



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF POKLIKAYEW v. POLAND

(Application no. 1103/16)

JUDGMENT

Art 1 P7 • Procedural safeguards relating to expulsion of aliens • Expulsion on national security grounds on the basis of classified information not disclosed to the applicant, without sufficient counterbalancing safeguards • Significant limitation of applicant's right to be informed of factual circumstances and content of documents underlying the expulsion decision • Strict scrutiny of counterbalancing factors, in absence of any domestic examination of the need for the significant limitation of his rights • Inadequate information disclosed to applicant about accusations against him and conduct which allegedly endangered national security • Very general reasons given by domestic courts for conclusions • Applicant not afforded an effective opportunity to secure representation by a lawyer • Involvement of highest judicial authority a significant safeguard, but insufficient given scarce and unspecific information available

STRASBOURG

22 June 2023

FINAL

06/11/2023

*This judgment has become final under Article 44 § 2 of the Convention.
It may be subject to editorial revision.*

In the case of Poklikayew v. Poland,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Marko Bošnjak, *President*,

Alena Poláčková,

Krzysztof Wojtyczek,

Lətif Hüseynov,

Péter Paczolay,

Gilberto Felici,

Erik Wennerström, *judges*,

and Liv Tigerstedt, *Deputy Section Registrar*,

Having regard to:

the application (no. 1103/16) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Belarusian national, Mr Oleg Poklikayew (“the applicant”), on 28 December 2015;

the decision to give notice to the Polish Government (“the Government”) of the complaints concerning Article 1 of Protocol No. 7 to the Convention and Article 13 of the Convention and to declare the remainder of the application inadmissible;

the observations submitted by the Government and the observations in reply submitted by the applicant;

the comments submitted by the Helsinki Foundation for Human Rights, which was granted leave to intervene by the President of the Section;

Having deliberated in private on 30 May 2023,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The case raises an issue under Article 1 of Protocol No. 7 to the Convention and concerns the expulsion of the applicant (a lawfully resident alien) on the grounds of national security. The applicant complained that the reasons for the revocation of his residence permit and for his expulsion had never been disclosed to him in detail.

THE FACTS

2. The applicant was born in 1980 and currently lives in Belarus. The applicant was represented by Ms M. Gąsiorowska, a lawyer practising in Warsaw.

3. The Government were represented by their Agent, Mr J. Sobczak, of the Ministry of Foreign Affairs.

4. The facts of the case may be summarised as follows.

I. BACKGROUND TO THE CASE

5. The applicant came to Poland in 2006. On 3 March 2006 the Mazowiecki Governor (*Wojewoda Mazowiecki*) granted him a permanent residence permit on the basis of Article 52 § 5 of the Polish Constitution (see paragraph 30 below), in view of his Polish origins. Subsequently, the applicant settled in Poland, found a job and bought an apartment.

II. EXPULSION PROCEEDINGS

6. On 23 January 2012 the head of the Internal Security Agency (*Agencja Bezpieczeństwa Wewnętrznego*) issued a request to have the applicant expelled under section 68(1) of the Aliens Act of 13 June 2003 (*Ustawa o cudzoziemcach* – “the 2003 Act”) (see paragraph 31 below) on the grounds that “his continued stay in Poland would constitute a threat to the State’s defence or the security of the State”. It was noted that since 2000 the applicant had been collaborating with the Belarusian secret services.

7. On 26 January 2012 the Mazowiecki Governor gave notice of the commencement of proceedings for revocation of the applicant’s permanent residence permit and his expulsion.

8. The Government submitted that on 6 February 2012 the applicant had consulted the case file and had asked the Governor not to revoke his permanent residence permit. He had assured the Governor that he had no ties with Belarus, did not maintain contact with anyone there and had not threatened the security of the Polish State.

9. The applicant disagreed in part. He submitted that he had only received the statement of the Mazowiecki Governor and had not been able to consult the entire case file on 6 February 2012.

10. On 13 February 2012 the Governor classified certain documents in the file as secret (*tajne*), pursuant to Article 74 §§ 1 and 2 of the Code of Administrative Procedure (see paragraph 37 below).

