact that it is apparent from the very wording of the second subparagraph of Article 23(1) of Directive 2013/32 that the EU legislature considered that access to the information on the file by the courts having jurisdiction and the establishment of procedures ensuring that the rights of defence of the person concerned are respected are two separate and cumulative requirements.

b. Automatic suspensive effect in return proceedings

The automatic suspensive effect of an appeal in return proceedings is not directly guaranteed in Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals. However, the CJEU in the case C-562/13 *Abdida* clearly indicated that Articles 5 and 13 of the Return Directive, taken in conjunction with Articles 19(2) and 47 of the CFREU, 'must be interpreted as precluding national legislation which does not make provision for a remedy with suspensive effect in respect of a return decision whose enforcement may expose the third country national concerned to a serious risk of grave and irreversible deterioration in his state of health' (para. 53). The remedy in return proceedings must be compatible with the requirements of Article 47 of the CFREU. The CJEU decided that '(i)n order for the appeal to be effective in respect of a return decision whose enforcement may expose the third country national concerned to a serious risk of grave and irreversible deterioration in his state of health, that third country national must be able to avail himself, in such circumstances, of a remedy with suspensive effect, in order to ensure that the return decision is not enforced before a competent authority has had the opportunity to examine an objection alleging infringement of Article 5 of Directive

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2008/115, taken in conjunction with Article 19(2) of the Charter' (para. 50). This approach has been confirmed in another CJEU's preliminary ruling of 30 September 2020 delivered in the case C-402/19 *LM*.

While the above-mentioned judgments concerned removals of ill third-country nationals, the CJEU, in other cases, confirmed that the procedural safeguards determined therein are of broader applicability (e.g. in the case C-239/14 *Tall* (2015), para 58). In the ruling of 19 June 2018 delivered in the case C-181/16 *Gnandi,* the CJEU stated: 'an appeal brought against a return decision within the meaning of Article 6 of Directive 2008/115 must, in order to ensure, as regards the third-country national concerned, compliance with the requirements arising from the principle of non-refoulement and Article 47 of the Charter, enable automatic suspensory effect, since that decision may expose the person concerned to a real risk of being subjected to treatment contrary to Article 18 of the Charter, read in conjunction with Article 33 of the Geneva Convention, or contrary to Article 19(2) of the Charter' (para. 56). Thus, automatic suspensive effect of a remedy against a return decision is required when the enforcement of this decision may violate the principle of non-refoulement.

IV. UNITED NATIONS STANDARD

International Covenant on Civil and Political Rights, in Article 13, provides for 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.

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).

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

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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).

Classified evidence is also used in asylum proceedings, especially in cases of exclusion from international protection. The United Nations High Commissioner for Refugees in its comments referred to procedural guarantees in asylum cases which may admittedly does not apply directly to expulsion, however, we would like to draw attention of the Court to them. According to the UNHCR "it offends principles of fairness and natural justice when the exclusion decision is based on evidence that the individual concerned does not have the opportunity to challenge". UNHCR also stated that in cases involving national security there is desire to withhold the nature of certain evidence. However, national security interest may be protected by "introducing procedural safeguards which also respect the asylum-seeker's due process rights". UNHCR pointed out for disclosing the general content of the sensitive material to the individual but reserving the details for his or her legal representative only.[9]

V. CONCLUDING REMARKS

The return proceedings based on Article 329a of the Aliens Act do not provide for sufficient procedural safeguards for returnees. They are flawed for multiple reasons. First, returnees and their lawyers have no access to confidential documents that constitute main evidence in the respective case. Second, the disclosed reasoning of return decisions is limited to the short statement that a person concerned is suspected of terrorism or espionage. Third, due to the scarcity of the reasoning, it is not feasible to assess whether the court duly exercised its power to examine the grounds underlying the issued decisions. In fact, it cannot be known to what extent the court verified the authenticity, credibility and veracity of the classified documents and information. Fourth, there is no suspensive effect attached to the remedy that is available in the 'Article 329a' proceedings, even if the returnee invokes the risk of ill-treatment contrary to Article 3 of the ECHR. Lastly, the Ministry of Interior and Administration is of opinion that in those proceedings he cannot take into account claims based on Article 3 of the ECHR. This approach has been accepted in some court's judgments as well. Moreover, the rigorous scrutiny in this respect in often lacking.

In the proceedings based on Article 329a of the Aliens Act, the courts insufficiently rely on international and European standards as regards procedural guarantees that are required in expulsion procedures. In particular, the ECtHR and CJEU's judgments are rarely

[9] See: UNHCR Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating; to the Status of Refugees; Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees; Addressing Security Concerns without Undermining Refugee Protection - UNHCR's perspective.

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mentioned. If they are referred to by a Polish court, then the most restrictive interpretation of the two courts' approach is applied.

As regards access to confidential documents, Polish administrative courts seem to be the most inspired by the *Regner v. the Czech Republic* case, despite the fact that it is not a case concerning a return ordered due to national security considerations and it pertains to the interpretation of Article 6 of the ECHR that is not applicable in asylum and migration cases. Moreover, the ECtHR's approach taken in the *Regner* case has been mitigated in the recent judgment of 11 January 2022 in the case of *Corneschi v. Romania*, no. 21609/16. Other - than the *Regner* case – judgments of the ECtHR are most often not mentioned by the Polish courts in their rulings concerning returns ordered due to national security considerations. The important judgments delivered e.g. in the cases *C.G. and Others v. Bulgaria*, no. 1365/07, *Ljatifi v. The Former Yugoslav Republic of Macedonia*, no. 19017/16, *A v. United Kingdom*, no. 3455/05, and *Muhammad and Muhammad v. Romania*, no. 80982/12, are predominantly ignored by Polish courts. Meanwhile, according to those judgments, a returnee (or a lawyer acting on his/her behalf) should have at least limited possibility to know factual grounds of the return decision. Without such a possibility the person concerned cannot present his/her point of view and refute the arguments of the authorities – they cannot refer directly to particular reasons of the decision. It should be also noted that the above-mentioned standard is applicable even if the national court has access to classified material. This conclusion has been also reached in the recent judgments of ECtHR (*Šćepanović v. Bosnia and Herzegovina*, 15 November 2022, no. 21196/21, §8) and of the CJEU (case C-159/21 *GM,* 22 September 2022, paras. 57-59).

Furthermore, in the 'Article 329a' proceedings, Polish courts do not always follow the ECtHR's abundant jurisprudence requiring a rigorous scrutiny and a suspensive effect of an appeal when a third-country national invokes risks of treatment contrary to Article 3 of the ECHR upon removal. The well-established standards in this regard have been recently reminded by the ECtHR in the cases of *R. v. France*, no. 49857/20, and *W. v. France*, no. 1348/21.

The Polish law and practice concerning returns of suspected terrorists and spies clearly conflict with the standards established by the ECtHR under Article 3 of the ECHR, Article 13 in conjunction with Article 3 of the ECHR as well as Article 1 of Protocol no. 7. The 'Article 329a' proceedings have not been scrutinized by the ECtHR yet; thus, the judgment given in the *A.S. v. Poland* case will have significant implications for the Polish law and practice.

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