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Application no. 32462/15
Marakchi 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 third-country nationals who have been ordered to leave a hosting state due to national security considerations. Responding to the increasing number of migrants and asylum seekers receiving decisions based on the grounds associated with national security in Poland, SIP has been more and more involved in domestic proceedings initiated against these persons, either by representing individual applicants or by intervening before national courts as a third-party. Moreover, SIP submitted its written comments in the case *A.S. v. Poland* (no. 37691/20) and – jointly with the Helsinki Foundation for Human Rights – in the case *Muhammad and Muhammad v. Romania* (no. 80982/12) decided by the Grand Chamber in 2020.

The case of *Marakchi v. Poland* concerns a Moroccan national who was denied a temporary residence permit in Poland, because he was deemed to pose a threat to state security or safety and public order (hereinafter, generally, national security). This decision was based on a confidential information of the Internal Security Agency that was not made available to the applicant nor his lawyer. The reasons for considering him as a threat to national security were not disclosed in any decision or judgment. The applicant left Poland within the prescribed period and was prohibited from re-entering for 3 years. His attempt to quash the entry ban was unsuccessful. The courts reached the unfavourable decisions

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concerning entry ban without a full access to the classified information concerning the applicant. In his complaint to the European Court of Human Rights, the applicant indicated that he had been deprived of the essential procedural guarantees in violation of Article 1 of Protocol No. 7 to the ECHR.

The *Marakchi* case is illustrative of the far-reaching Polish practice regarding third-country nationals considered to be a threat to national security. This third-party intervention focuses on national, EU and international law and case-law concerning procedural safeguards required in the proceedings initiated against those third-country nationals. Their rights to have access to confidential files and to learn what are the reasons for them being considered a threat, are given particular attention.

II. POLISH LAW AND PRACTICE

The *Marakchi v. Poland* case concerns the decisions and judgments issued in Poland in years 2009-2014. They were based on the Act on Foreigners of 13 June 2003 that is no longer in force. Since May 2014, it has been replaced by the 2013 Act on Foreigners. However, the general rules concerning refusing residence permits and returning third-country nationals due to national security considerations, have not changed with the adoption of the new law in 2013. Just like Article 57(1)(5) of the 2003 Act on Foreigners, Article 100(1)(4) of the 2013 Act on Foreigners allows for refusing a temporary residence permit if it is required for reasons of defence or state security or the protection of safety and public order. Moreover, for the same reasons, Article 6(1) of the 2013 Act on Foreigners enables limiting the scope of the reasoning in the respective decisions, similarly to Article 8(1) of the 2003 Act on Foreigners. Data of foreigners who are considered to pose a threat to national security, are still registered in a registry of persons whose stay in Poland is undesirable, and in the Schengen Information System. Furthermore, over all those years, the approach of the Polish authorities, including courts, to procedural safeguards in the proceedings regarding third-country nationals representing a threat to national security, remained the same. Thus, the analysis of the Polish law and practice presented below does not differentiate between the 2003 and 2013 Act on Foreigners, and the case-law of the courts concerning the two acts is scrutinized jointly.

Proceedings concerning third-country nationals seen as a threat to national security, differ from other administrative and court proceedings regarding migrants and asylum seekers initiated in Poland. In the latter proceedings, procedural rights of foreigners are guaranteed to a greater extent. Meanwhile, in the proceedings intertwined with national security, procedural guarantees are significantly limited, if not non-existent. Firstly, decisions issued in those proceedings 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. Moreover, occasionally, even courts and other authorities struggle with accessing all confidential files. Secondly, no information

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about the relevant factual elements, which have led to considering a third-country national as a threat, 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 a threat. No factual reasoning for this conclusion is given, so a third-country national concerned cannot learn why he/she is seen as a threat by Polish authorities. Effective defence in those circumstances is impossible. Thirdly, 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 reasoning of the judgment in this regard is most often meagre or lacking. The courts limit themselves to stating that they read confidential files and those materials confirm that a person concerned is a threat to national security. The Polish law in question does not offer any safeguards aimed at protecting third-country nationals against arbitrariness on the part of the authorities. In particular, there is no 'security-cleared counsel' who would be able to effectively represent a third-country national considered to be a threat to national security.