11. The Government submitted that on the same date the applicant had again consulted the case file.

12. The applicant disagreed. He stated that he had not been allowed to consult the case file and had only received the Governor’s statement regarding the revocation of his residence permit.

13. On 16 February 2012 the applicant submitted certain documents to the Governor, in particular his contract of employment and the sale and purchase contract for his apartment. Those documents were subsequently transferred to the head of the Internal Security Agency for comments. On 2 March 2012 the Agency confirmed its request to have the applicant expelled from Poland.

14. On 16 March 2012 the Mazowiecki Governor decided to revoke the applicant’s residence permit and to expel him from Poland, as requested by the Internal Security Agency. On the basis of the evidence collected, the

Governor held that the applicant's continued stay in Poland would constitute a threat to the State's defence or national security, or to the protection of public security and public order, or otherwise threaten the interests of the Republic of Poland. The Governor also stated that no grounds existed for granting the applicant a "tolerated stay". Lastly, the Governor prohibited the applicant from entering and remaining in the Schengen Area for a period of five years. An immediate enforcement clause was attached to this decision.

15. On 20 March 2012 the applicant was expelled from Poland.

16. On 2 April 2012 the applicant lodged an appeal through his lawyer against the expulsion decision, alleging a breach of sections 68(1)(1) and 88(1)(5) of the 2003 Act (see paragraphs 31 and 32 below) and arguing that the applicant had unjustly been considered a threat to national security.

17. On 21 August 2012 the head of the Office for Foreigners (*Szef Urzędu do Spraw Cudzoziemców*) upheld the first-instance decision on the applicant's expulsion, reiterating the findings of the lower authority. It was noted that the authorities had obtained sufficient information to indicate a need to restrict the applicant's right to settle in Poland for reasons of national security. The classified documents provided evidence justifying that decision. It was also noted that further reasons could not be provided because of the need to protect national security. Lastly, it was stressed that the applicant's close family (his parents) still lived in Belarus. During the previous four years the applicant had gone back to Belarus on many occasions.

18. The applicant appealed, submitting again that the decision to expel him was in breach of sections 68(1)(1) and 88(1)(5) of the 2003 Act.

19. On 16 July 2013 the Warsaw Regional Administrative Court (*Wojewódzki Sąd Administracyjny*) upheld the second-instance decision to expel the applicant. The court noted at the outset that the head of the Office for Foreigners had provided it with all the classified documents. However, the applicant's representative had been refused access to those documents and the court session had been held in camera. The refusal was based on the fact that the applicant's representative had not complied with the requirements set out in section 4(1) of the Law of 5 August 2010 on the protection of classified information (*ustawa o ochronie informacji niejawnych* – "the 2010 Act") (see also paragraph 39 below). Specifically, since he had not obtained a certificate of clearance – a formal authorisation obtained following a positive conclusion to a security screening procedure – he could not have been treated as a person who could give a guarantee of secrecy (*osoba dająca rekojmię zachowania tajemnicy*).

20. The court further observed that the request to revoke the applicant's residence permit had been submitted by the Internal Security Agency on 23 January 2012. The request was not a classified document. The Agency noted that since 2000 the applicant had been cooperating with the Belarusian secret services and in that capacity had carried out assignments on Polish territory. Subsequently, the head of the Internal Security Agency submitted

further documents in support of the request. These documents were classified as secret and could not be disclosed to the applicant or his representative. The court noted that the administrative authorities had correctly, under section 8 of the 2013 Act, dispensed with their obligation to give further reasons for their decisions for reasons of national security (see paragraph 34 below). It also held that in view of the information contained in the classified documents, the contested decision was correct.

21. Lastly, the court found that the applicant could have and in fact had actively participated in the proceedings. The applicant had been notified of the institution of the proceedings and had been given an opportunity to present arguments and adduce evidence. Most importantly, he had consulted the case file on 6 February 2012 and had had access to the Internal Security Agency's request of 23 January 2012. Consequently, at the beginning of the administrative procedure he had obtained information about the nature of the allegations made against him.

22. The applicant lodged a cassation appeal against that judgment. Amongst other things, he alleged a breach of sections 68(1)(1) and 88(1)(5) of the 2003 Act. He noted that the reasoning of the judgment had not included the classified part. He further submitted that, apart from the mere statement that since 2000 he had cooperated with the Belarusian secret services and in that capacity had carried out assignments on Polish territory, the Regional Court had not pointed to any facts in support of that finding.

