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za pośrednictwem:  
**Wojewódzkiego Sądu Administracyjnego**  
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**Case Nr : II OSK 2315/20**

**Request to intervene as a third-party in the proceedings concerning case II OSK  
2315/20**

In accordance with Article 33 § 2 in conjunction with Article 25 § 4 of the Act of August 30, 2002, Law on Proceedings Before Administrative Courts, the European Council on Refugees and Exiles (ECRE) respectfully requests permission to intervene in the proceedings in the case II OSK 2315/20 regarding the complaint of N. M.

We appoint the Head of Legal Support of Litigation, Julia Zelvenska, an employee of the European Council on Refugees and Exiles (ECRE), to represent ECRE in the proceedings related to case II OSK 2315/20 before the Supreme Administrative Court of Poland.

**I. Substantiation of the request to intervene.**

1. In accordance with Article 33 § 2 in conjunction with Article 25 § 4 of the Act of August 30, 2002, Law on Proceedings Before Administrative Courts, the European Council on Refugees and Exiles (ECRE), as a social and non-profit organization, may request leave to intervene in judicial proceedings as a third party in a case concerning the legal interest of another person, if the case falls within the scope of its statutory activity.
2. The European Council on Refugees and Exiles (ECRE) is an international alliance of 107 non-profit social organisations across 40 European countries, including Poland, working together to protect and advance the rights of refugees, asylum applicants and the other displaced persons
3. The statutory objectives of ECRE include the legal analysis and judicial engagement (§ 3(1)(b) of the Statute of the European Council on Refugees and Exiles), carried out, *inter alia*, by performing any lawful activities as are incidental or conducive to or necessary for the attainment of the above purposes (§3(2)(u) of the Statute).

4. To fulfil our statutory objectives ECRE, *inter alia*, engages in legal research and training on the application and interpretation of EU law and relevant international human rights instruments in order to promote and protect the rights of the displaced.
5. ECRE also coordinates the European Legal Network on Asylum (ELENA), a forum of over 500 asylum and migration lawyers in 38 European countries including Poland, representing numerous asylum and migration cases across Europe, and providing legal assistance to the displaced. ECRE supports ELENA lawyers by providing them with legal argumentation concerning the matters of EU and international human rights law and relevant jurisprudence by national and European Courts. The latter is carried out through collecting over 1000 decisions, including by the courts in Poland, via the European Database of Asylum Law (EDAL), managed by ECRE.
6. Moreover, one of the key activities in order to fulfil ECRE's statutory aims is strategic litigation and legal support. This activity is dedicated to intervening and otherwise supporting cases related to asylum, detention, family reunification and reception of the displaced in Europe, and following up on the implementation of the judicial decisions. Ensuring access to legal assistance and effective remedies to the displaced is one of the main priorities of ECRE and the ELENA lawyers over the last 10 years.
7. ECRE has already successfully intervened in over 30 cases before the national and European Courts as well as UN Treaty Bodies. Our interventions included an intervention before the Czech Constitutional Court in case 4 Azs 115/2014 – 40; an intervention before the Italian Council of State in case 04809/2019; interventions before the ECtHR in *M.A. and Others v. Poland*, Application no. 42902/17; *Bilalova v Poland*, Application no. 23685/14; *Ilias and Ahmed v. Hungary* (no. 47287/15); *Al H. and others v. Greece*, Application Nos. 4892/18 and 4920/18. We also filed numerous submissions to the Council of Europe's Committee of Ministers regarding the implementation of decisions by the European Court of Human Rights (ECtHR) and a collective complaint no 173/2018 against Greece to the European Committee on Social and Economic Rights (ECSR).
8. The present case II OSK 2315/20 falls within the priorities of ECRE as it concerns access to legal assistance and effective remedies of a displaced person in detention in Poland. The case also concerns the implementation and interpretation of EU law provisions related to effective remedies, the right of defence and the legal assistance.
9. In the opinion of ECRE, as long as legal aid is unavailable in the return proceedings, holding third-country nationals strictly to a 14-day time limit for appealing against a return decision will never be compatible with EU law when the individuals in question lack sufficient resources to fund their own legal representation during that timeframe – and especially where they have previously been granted international protection. ECRE also opines that in line with the well-established case law of the Court of Justice of EU, the questions of the interpretation of EU law raised in the present case, in particular, concerning whether EU law obliges legal aid to be provided to third-country nationals in the identified circumstances, need to be referred to the Court of Justice of EU.
10. Therefore, ECRE considers that it is in the public interest, as well as in the interest of the applicant in the present case, that ECRE participates in the proceedings before the Supreme Administrative Court in order to advance the application of legal principles raised by the applicant in consistence with the Poland's obligations under EU law and the fundamental rights. The participation of ECRE in the proceedings in question is also important from the point of view of shaping the jurisprudence concerning access to legal aid, the right to defence and effective remedies against the negative decisions in the area