The procedural safeguards in the proceedings intertwined with national security as provided for in the Polish law, have been considered insufficient and inadequate by Polish civil society organizations, including SIP. The lack of any access to confidential information and the lack of reasoning in the issued decisions have been particularly criticized.[1] It is seen as conflicting with, *inter alia,* Article 47 of the Charter of Fundamental Rights of the EU (hereinafter: CFREU) and Article 1 of the Protocol no. 7 to the ECHR. Numerous attempts to challenge the respective law and practice have been made on a national level – hitherto to no avail.[2] The Polish law in question remained in essence the same, and Polish courts persistently state – contrary to the civil society organizations' view – that the current guarantees are enough from the standpoint of national, EU and international law.[3]

[1] See e.g. Hungarian Helsinki Committee, Kisa, Helsinki Foundation for Human Rights, 'Comparative Report on Access to Classified Data in National Security Immigration Cases in Cyprus, Hungary and Poland', September 2021, https://helsinki.hu/en/wp-content/uploads/sites/2/2021/03/Advocacy-Report-Right-To-Know.pdf, 39-41.

[2] See e.g. SIP, 'Judgement: deportation can't create a risk of torture', 20 January 2023, ,https://interwencjaprawna.pl/en/the-supreme-administrative-courtacknowledges-that-deportation-cannotcreate-risk-of-torture-but-disagrees-onaccess-to-case-files/.

[3] 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 inter alia on the following judgments: Provincial Administrative Court in Warsaw, Judgment of 26 November 2009, no. V SA/Wa 1080/09; Provincial Administrative Court in Warsaw, Judgment of 13 December 2012, no. IV SA/Wa 2134/12; Provincial Administrative Court in Warsaw, Judgment of 23 October 2014, no. IV SA/Wa 1260/14; Supreme Administrative Court, Judgment of 9 September 2016, no. II OSK 61/15; 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; Supreme Administrative Court, judgment of 27 July 2018, no. II OSK 1084/18; Provincial Administrative Court in Warsaw, Judgment of 13 December 2018, no. IV SA/Wa 2659/18, Provinc;ial Administrative Court in

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Polish courts acknowledge that it may be difficult to challenge a decision when it lacks a full reasoning and is based on information and documents that has not been disclosed to a third-country national nor his/her lawyer. However, in the national courts' opinion, appeal administrative proceedings are not formalized and second-instance administrative authorities must consider the legality of the decision in full, irrespective of whether the party has presented arguments against this decision or not. Moreover, the decisions of the second-instance administrative authorities may be further challenged before administrative courts. Those courts should have access to and assess confidential information and documents. According to those courts, it is a sufficient procedural guarantee in those circumstances. Furthermore, a third-country national is informed about the main reason why the decision was issued, i.e. the fact that he/she is a threat to national security. No further explanation is needed. Taking all that into account, Polish courts conclude that procedural safeguards in the proceedings concerning third-country nationals considered to be a threat to national security, are in coherence with the national, EU and international law, including the ECHR.

However, 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,[4] 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 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. Those arguments are often repeated in the respective case-law of Polish courts. The *Regner* case seems to be a leading ECtHR's judgment for the Polish courts deciding on national security considerations in migration and asylum proceedings. The argumentation based on the *Regner* case persists despite the fact that in the following similar judgments (e.g. *Corneschi v. Romania*, no. 21609/16, 11 January 2022), the ECtHR found that Article 6 of the ECHR has been violated when the applicant (and his lawyer) was unable to learn why he was considered to pose a threat, and the reasoning of the national court's decision was so limited that the

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 12 July 2022, no. II OSK 1941/21; Supreme Administrative Court, Judgment of 6 September 2022, no. II OSK 457/21; Supreme Administrative Court, Judgment of 5 December 2022, no. II OSK 2295/21. The approach of administrative courts to procedural safeguards is in fact very similar in all cases that invoke national security (thus, e.g. those concerning refusals of residence permits, expulsions, access to the case files, access and changes to registries regarding third-country national).

