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## **Poland - Ruling of the Supreme Administrative Court from 2 June 2016 II OSK 2380/14 quashing the ruling of the Voivodeship Administrative Court and dismissing the complaint against a return decision**

**Country of Decision:**

Poland

**Date of Decision:**

02-06-2016

**Citation:**

II OSK 2380/14

**Court Name:**

Supreme Administrative Court

**Keywords:**

Freedom of movement (right to)

Residence document

Return

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**Headnote:**

Internal borders of the EU Schengen zone can be crossed without submitting persons to any border control. However it does not mean that a third country national is not subject to any requirements while crossing the border. Interpretation of the Schengen Border Code, the Convention applying the Schengen Agreement and the Law on Foreigners leads to a conclusion that the third country national should hold a passport and a residence card while crossing the border. Holding these documents beyond doubt means possessing them, ie carrying them.

**Facts:**

A third country national travelled from Poland to Germany and while crossing the border he did not carry his residence card, which he had been issued and which was valid during the incident. On this basis he was given a return decision by the Lubuski Voivode. Then the third country national

submitted a request to the Head of the Office for Foreigners to invalidate this decision as flagrantly violating the law. The Head of the Office for Foreigners refused to do it. The authority claimed that the third country national should have had his passport and a residence card with him while crossing the border, otherwise he crosses the border illegally, which is a basis to issue a return decision. The third country national asked for this decision to be reconsidered but the Head of the Office maintained it.

He then submitted a complaint to the Voivodeship Administrative Court and stated that he had a right to cross the internal border of the EU because he had been issued a residence card and the relevant legal provisions do not directly oblige him to possess it while crossing the border. The Voivodeship Administrative Court quashed both decisions of the Head of the Office for Foreigners, in favour of the third country national. The authority submitted a cassation complaint to the Supreme Administrative Court claiming that their refusal to invalidate the decision on return was justifiable under the Schengen Border Code. The Supreme Administrative Court quashed the ruling of the Voivodeship Administrative Court and dismissed the complaint.

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### **Decision & Reasoning:**

The Supreme Administrative Court decided to grant the cassation complaint submitted by the Head of the Office for Foreigners. The Supreme Administrative Court found material law allegations admissible and justifiable.

The subject of the control of the Head of the Office for Foreigners was the decision of the Lubuski Voivode, which ordered a return of a third country national. Under the Law on Foreigners, a third country national should be returned if they crossed or attempted to cross the border breaching the law. This provision does not state in which direction the border should be crossed, so it should be applicable to all crossings of the Polish border (whether travelling to Poland and out of Poland).

There was also a breach of law during this border crossing. Internal borders of the EU Schengen zone can be crossed without submitting persons to any border control. However it does not mean that a third country national is not subject to any requirements while crossing the border. Interpretation of the article 5(1a) and article 21 of the Convention applying the Schengen Agreement leads to a conclusion that the third country national should hold a passport and a residence card while crossing the border. Holding these documents beyond doubt means possessing them, ie carrying them. It means that the statement of the Voivodeship Administrative Court that the rights related to holding a residence card are not dependent on carrying it are unjustifiable.

It is worth noting that the Law on Foreigners names crossing the border illegally as breaching the law and not 'without relevant entitlements?'. The justification of the judgement of the lower instance seems to elaborate on the latter term.

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### **Outcome:**

The return decision is still in force.

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### **Observations/Comments:**

The Helsinki Foundation for Human Rights was involved in this case and the HFHR lawyer Jacek Bialas represented the applicant in courts.

The Court dismissed the statements made in the response to the cassation complaint proving that

article 21 of the Schengen Border Code distinguishes two notions: 'to hold' the documents and 'to carry' them and that article 21 of the Convention applying the Schengen agreement refers to 'holding' the documents, not necessarily 'carrying' them. The Law on Foreigners only defines that the residence card entitles the individual to cross the border without the need to obtain a visa. There is no provision imposing an obligation to carry it.

**Other sources cited:**

Article 2 point 5 of the Schengen Border Code.

Article 5(1a) and Article 21 of the Convention applying the Schengen agreement.

**National / Other Legislative Provisions:**

[Poland - Law of 12 December 2013 on Foreigners - Article 88\(1\) point 6 242 \[1\]](#)

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**Links:**

[1] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/poland-law-12-december-2013-foreigners-article-881-point-6-242>