of migration in accordance with EU and international law standards. ECRE wishes to assist the Court by putting before it the following argumentation:

- (a) arguments related to the fundamental importance of legal aid as a prerequisite to access to the effective remedies against decisions capable of negatively affecting the fundamental rights of the third-country nationals previously granted international protection, in particular, under EU law;
- (b) arguments relating to the compliance of a 14-day time limit to appeal against a return decision in the absence of legal aid, in particular under EU law;
- (c) arguments related to the need to refer questions raised by the present case to the Court of Justice of EU, under EU and international law.

The short description of the proposed arguments is provided below.

- 11. For all of the above reasons, ECRE respectfully requests the Supreme Administrative Court's permission to intervene as a third party or amicus curiae in these proceedings, and in that capacity to advance the points of principle identified in the present submission.**

## **II. Proposed arguments**

### **The relevant legislative framework**

12. Article 47 of the Charter of Fundamental Rights of the European Union ("the EU Charter")<sup>1</sup> provides that everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Those conditions include the requirement that everyone shall have the possibility of being advised, defended and represented; and the requirement that legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.
13. Article 13 of Directive 2008/115/EC ("the Returns Directive")<sup>2</sup> obliges EU Member States bound by the Directive, including Poland, to afford third-country nationals an effective remedy to appeal against or seek review of decisions requiring their expulsion or departure from their territory. It provides that that remedy must lie before a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence. The same article specifies that this effective remedy must include the possibility of obtaining legal advice, representation and where necessary linguistic assistance, and obliges EU Member States including Poland to ensure that the necessary legal assistance and/or representation is granted in accordance with relevant national legislation or rules regarding legal aid. These provisions specify, by reference to the Directive 2013/32/EU (Asylum Procedures Directive),<sup>3</sup> conditions to which

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<sup>1</sup> Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012.

<sup>2</sup> 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, OJ L 348, 24.12.2008.

<sup>3</sup> 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, OJ L 180, 29.6.2013.

EU Member States, including Poland may lawfully subject entitlement to such free legal assistance and/or representation, including that it only be available in first instance appeals, and that it only be available to those who lack sufficient resources.

14. The Polish legal framework makes third country nationals' access to an appeal against a return decision before a court of law (where legal aid may be available) conditional upon the third country national first exhausting a prior appeal to the Head of the Office for Foreigners, with no possibility of legal aid, and with a time limit of 14 days from being served with the decision in which to lodge that prior appeal. ECRE understands that the same national legal framework permits the time-limit to be extended beyond 14 days if the third country national failed to meet it through no fault of his own.

### **The key issue of substantive legal principle addressed in the case II OSK 2315/20**

15. The present case raises an issue of fundamental and general legal importance:  
*Is it appropriate or indeed permissible for the Polish courts to hold a third-country national strictly to a 14-day time-limit for appealing to the Head of the Office for Foreigners against a return decision, when he lacked sufficient resources to pay for legal advice and representation in the absence of legal aid, and the effect of holding him to the 14-day time-limit is to exclude his ability to pursue an onward appeal against the return decision before an independent court of law?*
16. **ECRE respectfully submits that, as a matter of principle, holding a third-country national strictly to a 14-day time-limit for appealing in such circumstances is neither appropriate nor permissible.** In particular, the strict application of a national procedure under which there is hardly any possibility of legal aid, when the effect is to exclude access to review of a return decision by an independent court or tribunal where legal aid may be available, would conflict with the aforementioned requirements of article 13 of the Returns Directive and article 47 of the EU Charter, and will undermine the effectiveness of EU law.
17. The objective of the right to legal aid in this context is to enable foreign nationals to understand the return decision itself; to assess with the benefit of independent legal advice the decision's legality and whether there are legitimate grounds for appealing it; and if there are such, to understand what they are and how best they should be framed. Access to the independent legal advice afforded by legal aid may also be necessary in practice for a foreign national to properly understand both the method by which an appeal must be submitted in order for it to be considered to have been validly lodged, and the time-limit for appealing – not merely when the time starts and ends, but also whether it is a fixed time-limit or a time-limit capable of extension, and if so on what grounds and in what circumstances it may be extended. Moreover, the presence or absence of legal aid can be determinative of the speed with which an individual's appeal can realistically be drafted and lodged: as a matter of principle, it cannot be assumed that a third-country national attempting to represent himself in Polish proceedings without any legal assistance could draw up and lodge properly conceived appeal documents at a speed that remotely approaches the speed at which a qualified Polish lawyer would do so on his behalf. **In all**