[4] Available at: https://orzeczenia.nsa.gov.pl/doc/9159697023

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ECtHR could not assess whether the reasons for considering the applicant a threat were sufficiently scrutinized.

The Polish law and practice described above have not changed following the Grand Chamber's judgment of 15 October 2020 in the *Muhammad and Muhammad v. Romania* case (no. 80982/12), where a violation of Article 1 of Protocol No. 7 to the ECHR was found. In fact, despite the utmost importance of this judgment, it seems to be overlooked by Polish administrative authorities and courts. Only in its recent judgment of 6 September 2022, no. II OSK 457/21, the Supreme Administrative Court – after relying again on the *Regner* case – mentioned the *Muhammad and Muhammad* judgment. It concluded that this judgment does not change the approach of the Polish administrative courts hitherto, because the Grand Chamber only confirmed that the procedural guarantees in the 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 in national security cases.

Polish administrative courts also occasionally argue 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. Moreover, the courts sporadically 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 interpret it very restrictively. They focus only on the CJEU's findings that the information should be undisclosed only when necessary, and that a third-country national should be informed at least of the essence of the grounds on which a decision was based. Again, Polish courts conclude that those requirements are satisfied by Polish law and practice. Other preliminary rulings of the CJEU concerning similar issues remain unnoticed by Polish courts. In fact, in the judgment of 6 September 2022, no. II OSK 457/21, the Supreme Administrative Court, denied suspending proceedings concerning the return of a third-country national due to national security considerations, pending the CJEU's ruling in the case C-159/21 *GM.* The Supreme Administrative Court stated that the suspension has no justification as the court is convinced that the sufficient procedural safeguards in those proceedings are provided for in the Polish law. Despite this conviction, the preliminary ruling in the *GM* case, delivered two weeks later, seems to lead to different conclusions.

III. EU LAW AND THE CJEU'S JURISPRUDENCE

Article 47 of the CFREU provides for a right to an effective remedy and to a fair trial. Guarantees enshrined in this provision were also interpreted in the jurisprudence of the CJEU regarding migrants and asylum seekers considered to pose a threat to national security. In the judgment of 4 June 2013 delivered in the case C-300/11 *ZZ*, that

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concerned a revocation of a permanent residence permit for a family member of the EU citizen due to national security considerations, the CJEU stated that:

> 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. (…)
> 59. In the context of the judicial review, (…), it is incumbent upon the Member States to lay down rules enabling the court entrusted with review of the decision's legality to examine both all the grounds and the related evidence on the basis of which the decision was taken. (…)
> 64. (…) if it turns out that State security does stand in the way of disclosure of the grounds to the person concerned, judicial review (…) must (…) be carried out in a procedure which strikes an appropriate balance between the requirements flowing from State security and the requirements of the right to effective judicial protection whilst limiting any interference with the exercise of that right to that which is strictly necessary.
> 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 (...).

Thus, national courts must have access to all information and documents, including confidential, that formed evidence for the contested decision. Moreover, a third-country national concerned should be informed at least 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. Otherwise, the third-country national cannot effectively defend himself/herself.

The importance of the rights of the defence arising from Article 47 of the CFREU was also invoked in the more recent judgment concerning the refusal of visa due to national security considerations (joint cases C-225/19 and C-226/19 *Minister van Buitenlandse Zaken*, 24 October 2020). In this preliminary ruling, the CJEU again reminded:

> 43. (…) it is settled case-law that if the judicial review guaranteed by Article 47 of the Charter is to be effective, the person concerned must be able to ascertain the reasons upon which the decision taken in relation to him or her is based, either by reading the decision itself or by requesting and obtaining notification of those reasons, without prejudice to the power of the court with jurisdiction to require the authority concerned to provide that information, so as to make it possible for him or her to defend his or her rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in applying to the court with jurisdiction, and in order to put the latter fully in a position in which it may carry out the review of the lawfulness of the national decision in question.

