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Cases of deportation of Ukrainian citizens duly posted to Germany Legal analysis

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Introduction

It is generally believed that German law requires posted workers, who are third-country nationals with lawful situation in the sending MS, to obtain a national visa issued *'according to Vander Elst'* before entering Germany, also for a short-term stay, and provides automatic expulsion in the event of entry without this visa. The following analysis, for the first time provided in such detail, examines this requirement in the context of EU law taking into account all available case law of the Court of Justice of the EU, in particular in context of the principle of autonomy of EU law and Article 56 TFEU.

Our analysis clearly proves that interpreting German law as requiring posted workers, who are TCNs with lawful situation in the sending MS, to obtain a visa before entering Germany and as providing for automatic expulsion in the event of entry without a visa, is in breach of the obligations under Article 56 TFEU. Irrespective of the above, German case law violates the principle of autonomy of concepts in EU law, which requires that concepts used in EU law and in national law should be interpreted independently, by assuming that the notion "paid activity" used in the regulation (EU) 2018/1806 includes posted workers, while this does not arise from any existing EU regulation or case law.

Subject

The subject of this analysis are the cases reported to us by Polish employers concerning deportation from Germany of workers who were Ukrainian citizens, employed as live-in caregivers, who were temporarily posted to Germany under the freedom to provide services and:

- had the right to a short-term stay in the territory of the Member States (pursuant to the Regulation 2018/1806[1] Ukrainian nationals are exempt from the requirement to be in possession of a visa when crossing the external borders of the Member States for stays of no more than 90 days in any 180-day period),
- were legally employed in Poland;
- held a biometric passport;
- held a valid PD A1 issued by the Polish Social Insurance Institution (ZUS);
- did not have a German visa issued pursuant to the so-called 'Vander Elst procedure';
- they did not have the long-term resident status in any Member State.

All the above-mentioned persons were detained in Germany during their posting assignment, whereby:

1. one person was detained while travelling by bus by a federal police patrol (Bundespolizei), which ordered her immediate deportation, arguing that her entry to the German territory was for the purpose of work rather than a tourist trip. The detained person was taken out of the bus at night and taken to a police station where a personal search was carried out.
2. In the case of another person, the department of foreigners' affairs of the municipal office of the city of Augsburg carried out an inspection in a private house after receiving a casual piece of information that a third-country national was working there illegally. As a result of the inspection, it was confirmed that the house was actually inhabited by a Ukrainian national who took care of an elderly person and held a biometric passport without a German visa. An official did not accept as sufficient the caregiver's arguments that she was legally employed by an employer with the registered office in another Member State and had the right to reside in Germany, because as a Ukrainian national she was exempt from applying for a visa if her stay did not exceed 90 days. That person was requested to leave Germany immediately and the investigating authority notified the Main Customs Office (Hauptzollamt) and the public prosecutor's office of the suspected offence of illegal entry and residence in Germany.
3. The third person was detained a few days after starting her posting assignment in Germany. The police issued an order for her to leave Germany within 3 days. A Polish national visa was crossed out in her passport with a pen[2]. According to the information we received, upon returning to Poland, that person had to apply for a new passport and then for a new visa, as she was not allowed to cross the Polish-Ukrainian border with her old passport.
4. The fourth person was escorted out of the bus by a police patrol and taken to a police station, where she was stripped and tested for drugs and then detained overnight in custody. In the morning, she was driven to the Polish border and dropped off at the side of the road without a mobile phone. She was told that she had no right to be in Germany and was told to sign documents in German. This

[1] Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, PE/50/2018/REV/1, OJ L 303, 28.11.2018, p. 39–58 (hereinafter also referred to as 'the Regulation (EU) 2018/1806').
[2] See Figure 1.

person enjoyed temporary protection in Poland and was assigned with a Polish personal identification number PESEL for that reason. She was also a holder of a Ukrainian biometric passport.

We provide a detailed legal analysis of these cases below to examine the compliance of such behaviour by German police and customs officers with EU law.

Legal context

Regulation (EU) 2018/1806 *listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement ('Regulation (EU) 2018/1806')* **grants Ukrainian nationals** who hold a biometric passport **the right to enter and stay in the territory of the Member States for a period of 90 days within 180 days without having to apply for a visa**.

REGULATION (EU) 2018/1806 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 14 November 2018

listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement

Article 1

This Regulation determines the third countries whose nationals are subject to, or exempt from, the visa requirement, on the basis of a case-by-case assessment of a variety of criteria relating, inter alia, to illegal immigration, public policy and security, economic benefit, in particular in terms of tourism and foreign trade, and the Union's external relations with the relevant third countries, including, in particular, considerations of human rights and fundamental freedoms, as well as the implications of regional coherence and reciprocity.

/…/

Article 4

1. Nationals of third countries listed in Annex II shall be exempt from the requirement set out in Article 3(1) for stays of no more than 90 days in any 180-day period.