23. On 28 July 2015 the Supreme Administrative Court (*Naczelny Sąd Administracyjny*) dismissed the cassation appeal by the applicant, observing in particular that the analysis of the secret material which had been made by the authorised bodies was binding and sufficient. Moreover, the analysis in question had been scrutinised by the courts, which had had access to all parts of the case file and had been able to objectively examine the reasons for the applicant's expulsion. While the judgment of the Regional Court had not included the classified part of the reasoning, that did not mean that that court had not examined the classified documents. The Regional Court had considered the classified documents in the file and concluded that they provided a basis for granting the Internal Security Agency's request.

III. ACCESS TO CLASSIFIED DOCUMENTS

24. On 5 June 2012 the head of the Office for Foreigners refused the applicant's lawyer's request to examine the classified part of the case file without giving further reasons for that decision, on the grounds of national security.

25. The applicant's lawyer appealed, relying on sections 1, 4 and 6 of the Law of 26 May 1982 ("the Act on the Bar" – *Prawo o Adwokaturze*) and Article 51 §§ 3 and 4 of the Constitution (see paragraph 29 below).

26. On 24 July 2012 the head of the Office for Foreigners confirmed the decision of 5 June 2012. It was noted that, among other things, under section 4(1) of the 2010 Act, classified information could be made available only to a person who could guarantee secrecy and only to the extent necessary to perform his or her official work or service or to carry out outsourced activities.

27. On 11 April 2013 the Warsaw Regional Administrative Court dismissed an appeal by the applicant's representative on the ground that he had not had the required certificate of clearance pursuant to section 4(1) of the 2010 Act.

28. On 10 May 2013 the Warsaw Regional Administrative Court refused a further request by the applicant's lawyer to examine the classified part of the case file. That decision did not contain any reasons.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. POLISH CONSTITUTION

29. Article 51 §§ 3 and 4 of the Constitution reads as follows:

“§ 3. Everyone shall have a right of access to official documents and data collections concerning himself. Limitations upon such rights may be established by statute.

§ 4. Everyone shall have the right to demand the correction or deletion of untrue or incomplete information, or information acquired by means contrary to statute.”

30. Article 52 § 5 of the Constitution reads as follows:

“Anyone whose Polish origin has been confirmed in accordance with statute may settle permanently in Poland.”

II. ALIENS ACT

31. Under section 68 (1) 1 of the Aliens Act of 13 June 2003 (*ustawa o cudzoziemcach*) (“the 2003 Act”) as applicable at the material time, a permanent residence permit was to be revoked if national defence or security or the need to protect the interests of the Republic of Poland so required.

32. Pursuant to section 88(1)(5), a foreigner was to be expelled from Poland if his or her continued stay would constitute a threat to the State's defence or national security or to the protection of public security and public order or would otherwise threaten the interests of the Republic of Poland.

33. Section 89(1) of the 2003 Act provided that a foreigner should not be deported if he or she:

- (i) was entitled to be granted a “tolerated stay”;
- (ii) was married to a Polish citizen or to a foreigner who had a permanent resident permit (among other grounds);

(iii) was staying in Poland on the basis of a Schengen visa (among other grounds); or

(iv) had a valid residence permit or other permit issued by another Schengen country entitling him or her to reside in Poland, provided that his or her stay did not threaten national security or safety or the public order or interests of the Republic of Poland.

34. Under section 8 of the 2003 Act, an administrative authority could refrain from providing a justification for its decision if it was so required by reasons of national defence or security or the protection of public safety and order.

35. The 2003 Act was repealed by the Aliens Act of 12 December 2013 (*ustawa o cudzoziemcach* – “the 2013 Act”), which entered into force on 1 May 2014.

III. CODE OF ADMINISTRATIVE PROCEDURE

36. Articles 9, 10 and 73 of the Code of Administrative Procedure establish respectively the principle of the rule of law, the principle of public proceedings (*jawność postępowania*) and the right of a party to proceedings to have access to the case file.