**of these respects, legal aid serves a fundamentally important function under the rule of law: not only does it safeguard the individual's right to an effective remedy against a return decision whose legality has not yet been tested and may be in dispute; it also safeguards the efficiency of the intended appeal proceedings, in the interests of all concerned parties and of the prospective appeal bodies themselves.**

18. Moreover, the fact that third country nationals might be able to meet such a time-limit with the benefit of legal aid in no way means that they should be treated as capable of meeting such a time-limit when legal aid is unavailable and they lack legal assistance. Equally, as a matter of principle, the fact that foreign nationals may in fact attempt to submit an appeal document outside of the 14-day time-limit cannot in and of itself be taken as an indicator that they could have duly lodged, or should be expected to have duly lodged, a valid appeal within the 14 day time limit, if at all times they had no choice but to act in person without the benefit of duly qualified legal advice, assistance and representation.
19. Finally, ECRE particularly wishes to emphasise the importance in practice and principle of the right to an effective remedy and the rights of the defence as they relate – specifically – to decisions requiring an individual's expulsion or departure from the territory of the decision-making state. The impacts of such decisions on the legal status and rights of the individual concerned are so great, and the potentially irrevocable consequences for him can in principle be so considerable, that there is a particularly strong need to ensure that his right to an effective remedy against such a decision and the rights of the defence are fully guaranteed in practice.<sup>4</sup> This is particularly the case for foreign nationals whom Poland has previously granted international protection: that is to say, persons whom Poland has previously recognized as being at real risk of ill-treatment upon return to their country of origin. The fact that such international protection status has been the subject of a cessation decision, as again ECRE understands is true in the present case, does not and cannot in and of itself mean that a subsequent return decision is lawful or appropriate. This is because cessation decisions do not answer the quite separate question of whether a proposed return decision would violate the absolute principle of non-refoulement as guaranteed by article 3 of the European Convention on Human Rights ("ECHR") and articles 4 and 19(2) of the EU Charter,<sup>5</sup> and because return decisions which would violate those principles of non-refoulement are absolutely prohibited and unlawful<sup>6</sup>.
20. In this context, it must be borne in mind that as both an EU Member State and party to the ECHR, Poland and its authorities and courts are under a continuing obligation, up to the point that removal is in fact effected, not only to carry out a full, *ex nunc* assessment of whether expulsion from Poland would violate the principle of non-refoulement enshrined in

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<sup>4</sup> *Mutatis mutandis*, the CJEU judgment in *G. and R.*, C-383/13 PPU, EU:C:2013:533, 10 September 2013, para. 35

<sup>5</sup> See the judgments of the CJEU in C-542/13, *M'Bodj*, ECLI:EU:C:2014:2452, 18 December 2014, and C-562/13, *Abdida*, ECLI:EU:C:2014:2453, (same date) which together clarify that circumstances may mean that an individual's expulsion or return would violate the principle of non-refoulement, even where they do not entitle that person subsidiary protection status. See also case C-391/16 *M*, ECLI:EU:C:2019:403, 14 May 2019, where the Grand Chamber of the CJEU confirmed the analogous principle that even where a member state is entitled to deny or revoke an individual's refugee status, this does not of itself mean that that individual's expulsion would not violate the principle of non-refoulement. The same principles must apply in respect of cessation decisions and subsidiary protection.