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Thus, the rejected visa applicants must be informed about 'the specific ground for refusal underlying that decision as well as the identity of the Member State which objected to the issuing of that visa' (para. 45).

In its most recent judgment of 22 September 2022 delivered in the case C-159/21 *GM*, the CJEU provided interpretation of the 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. This provision states that the Member States shall ensure that a lawyer who represents an applicant enjoys access to the information in the applicant's file, but they may make an exception where the disclosure of information or sources would jeopardise national security. In this respect, the CJEU highlighted that:

> 53. (…) 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 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.

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 safeguard. 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.

Thus, the CJEU clearly confirmed in the *GM* case that the fact that the national court deciding on a case can access confidential files, is not a sufficient guarantee in the

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proceedings concerning third-country nationals considered to pose a threat to national security.

This overview of the CJEU's case-law proves that the Luxembourg Court firmly protects third-country nationals' rights to the defence, irrespective of a context of the case at hand (equally in asylum proceedings, with regard to a refusal of visa, and as regards the revocation of a residence permit). It states clearly that third-country nationals must be able to defend themselves, and for this reason they need to have some access to evidence gathered in their case, and be informed at least of the essence of the grounds on which decision was based. It is not enough that the court deciding on a case can access all the files, including the confidential ones.

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 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. According to the UNHCR "it offends principles of fairness and natural justice when the exclusion

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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.[5]

V. CONCLUDING REMARKS

Proceedings concerning third-country nationals considered to be a threat to national security initiated in Poland, do not provide for adequate procedural safeguards. First, third-country nationals and their lawyers have no access to confidential documents that constitute main evidence in the respective case. Second, the disclosed reasoning is limited to the very short statement that a person concerned poses a threat to national security. 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, even if it had access to those files.

Polish courts invariably claim that the procedural guarantees provided for in the Polish law are in coherence with the national, EU and international law, including the ECHR. They focus on the fact that they have access to the confidential materials and may asses them. However, Polish courts insufficiently rely on international and European standards as regards procedural guarantees that are required in the proceedings concerning third-country nationals considered to pose a threat to national security. In particular, the ECtHR and CJEU's judgments are rarely mentioned in the courts' rulings. If they are referred to by a Polish court, then the most restrictive interpretation of the two courts' approach is often applied. Polish administrative courts seem to be the most inspired by the *Regner v. the Czech Republic* case (judgment of the Grand Chamber of 19 September 2017, no. 35289/11). Meanwhile, the ECtHR's approach taken in this 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. 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 third-country national (or a lawyer acting on his/her behalf) should have at least limited possibility to know factual grounds of the decision based on national security considerations. Without such a possibility, the person

[5] 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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concerned cannot present his/her point of view and refute the arguments of the authorities. The above-mentioned standard is applicable even if the national court has access to the 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).

In the SIP's opinion, the Polish law and practice as regards procedural guarantees provided for in the proceedings concerning third-country nationals deemed to be a threat to national security, clearly conflict with the standards established by the ECtHR under Article 1 of Protocol no. 7 to the ECHR. In particular, third-country nationals lawfully resident in Poland are being expelled therefrom without a real possibility to submit reasons against this expulsion. They cannot effectively defend themselves as they have no access to confidential evidence that formed a basis for their expulsion, and they are not informed about the factual grounds of the decision based on national security considerations. While Polish courts claim that those procedural limitations are balanced by the fact that the court can access and assess the confidential materials, the recent case-law of the ECtHR and CJEU clearly proves that it is not a sufficient procedural safeguard.

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