37. Article 74 of that Code sets out an exception to the general rule regarding the right of a party to proceedings to have access to the case file, and provides as follows:

“§ (1) The provisions of Article 73 shall not apply to case files containing classified information with the classification ‘secret’ or ‘top secret’, or to other files excluded by the public administration body on account of an important State interest.

§ (2) Refusal to allow a party to inspect a case file, to make notes and copies and to certify such copies or to issue certified copies shall be given by means of a decision which shall be subject to an interlocutory appeal.”

IV. THE 2010 ACT

38. The Law on the protection of classified information of 5 August 2010 (*ustawa o ochronie informacji niejawnych* – “the 2010 Act”) sets out principles for “the protection of information whose unauthorised disclosure, including while it is in the course of preparation and regardless of its form or the manner of its communication, would or could cause damage to the Republic of Poland or would be to the detriment of its interests (hereinafter referred to as ‘classified information’).”

39. Section 4 of the 2010 Act deals with the principle of restricted access and provides that “classified information may be made available only to a person giving a guarantee of secrecy and only to the extent necessary for the performance of his or her official work or service or for the performance of outsourced activities”.

40. Section 5 accords four levels of protection depending on the importance of the classified material, namely: “top secret” (*ściśle tajne*), “secret” (*tajne*), “confidential” (*poufne*) or “restricted” (*zastrzeżone*). Under section 5(2) of the Act, classified information is rated “secret” if its unauthorised disclosure would cause grave damage to the interests of the Republic of Poland.

41. Section 8 of the 2010 Act further provides as follows:

“[Rules for the protection of classified information]

Classified information which has been assigned a specific security classification:

(1) may only be disclosed to an authorised person in accordance with the provisions of [this] Act on access to a specific security classification.

(2) shall be processed under conditions preventing its unauthorised disclosure, in accordance with the provisions defining the requirements for secret registries, security of ICT systems, circulation of materials and physical security measures, as appropriate to the assigned security classification;

(3) shall be protected, as appropriate to the security classification assigned, using the security measures laid down in [this] Act and implementing regulations issued on the basis of it.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 7 TO THE CONVENTION

42. The applicant complained under Articles 6 and 13 of the Convention that he had not been afforded sufficient procedural safeguards and therefore had not been able to defend himself effectively in the proceedings initiated by the application to have him expelled from Poland on national security grounds. More specifically he alleged that: he had not been notified of the actual accusations against him, neither he nor his lawyer had been granted access to the case file during the domestic proceedings and the decision to expel him had been enforced immediately.

43. The Court, being master of the characterisation to be given in law to the facts of the case (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, §§ 113-15 and 126, 20 March 2018), finds it appropriate to examine the applicants’ allegations solely under Article 1 of Protocol No. 7 to the Convention (see *Muhammad and Muhammad v. Romania* [GC], no. 80982/12, § 90, 15 October 2020), which reads as follows:

“1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:

(a) to submit reasons against his expulsion,

(b) to have his case reviewed, and

(c) to be represented for these purposes before the competent authority or a person or persons designated by that authority.

2. An alien may be expelled before the exercise of his rights under paragraph 1 (a), (b) and (c) of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.”

A. Admissibility

44. The Court reiterates that the safeguards provided for by Article 1 of Protocol No. 7 apply only to aliens who are “lawfully resident” in the territory of a State which has ratified this Protocol (see *Georgia v. Russia* (I) [GC], no. 13255/07, § 228, ECHR 2014, and *Muhammad and Muhammad*, cited above, § 91). In the present case the applicant arrived in Poland in 2006 and was granted a permanent residence permit in view of his Polish origins (see paragraph 5 above). He was thus “lawfully resident” in Poland when the expulsion proceedings were initiated and Article 1 of Protocol No. 7 is therefore applicable *ratione materiae* in the present case.

45. The Court notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties’ submissions

(a) The applicant

46. Referring to *Muhammad and Muhammad* (cited above), the applicant submitted that the decision to expel him from Poland had not complied with the procedural requirements of Article 1 of Protocol No. 7 to the Convention. He maintained that he had never been informed of the reasons for his expulsion but only provided with a general statement. Even during the proceedings before the administrative courts, the substantive reason had not been communicated to him or his lawyer. In addition, he had not had a right to consult the documents in the file. He could not challenge the authorities’ statements to the effect that national security was at stake without knowing the facts which had led the domestic authorities to believe that he represented a threat to national security.