<sup>6</sup> See the above case law and also e.g. article 5 of the Returns Directive.

those fundamental rights instruments<sup>7</sup> but also to guarantee individuals due process and an effective remedy in respect of that issue.<sup>8</sup> Inherent to that procedural protection and that right to an effective remedy is a fundamental right to effective legal aid.<sup>9</sup> Those principles, established as inherent to the protections of article 3 ECHR in expulsion cases, apply equally as part of the content of protections flowing from articles 4 and 19(2) of the EU Charter in cases of threatened expulsion or return, by virtue of article 52(3) of the EU Charter.<sup>10</sup>

21. The final consideration of which ECRE wishes to reiterate concerns the approach to potential conflicts between national legal provisions and individual's rights, or EU Member States obligations, under EU law. It is a long-established, fundamental principle that, when applying domestic law, national courts must as far as possible interpret it in a way which accords with the requirements of EU law<sup>11</sup>. Thus, the national provisions that enable the extension of the usual 14-day time-limit for appealing to the Head of the Office for Foreigners where an individual missed it "through no fault of his own" must be interpreted in a way that ensures Poland's compliance, in practice, in the individual case with the obligations to guarantee an effective remedy and the right of the defence supported by legal aid under article 13 of the Returns Directive and article 47 of the EU Charter. However, if the national court considers that national law cannot be interpreted or apply the national provisions in way that ensures the full compliance in practice with the requirements of EU law, it is equally well-established that the national courts must disapply any national provision insofar as its application would, in the circumstances of the case, lead to a result contrary to EU law.<sup>12</sup> On that footing, the national courts would be obliged to disapply the 14-day time-limit for appealing to the Head of the Office for Foreigners against a return decision whenever its application would, in the individual case, lead to a violation of article 13 of the Returns Directive or article 47 of the EU Charter.
22. For the reasons stated above, **ECRE respectfully submits that, as a matter of principle, as long as legal aid is unavailable in such proceedings, holding third-country nationals strictly to a 14-day time limit for appealing against a return decision will never be compatible with EU law when the individuals in question lack sufficient resources to fund their own legal representation during that timeframe – and**

<sup>7</sup> See e.g. judgment of European Court of Human Rights in *F.G. v. Sweden* [GC] no. 43611/11, 23 March 2016 generally and in particular §§ 115 and 154-6.

<sup>8</sup> See e.g. judgments of European Court of Human Rights in *Abdolkhani and Karminia v. Turkey*, no. 30471/08, 22 September 2009, § 111-117; *Hirsi Jamaa and others v. Italy* [GC], no. 27765/09, 23 February 2012, § 198; and *Tarakhel v. Switzerland* [GC], no. 29217/12, 4 November 2014 § 126.

<sup>9</sup> See e.g. judgment of European Court of Human Rights in *M.S.S. v. Belgium v. Greece*, no. 30696/09, 21 January 2011, § 319.

<sup>10</sup> "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

<sup>11</sup> See e.g. CJEU, C-106/89, *Marleasing*, ECLI:EU:C:1990:395, 13 November 1990, para. 8, and C-165/91, *van Munster*, ECLI:EU:C:1994:359, 5 October 1994, para. 34.

<sup>12</sup> See e.g. CJEU, C-106/77, *Simmmenthal*, ECLI:EU:C:1978:49, 9 March 1978, para. 24. For confirmation, specifically, that this principle requires the disapplication of a national time-limit for an administrative appeal which would exclude or undermine an individual's right to an effective remedy under an EU Directive, see e.g. case C-406/08, *Uniplex*, ECLI:EU:C:2010:45, 28 January 2010.

**especially where they have previously been recognized as refugees or as being in of subsidiary protection.**

**The need to refer the applicant's questions to the Court of Justice of the EU.**

23. ECRE notes that the appellant has requested that the Supreme Administrative Court refer two questions of EU law to the Court of Justice of the EU. Without repeating those questions here, ECRE respectfully asks to make the following submissions as to the issues of principle raised by the appellant's request.

24. As is now well-established in the case law of the Court of Justice of the EU, there are only three, strictly limited exceptions from the Supreme Administrative Court's obligation, under the third paragraph of article 267 of the Treaty on the Functioning of the EU ("TFEU"), to refer these questions as the national court of last instance in these proceedings. In particular, in 283/81 *CILFIT*<sup>13</sup> the CJEU held that a court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of EU law is raised before it, to comply with its obligation to bring the matter before the Court, unless it has established:

24.1. that the answer to the question raised can in no way affect the outcome of the case (para. 10, the irrelevance doctrine).