/…/

ANNEX II

LIST OF THIRD COUNTRIES WHOSE NATIONALS ARE EXEMPT FROM THE REQUIREMENT TO BE IN POSSESSION OF A VISA WHEN CROSSING THE EXTERNAL BORDERS OF THE MEMBER STATES FOR STAYS OF NO MORE THAN 90 DAYS IN ANY 180-DAY PERIOD

a) STATES

/…/

Ukraine (7)

/…/

(7) The exemption from the visa requirement shall be limited to the holders of biometric passports issued by Ukraine in line with standards of the International Civil Aviation Organisation (ICAO).

Source: Regulation (EU) 2018/1806

However, the Regulation also contains, in Article 6(3), a norm **allowing Member States (MSs) to provide for exceptions** from the exemption from the visa requirement **as regards third-country nationals (TCNs) carrying out so called '*paid activity*':**

> **Article 6**
>
> 3. A Member State may provide for exceptions from the exemption from the visa requirement provided for in Article 1(2) as regards persons carrying out a **paid activity** during their stay.
>
> *Source: ibidem*

Presumably, on the basis of this very entitlement, **§ 17(1) was introduced** in *the German Residence Ordinance (AufenthV)*[3], which **removes the right of residence granted under EU law to** nationals of the countries listed in Annex II of Regulation (EU) 2018/1806, including the citizens of Ukraine, **who do or intend to carry out *'Erwerbstätigkeit' (transl. 'paid activity')* in Germany**, by reinstating for them the requirement to obtain a *residence title*, which is mentioned in *the German Residence Act (AufenthG):*

> **§ 17 Non-existence of the exemption in the case of paid activity during a short stay**
>
> *(1)* For entry and short-term stay, persons referred to in Article 4(1) of Regulation (EU) 2018/1806, as amended from time to time, and **holders of a residence title or national long-stay visa issued by a Schengen State shall not be exempt** from the requirement of a residence title if they are carrying out a **paid activity [Erwerbstätigkeit]** in the Federal territory.
>
> *Source: The German Residence Ordinance, Aufenthaltsverordnung - AufenthV*

It is apparent that § 17 goes beyond what is allowed by Article 6 of the Regulation (EU) 2018/1806, as it *de facto* introduces the obligation to obtain a Schengen or national visa issued by Germany to third-country nationals carrying out *'paid activity'*, who already hold a national or a Schengen visa issued by another Schengen State. However, this issue is beyond the scope of the analysis herein.

The German Residence Act (AufentG)[4] recognises as a *residence title* in particular:

a) a Schengen visa, which allows a short-term stay of up to 90 days within 180 days,

b) a national visa which allows a longer stay and can only be granted prior to entry into Germany.

> **Section 6**
> **Visas**
>
> **(1) A foreigner may be granted the following visas in accordance with Regulation (EC) No 810/2009:**
>
> 1. **a visa** for the purpose of transit through the territory of the Schengen states or **for planned stays in this territory of up to 90 days within a 180-day period (Schengen visa),**
>
> 2. an airport transit visa for the purpose of passing through the international transit area at airports.
>
> (2) In accordance with Regulation (EC) No 810/2009, Schengen visas may be extended up to a total stay of 90 days within a 180-day period. A Schengen visa may be extended by a further 90 days within the 180-day period concerned as a national visa on the grounds stated in Article 33 of Regulation (EC) No 810/2009/EC, to safeguard the interests of the Federal Republic of Germany or for reasons of international law.
>
> (2a) Schengen visas do not entitle holders to pursue an economic activity unless they were issued for this purpose.
>
> **(3) A visa for the federal territory (national visa) is required for longer stays**; this visa is granted before the foreigner enters the federal territory. It is issued on the basis of applicable provisions for a temporary residence permit, EU Blue Card, ICT Card, permanent settlement permit or EU long-term residence permit. The duration of lawful residence with a national visa is offset against the periods of possession of a temporary residence permit, EU Blue Card, permanent settlement permit or EU long-term residence permit.
>
> *Source: The German Residence Act, Aufenthaltsgesetz – AufenthG*

[3] See the German Ordinance Governing Residence of 25 November 2004 – Aufenthaltsverordnung vom 25.November 2004 (BGBI. I S. 2945), hereinafter also referred to as **'AufenthV' and/or 'Residence Ordinance'**.
[4] See the German Residence Act of 25 February 2008 – Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet (BGBI. I S. 162), hereinafter also referred to as **'AufenthG' and / or 'Residence Act'.**

It is worth noting the stipulation contained in Article 4(1) according to which the obligation for foreign nationals to obtain a residence title for entry into and residence in Germany introduced by this legal act **shall not apply in cases where EU law provides otherwise**. A good example of such a situation is the entry for short-term stay in Germany of Ukrainian nationals, who have been exempted from the requirement to obtain a *residence title* by EU law, explicitly in Article 4(1) of Regulation (EU) 2018/1806.

Even if the above provision in national (German) law did not exist, the exact same effect results from the **principle of the primacy of EU law**, which is based on the idea that where a conflict arises between an aspect of EU law and an aspect of law in an EU country (national law), EU law will prevail[5].