47. The applicant maintained that he had not been informed of the specific accusations against him or even the general context on which the expulsion had been based as the submissions which had initiated the proceedings had merely referred to intelligence materials to the effect that he had engaged in activities capable of endangering national security.

48. He further stated that his lawyer had asked for access to the case file on several occasions; however, to no avail. In addition, by the time of the

appeal proceedings the applicant had already been expelled and was in Belarus, so he had never been heard by the administrative courts which had decided on his appeal.

49. In the applicant's view the guarantee of his procedural rights had not been honoured. He had never been heard by an independent body and never questioned by the courts. It was true that he could have submitted written statements, but he had not had an opportunity to ask questions or to challenge the reasons for his expulsion.

50. It was true that he had been represented by a lawyer in the domestic proceedings, but that was only after his removal from Poland. Moreover, he had not been able to find a lawyer who held the relevant certification for accessing classified documents. Most importantly, the decision of 10 May 2013 refusing the applicant's lawyer access to the case file had not contained any reasons.

51. Lastly, the applicant noted that the reasoning in the judgments of the Warsaw Regional Court and the Supreme Administrative Court was very general. The courts had merely cited the relevant legal provisions and had not made any analysis of his individual situation.

(b) The Government

52. The Government noted at the outset that on 3 March 2006 the applicant had been granted a permanent residence permit for Poland in view of his Polish origins. Referring to *Chahal v. the United Kingdom* (15 November 1996, § 138, *Reports of Judgments and Decisions* 1996-V), the Government submitted that the Mazowiecki Governor's decision to revoke the applicant's residence permit and to expel him from Poland had been issued in accordance with provisions of domestic law, namely section 68(1) of the 2003 Act (see paragraph 31 above), and had been necessary in the interests of public order and national security.

53. The Mazowiecki Governor's decision to classify certain documents in the file as "secret" had been based on Article 74 § 1 of the Code of Administrative Procedure and section 8 of the 2010 Act (see paragraphs 37 and 41 above). The Government noted that in certain circumstances the classification of documents as "secret" was necessary for the proper conduct of proceedings, for reasons of national defence, security, or the protection of public safety.

54. The Government further pointed out that in his decision the Governor had explained in detail the reasons for revoking the applicant's residence permit with reference to the relevant legal provisions. It had been stressed that it followed from the evidence filed that the applicant's continued stay in Poland would threaten national security. Moreover, the applicant had had an opportunity to actively participate in the proceedings. He had consulted the case file on 6 and 13 February 2012 and submitted certain documents, including a request for the proceedings for revocation of his residence permit

to be struck out. Those documents had been then transferred to the Internal Security Agency, which had examined them but nevertheless confirmed its request to have the applicant expelled.

55. Moreover, the case was subsequently reviewed by the administrative courts. The Warsaw Regional Administrative Court examined the classified documents and held that in view of the information contained in them, the disputed decision had been correct. The Supreme Administrative Court had confirmed that reasoning and held that the applicant had obtained sufficient knowledge of the nature of the allegations made against him by the Internal Security Agency.

56. The Government also noted that, contrary to the case of *Lupsa v. Romania* (no. 10337/04, ECHR 2006-VII), in the case at hand all the relevant documents, including sensitive and classified material, had been carefully examined by the domestic administrative courts at both levels.

57. Lastly, the applicant had been able to participate throughout the administrative proceedings. The refusal to allow the applicant's lawyer to consult the classified part of the case file had been based on section 4(1) of the 2010 Act and also on the fact that the lawyer had not had the required certification to give a guarantee of secrecy and so had not met the conditions necessary to obtain access to classified information.

2. *The third-party intervener*

58. The Helsinki Foundation for Human Rights submitted that Polish law deprived aliens who were the subject of expulsion proceedings of access to classified documents in their case files. Such regulation disproportionately restricted their procedural guarantees, especially in view of other procedural rules applicable in expulsion proceedings (in particular, the immediate enforceability of decisions on expulsion for national security reasons).