24.2. that previous decisions of the CJEU have already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those decisions, and regardless of whether the questions at issue are strictly identical or not (para. 14, the so-called "acte éclairé" doctrine).

24.3. that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved (para. 16, the so-called "acte claire" doctrine).

25. For the reasons given in the main part of this submission above, it cannot be said that the answers to the questions which the appellant asks the Supreme Administrative Court to refer to the Court of Justice of the EU are in no way capable of affecting the outcome of the case. That being so, the Supreme Administrative Court is obliged to refer each question raised by the appellant unless it falls within the acte éclairé doctrine or the acte claire doctrine.

26. The Court of Justice, to ECRE's knowledge, has not dealt directly in any previous decision with the points of EU law raised in or underpinning the first question of EU law advanced by the appellant for referral (concerning whether EU law confers a right on third-country nationals, upon request, to free legal aid in order to draw up an appeal against a return decision in the circumstances identified in the question) and this question therefore does not fall within the acte éclairé doctrine.

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<sup>13</sup> CJEU, *Cilfit and Others*, 283/81, EU:C:1982:335, 6 October 1982.

27. By contrast, if the second question advanced by the appellant for referral is to be understood as essentially asking whether EU law obliges national courts where possible to interpret national law so as to extend the 14-day time-limit for lodging appeals against return decisions so far as this is required by EU law, but otherwise to disapply the application of that 14-day time-limit if its application would conflict with Poland's obligations under EU law, then ECRE recognizes that the Supreme Administrative Court may consider that that question falls within the *acte éclairé* doctrine (the answer to it being "yes" on both fronts): see paragraph [21] and footnotes [11] and [12] above, which refer by way of example to the judgments of the Court of Justice of the EU in *Marleasing*, *van Munster*, *Simmenthal*, and *Uniplex*.
28. As to the final *CILFIT* criterion (*acte claire*), the Court of Justice in a series of cases has set out clear principles as to the very limited circumstances under which a national court of last instance is permitted to conclude that the *acte claire* doctrine applies to a question of EU law. In *CILFIT* itself, the Court stressed (para. 16) that a national court is not permitted to conclude that the *acte claire* doctrine applies to a question of EU law unless it is "*convinced that the matter is equally obvious to the courts of the other member states and to the Court of Justice*". The Court of Justice held further that that the existence of such a possibility must be assessed on the basis of the characteristic features of EU law and the particular difficulties to which its interpretation gives rise (para. 17). This last principle requires the national court to have particular regard to:
- 28.1. the fact that EU legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of EU law thus involves a comparison of the different language versions (*CILFIT*, para. 18).
- 28.2. the fact that even where the different language versions are entirely in accord with one another, EU law uses terminology which is peculiar to it, and that legal concepts do not necessarily have the same meaning in EU law and in the law of the member states (*CILFIT*, para. 19).
- 28.3. the principle that every provision of EU law must be placed in its context and interpreted in light of the provisions of EU law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied (*CILFIT*, para. 20).
29. In a series of subsequent and recent cases, the Court of Justice of the EU has confirmed the continued application not only of the three *CILFIT* criteria, but also of the above-stated principles as to their narrow application, including specifically in relation to the *acte claire* doctrine.<sup>14</sup>

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<sup>14</sup> See, e.g. C-379/15, ECLI:EU:C:2016:603, *Association France Nature Environnement*, 28 July 2016, paras. 48-50; C-416/17, *Commission v. France*, ECLI:EU:C:2018:811, 8 October 2018, para. 110.

