

## **Summary: Judgment of the Supreme Administrative Court of 13 March 2018, II OSK 1969/17**

Control of the legality of foreigners' stay - international protection - Regulation No 604/2013 (Dublin III) - transfer of a foreigner to another EU country - foreigner's obligation to return - prohibition on re-entry into the territory of Poland and other Schengen States - refusal to determine that a decision is invalid - flagrant breach of law - Direct application of EU law - principle of effectiveness of EU law

The case concerned a foreigner - a Syrian citizen who in August 2015 was detained on the southern border of Poland by the border guard authorities. As a result of the inspection, it was found that he did not have a valid travel document nor a document entitling him to enter and stay on the territory of Poland. In these circumstances, the competent border guard authority initiated the proceedings to oblige the foreigner to return. In the course of the proceedings it was established that the data of the foreigner had been entered in EURODAC system by the Hungarian authorities. Therefore, the Head of the Office for Foreigners requested the Hungarian side to take over the foreigner, in line with the DUBLIN III Regulation. Due to the lack of reply, he informed the Hungarian side that, pursuant to Article 25(2) of the DUBLIN III Regulation, the Hungarian side had become responsible for examining the application for international protection. Subsequently, the border guard authority issued a decision obliging the foreigner to return and prohibiting re-entry into the territory of Poland and other Schengen Member States for a period of 3 years, indicating as the legal basis the provisions of the Polish Act on Foreigners (Article 302(1)(1) and (10)). At the same time, in view of the fact that the foreigner is to be surrendered to the Hungarian side, the authority regarded that there were no grounds for examining the criteria for granting to the foreigner a residence permit for humanitarian reasons or a permit for tolerated stay. This decision became final.

After being surrendered in December 2015 to another EU Member State, the foreigner applied for the determination that the said decision was invalid (pursuant to Article 156(1)(2) of the Code of Administrative Proceedings - issuing a decision without a legal basis or with a flagrant breach of law). The Head of the Office for Foreigners refused to determine that the said decision obliging the foreigner to return was invalid. The first instance court dismissed the appeal against the decision, indicating that the authorities had legitimately held that there were no grounds for determining that the return decision was invalid.

SAC granted the cassation appeal against the judgment of the first instance court, recognising that the issued decision obliging the foreigner to return was issued in flagrant violation of law. SAC held that in the subject case, the relevant provisions of the Act on Foreigners (Article 302(1)(1) and (10) in conjunction with the provisions of the Dublin III Regulation (Articles 24-26) were misinterpreted, assuming that the provisions of the domestic act apply, not those of the EU Regulation. SAC explained that the return decision was issued in flagrant violation of law on the grounds that the applicable provisions did not allow the authority to waive the obligation to consider whether the criteria for granting a residence permit for humanitarian reasons or a permit for tolerated stay (Articles 348 and 351 of the Act on Foreigners) were not met in the case - only because the party was to be transferred to another Member State under the Dublin III procedure. SAC stressed that, although the negative premise for initiating the proceedings in the matter of obliging the foreigner to return in the event of their transfer to another Member State under the Dublin III procedure was introduced (November 2015) into the Act on Foreigners only after the border guard authority issued a return decision, this regulation is binding in its entirety and directly applicable in the Member States. This means that the absence of relevant provisions in the national legal order did not release the authority from the duty to act in accordance with the EU Regulation. SAC, taking into account recital 8 of the preamble to Directive 2008/115/EC and the principle of effectiveness of EU law, concluded that a foreigner who has lodged an application for international protection and has been surrendered under the Dublin procedure to another Member State cannot be subject to a return decision until a negative decision on the application enters into force.