59. In the intervener's opinion, aliens had to be made aware of the factual reasons underlying the expulsion so that they could make use of their procedural rights and in order for the proceedings to be consistent with the case-law of the Court of Justice of the European Union, with European Union legislation and with the United Nations standards in matters relating to the expulsion of aliens. The mere fact that the classified documents could be reviewed by the administrative courts did not mitigate all the negative consequences resulting from the lack of truly adversarial proceedings.

3. *The Court's assessment*

(a) **General principles**

60. The general principles are set out in the judgment *Muhammad and Muhammad* (cited above, §§ 125-57).

61. In that case the Court held in particular that Article 1 § 1 of Protocol No. 7 required that the aliens concerned be informed of the factual elements

which had led the domestic authorities to consider that they represented a threat to national security, and also that they be given access to the content of the documents and the information in the case file on which those authorities had relied when deciding on their expulsion (*ibid.*, § 129, and *Hassine v. Romania*, no. 36328/13, § 51, 9 March 2021).

62. The Court further stated that any limitations of the rights in question should not negate the procedural protection guaranteed by Article 1 of Protocol No. 7 by impairing the very essence of the safeguards enshrined in this provision. Even in the event of limitations, the alien should be offered an effective opportunity to submit reasons against his expulsion and should be protected against any arbitrariness. The Court should therefore first ascertain whether the limitations of the alien's procedural rights had been found to be duly justified by the competent independent authority in the light of the particular circumstances of the case. The Court would then examine whether the difficulties resulting from those limitations for the alien concerned were sufficiently compensated for by counterbalancing factors. Thus, only limitations which, in the circumstances of each case, were duly justified and sufficiently counterbalanced would be permissible in the context of Article 1 of Protocol No. 7 (see *Muhammad and Muhammad*, § 133, and *Hassine*, § 52, both cited above).

63. The less stringent the examination by the national authorities of the need to place limitations on the alien's procedural rights, the stricter the Court's scrutiny of the counterbalancing factors would have to be (*ibid.*, § 145). In its assessment, the Court would be guided by two basic principles: the more the information available to the alien was limited, the more the safeguards would be important, in order to counterbalance the limitation of his or her procedural rights; where the circumstances of a case showed that there would be particularly significant repercussions for the alien's situation, the counterbalancing safeguards had to be strengthened accordingly (see *Muhammad and Muhammad*, § 146, and *Hassine*, § 53, both cited above).

64. The elements that could sufficiently compensate for the limitations on the alien's "procedural rights" were: the relevance of the information disclosed to the alien as to the grounds for his or her expulsion and the access provided to the content of the documents relied upon; disclosure to the alien of information as to the conduct of the proceedings and the domestic mechanisms in place to counterbalance the limitation of his or her rights; and finally, whether the alien was represented and whether an independent authority was involved in the proceedings (see *Muhammad and Muhammad*, §§ 147-56, and *Hassine*, § 54, both cited above).

65. Lastly, the Court pointed out that compliance with Article 1 § 1 of Protocol No. 7 did not necessarily require that questions as to all the above-mentioned matters should be answered cumulatively in the affirmative. The assessment of the nature and extent of the counterbalancing factors to be implemented might vary depending on the circumstances of a

given case. In each case the Court would be required, in the light of the proceedings as a whole, to determine whether the very essence of the rights secured to the alien by Article 1 § 1 of Protocol No. 7 had been preserved (see *Muhammad and Muhammad*, § 157, and *Hassine*, § 54, both cited above).

(b) Application to the present case

(i) The limitation of the applicant's procedural rights

66. Turning to the facts of the present case, the Court notes that in the decision of 16 March 2012 the Mazowiecki Governor held that the applicant's continued stay in Poland would constitute a threat to the State's defence or national security. The decision also noted in general that the applicant had collaborated with the Belarusian secret services. No further reference was made to the factual elements of the case or any additional reasons (see paragraph 14 above). However, as subsequently confirmed by the domestic authorities (see paragraphs 17 and 20 above), further reasons could not have been provided because of the need to protect national security.