30. Applying all of these principles, ECRE considers that the first question of EU law raised by the applicant for referral, concerning whether EU law obliges legal aid to be provided to third-country nationals in the identified circumstances, does not fall within the *acte claire* doctrine and must therefore be referred to the Court of Justice of the EU under article 267 TFEU.
31. As to the second question of EU law raised by the appellant, if it is to be understood as essentially asking what is described in paragraph [27] above, and if it does not fall within the *acte éclairé* doctrine as stated above, then by reference to case law referred to in that paragraph, ECRE recognizes that the question may fall within the *acte claire* doctrine – but only so long as the answer on both fronts is “yes”.
32. Finally, ECRE respectfully draws the Supreme Administrative Court’s attention to the fact that in a series of cases, the European Court of Human Rights has held that an individual’s right under article 6 § 1 ECHR to a fair hearing before an independent and impartial tribunal in the determination of his civil rights itself prohibits EU Member States’ national courts of last instance from refusing to refer a question of EU law to the Court of Justice in any circumstances other than those permitted by the *CILFIT* criteria: see e.g. *Ullens de Schooten and Rezabek v. Belgium*, nos. 3989/07 and 38353/07, 20 September 2011, paras. 57 – 59; *Baltic Master Ltd v. Lithuania*, no. 55092/16, 16 April 2019, para. 34. In the same line of case law, the European Court of Human Rights has made clear that the right to a fair hearing in the determination of an individual’s civil rights under article 6 § 1 ECHR additionally obliges those courts of last instance of EU member states who nevertheless refuse to make a reference under article 276 TFEU to provide adequate reasons not only as to which of the *CILFIT* criteria it considers is applicable, but also as to why it considers it that criterion is applicable: see e.g. *Dhabi v. Italy*, no. 17120/09, 8 April 2014, para. 31; *Baltic Master Ltd v. Lithuania* (cited above) para. 35. By way of exception, the European Court of Human Rights recognizes that the national court’s duty to give such reasons can be satisfied by more summary wording where an applicant’s request for a preliminary reference is itself insufficiently pleaded or only formulated in broad or general terms: see e.g. *Baltic Master Ltd v. Lithuania* (cited above), para. 36. However, that exception to, or diminution of, the full duty to give reasons is not recognized by the European Court of Human Rights when the applicant’s request for a preliminary reference is formulated in specific terms, and with sufficient pleading and supporting argument.
33. ECRE recognizes that, under the existing case law of the European Court of Human Rights, since the present case concerns a challenge to a decision ordering the expulsion of a foreign national from Polish territory, it cannot be said to engage the appellant’s “civil rights” within the meaning of article 6(1) ECHR.<sup>15</sup> Nevertheless, ECRE respectfully submits that even though the present case does not engage the applicant’s “civil rights” within the meaning of article 6(1) ECHR, the content of the prohibition and obligations articulated in the previous paragraph nevertheless remains directly applicable in the present case through the vehicle of article 47 of the EU Charter. There are two cumulative reasons for

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<sup>15</sup> See the judgment of the European Court of Human Rights in *Maaouia v. France* [GC], no. 39652/98, 5 October 2000, paras. 35-37, and para. 40.

this. The first is that exactly the same content of rights and obligations under article 6(1) ECHR must be treated as inherent in the content of rights and obligations under article 47 EU Charter wherever the latter applies. Second, article 47 of the EU Charter applies even in cases where article 6 ECHR does not, since the application of article 47 of the Charter is not limited to cases of arguable interference with “civil rights” as understood under article 6(1) ECHR, rather article 47 of the EU Charter applies to any cases of arguable violations of any right or freedom guaranteed by EU law. For both of those two cumulative principles see e.g. *Explanations relating to the Charter of Fundamental Rights* (2007/C 303/02), at p. 30.<sup>16</sup>

34. In ECRE’s submission article 47 of the EU Charter is indisputably applicable and engaged in the present case. Article 47 of the EU Charter operates in the present case both to prohibit a refusal to refer questions of EU law to the Court of Justice of the EU except in the strictly limited circumstances specified and explained in *CILFIT*, and to oblige a court of last instance that nevertheless refuses to make such a referral to give adequate reasons not only as to which *CILFIT* criterion it considers is applicable, but also as to why it considers that that criterion is applicable.
35. Finally, ECRE respectfully reminds the Supreme Administrative Court that, even if it considers that a question of EU law raised by the applicant falls within the *acte claire* doctrine or the *acte éclairé* doctrine, it may still freely refer that question to the Court of Justice of the EU if it so wishes (second paragraph of article 267 TFEU; *CILFIT*, para. 9).
- 36. For all of the above reasons, ECRE respectfully requests the Supreme Administrative Court’s permission to intervene as a third party or *amicus curiae* in these proceedings, and in that capacity to advance the points of principle identified in the current document.**

## List of Annexes

1. The Statute of Association of ECRE in French
2. The Certified translation of the Statute of Association of ECRE in Polish
3. The letter of appointment of ECRE’s Head of Legal Support and Litigation, Julia Zelvenska, to represent ECRE in the proceedings connected to Case II OSK 2315/20.

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<sup>16</sup> The full Polish text of this document is available here: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT&from=EN>