67. With regard to the applicant's right to be informed of the content of the documents and information in the case file on which the case against him was based, the Court observes that following the Governor's decision to classify certain documents as secret (see paragraph 10 above), which had been issued at the start of the proceedings, the applicant, and subsequently his lawyer, could not access those documents. This clearly entailed a significant limitation of the applicant's right to be informed of the factual circumstances and the content of the documents underlying both the application for his expulsion submitted by the head of the Internal Security Agency and the domestic authorities' decision to order his removal from Poland (compare *Muhammad and Muhammad*, cited above, § 160).

68. The Court further observes that the parties disagreed as to whether the applicant could have consulted the case file on 6 and 13 February 2012. The Government maintained that the applicant had examined the file on those dates. At the same time the applicant argued that he had not been able to have access to the whole file and had only received the Governor's statement (see paragraphs 8, 9, 11 and 12 above). In turn, the Warsaw Regional Administrative Court merely stated that the applicant had consulted the case file on 6 February 2012 and had access to the Internal Security Agency's request of 23 January 2012 (see paragraph 21 above). However, as noted by the same court, this request was not a classified document (see paragraph 20 above). Although the Court does not have a sufficient basis to call into question the finding made by the Warsaw Regional Administrative Court, it does not, as such, adequately convey in the Court's view whether the applicant had been effectively able to consult the whole case file on 6 February 2012.

69. It remains for the Court to establish whether the limitations of the applicant's procedural rights were necessary and whether counterbalancing measures were put in place by the national authorities to mitigate those limitations, before assessing the concrete impact of the limitations on the applicant's situation in the light of the proceedings as a whole (*ibid.*, § 161, and *Hassine*, cited above, § 56).

(ii) Whether the limitations of the applicant's procedural rights were duly justified

70. The Court notes that in their decisions refusing the applicant access to the case file, the domestic authorities referred to national security and relied on the fact that certain documents were classified. However, no further reasons were given, and no additional explanation was provided (see paragraphs 19, 24 and 28 above). In the Court's view it does not appear that the domestic authorities carried out any examination of the need to limit the applicant's procedural rights and to decline to disclose the classified information to him. The nature of the national security reasons which precluded the disclosure of the classified material concerning the applicant was not in any way clarified by the national authorities. The most recent refusal of access to classified documents, by the Warsaw Regional Administrative Court, did not even contain any reasons (see paragraph 28 above).

71. Consequently, in the absence of any examination by the domestic authorities of whether it was necessary to limit the applicant's procedural rights, the Court must exercise strict scrutiny in order to establish whether the counterbalancing factors put in place were capable of effectively mitigating those limitations (see *Muhammad and Muhammad*, § 165, and *Hassine*, § 57, both cited above, and the general principles cited in paragraph 63 above).

(iii) The existence of counterbalancing factors in the present case

72. The Court observes that a number of factors must be taken into consideration in its examination of whether the applicant's rights were upheld in the present case. Among other considerations, the Government pointed out that: the Governor had explained the reasoning for revoking the applicant's residence permit in his decision; the applicant had had an opportunity to participate in the proceedings and had been represented by a lawyer; he had examined the case file on 6 and 13 February 2012; he had had the opportunity to file documents and make statements; and, above all, his case had been reviewed by the administrative courts, which had decided that the expulsion was necessary in the light of the classified documents (see paragraphs 53-56 above).

73. In this connection, the Court observes that the applicant was notified that the Internal Security Agency had initiated the proceedings (see paragraph 7 above). However, in the application in question the

applicant's conduct was described in very general terms – collaboration with the Belarusian secret services – without any mention of the specific activities which he had allegedly undertaken (see paragraph 6 above). No further accusations against the applicant were stated. During the appeal proceedings the domestic authorities and courts merely repeated the same reasons, but no further factual grounds or details were given. Thus, in the Court's view the information provided to the applicant in the context of the proceedings was not a factor capable of counterbalancing the limitation of his procedural rights (compare *Muhammad and Muhammad*, cited above, § 177).

74. With regard to the applicant's participation in the proceedings, the Court notes that he was expelled from Poland on 20 March 2012, four days after the Governor's decision had been issued (see paragraph 5 above). This fact inevitably had an impact on his ability to plead his case before the Polish authorities. While the applicant was indeed subsequently represented by a lawyer, the lawyer chosen by him did not have access to the classified documents in the file.

75. The Court observes that the domestic authorities merely noted that the applicant's lawyer did not have the required security clearance to access the classified documents (see paragraphs 19, 26 and 27 above). However, the applicant was not provided with any further information on how to access the documents in the file or a list of the names of lawyers who held the relevant security clearance (compare *Muhammad and Muhammad*, cited above, §§ 185 and 186).

76. In view of the above, the Court finds that, having regard to the specific nature of the proceedings and the fact that by that time the applicant had already left Poland, he was not afforded an effective opportunity to secure representation by a lawyer.

77. In the light of the foregoing, the Court finds that the applicant's representation was not sufficiently effective to be able to counterbalance, in a significant manner, the limitations affecting the applicant in the exercise of his procedural rights.

78. The Court further observes that while the initial decision on the revocation of the applicant's residence permit and his expulsion was given by an administrative authority – the Mazowiecki Governor – and subsequently upheld by the Office for Foreigners (see paragraphs 14 and 17 above), it was subject to judicial review by the administrative courts (see paragraphs 19 and 23 above). The relevant administrative courts enjoyed the requisite independence within the meaning of the Court's case-law, and this has not been questioned by the applicant. The Court also attaches particular weight to the fact that the proceedings took place before the superior courts in the hierarchy of the Polish legal system; the Supreme Administrative Court is in fact the highest judicial authority in administrative cases. In the Court's view, those are significant safeguards which should be taken into account in the assessment of the factors capable of mitigating the effects of the limitations

imposed on the applicant's enjoyment of his procedural rights (compare, *Muhammad and Muhammad*, cited above, § 193).

79. However, even in those judicial proceedings, given the scarce and unspecific information available to him, the applicant could not effectively challenge the authorities' statements that national security was at stake. Moreover, as pointed out by the applicant, the domestic courts gave very general reasons for their conclusions.

(iv) Conclusion as to compliance with Article 1 of Protocol No. 7 in the present case

80. The Court finds that in the present case the applicant was subjected to significant limitations in the exercise of his right to be informed of the factual elements underlying the decision to expel him and of his right to have access to the content of the documents and the information relied on by the authority which made that decision. However, in view of the above considerations, it does not appear that the need for such limitations was examined and identified as duly justified by an independent authority at domestic level. The Court is therefore required to exercise strict scrutiny of the measures put in place in the proceedings against the applicant in order to counterbalance the effects of those limitations, for the purposes of preserving the very essence of his rights under Article 1 § 1 of Protocol No. 7 (see paragraph 63 above).

81. The Court would observe in that connection that the applicant received only very general information about the accusations against him, while no specific actions by him which allegedly endangered national security could be seen from the file. Nor was he provided with any information about the possibility of accessing the documents in the file through a lawyer with the required security clearance. Given that at the relevant time the applicant had already been expelled to Belarus it made it very difficult for him to plead his case. Furthermore, the fact that the final decision was taken by independent judicial authorities at a high level does not suffice to counterbalance the limitations that the applicant sustained in the exercise of his procedural rights.

82. In conclusion, having regard to the proceedings as a whole and taking account of the margin of appreciation afforded to States in such matters, the Court finds that the limitations imposed on the applicant's enjoyment of his rights under Article 1 of Protocol No. 7 were not counterbalanced in the domestic proceedings such as to preserve the very essence of those rights.

83. There has accordingly been a violation of Article 1 of Protocol No. 7 to the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

84. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

85. The applicant claimed 15,000 euros (EUR) in respect of pecuniary and non-pecuniary damage.

86. The Government contested this claim.

87. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. However, it awards the applicant EUR 6,500 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

88. The applicant also claimed EUR 1,640 for the costs and expenses incurred before the Court.

89. The Government considered the claims to be excessive.

90. According to the Court’s case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 1,640 for the proceedings before it, plus any tax that may be chargeable to the applicant.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 1 of Protocol No. 7 to the Convention;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

- (i) EUR 6,500 (six thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 1,640 (one thousand six hundred and forty euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 22 June 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Liv Tigerstedt
Deputy Registrar

Marko Bošnjak
President