In the context of the above, the pivotal question must be raised as to whether EU law does not preclude the introduction of a *residence title* requirement for **TCN workers posted to Germany by employers established in another MS.**

Section 4
Residence title requirement

(1) In order to enter and stay in the federal territory, foreigners require a residence title, in the absence of any provisions to the contrary in the law of the European Union or a statutory instrument and except where a right of residence exists as a result of the agreement of 12 September 1963 establishing an association between the European Economic Community and Turkey (Federal Law Gazette 1964 II, p. 509) (EEC/Turkey Association Agreement). Residence titles are granted in the form of

1. **a visa pursuant to section 6 (1), no. 1 and (3),**
2. a temporary residence permit (section 7),
2a. an EU Blue Card (section 18b (2))
2b. an ICT Card (section 19),
2c. a Mobile ICT Card (section 19b)
3. a permanent settlement permit (section 9) or
4. an EU long-term residence permit (section 9a).

Source: The German Residence Act, Aufenthaltsgesetz – AufenthG

German case-law

It has been generally presumed in the German case-law that the obligation to obtain a German *residence title* schould be applied to posted workers who are TCNs, with the exception of those referred to in Section 30(3) of the *German Ordinance on the Employment of Foreigners (BeschV)*, which introduces the so-called 'legal fiction'[6] whereby the activity of TCN workers who have been *'temporarily posted to Germany for the purpose of performing a service by an employer established in another Member State'* is not deemed to be *'Beschäftigung' (employment)* within the meaning of national (German) law, provided that said activity does not exceed 90 days in a 12-month period and that they hold the long-term resident status in another MS.

[5] *https://eur-lex.europa.eu/EN/legal-content/glossary/primacy-of-eu-law.html*
[6] A 'legal fiction' is a traditional mechanism that is quite common in legal systems all over the world. It allows the legal consequences of a given situation to be shaped in a specific way (...). The concept of legal fiction is applied in many aspects of labour law – see J. Janik, *Zakres i znaczenie fikcji prawnych w przepisach Kodeksu pracy o rozwiązaniu stosunku pracy [Scope and meaning of legal fictions in the provisions of the Labour Code on termination of employment]*, Monitor Prawa Pracy 6/2013.

Section 30
Stays of employment without a residence title

The following is not deemed to constitute employment within the meaning of the Residence Act:

1. activities under section 3, no. 1 and 2, including without approval, and under section 16 which are performed for up to 90 days within a period of 180 days,

2. activities under sections 5, 14, 15, 17, 18, 19 (1) and sections 20, 22 and 23 performed for up to 90 days within a period of twelve months,

3. activities under **section 21** performed for up to 90 days within a period of twelve months by foreigners who hold long-term resident status in another Member State of the European Union, and

4. activities by persons who are exempt from the requirement of a residence title pursuant to sections 23 to 30 of the Residence Ordinance.

Source: The German Ordinance on the Employment of Foreigners, Beschäftigungsverordnung - BeschV

Section 21
Rendering of services

No approval is required for the issuance of a residence title to persons who are duly employed by a company seated in a Member State of the European Union or a contracting party of the Agreement on the European Economic Area in the country in which the company is seated and who are temporarily posted to the territory of the Federal Republic of Germany to render a service.

Source: The German Ordinance on the Employment of Foreigners, Beschäftigungsverordnung - BeschV

Despite the above, workers posted to Germany who are TCNs are only offered a specific *'facilitation'* by the German Ministry of Foreign Affairs. One could not help but get the impression that its sole purpose is to serve as a safeguard against the accusation of its incompatibility with the CJEU case law.

Namely, the German Ministry of Foreign Affairs has introduced a specific administrative practice, perversely called '*Vander Elst*'[7], which is intended to make it easier for TCNs to obtain a German national visa (so-called 'D'-type visa) before being posted to Germany, or exceptionally, in the case of nationals of non-Schengen Member States (the United Kingdom and Ireland) or nationals of countries that do not yet fully apply the Schengen *acquis* (Bulgaria, Romania, Croatia and Cyprus) – to obtain a Schengen visa (so-called 'C'-type visa).

According to the *Visa Handbook* issued by the German Ministry of Foreign Affairs[8], which serves as an instruction for consular services, a visa *'according to Vander Elst'* is to be issued in a specific procedure examining the *'validity and reasonableness'* of the application on the basis of the criterion of *'temporariness'* of the service, provided by the applicant's employer. In any case, a visa issued under this procedure must bear the annotation *'Issued according to Vander Elst*'.

It was the *Visa Handbook* that has obviously triggered the misinterpretation, as it contains an explanation of why the requirement to obtain the visa '*according to Vander Elst'* does not, in the authors' opinion, violate EU law order and shaped judicial rulings of the German courts.

According to the *Visa Handbook,* **the 'Vander Elst' visa may only be refused if there exists concrete evidence of a real, present and significant threat to public policy, public security or health**, and German embassies should only examine an application in detail in exceptional cases where there are particular concerns about abuse of the application procedure. Informal documents such as a simple letter from the employer, a copy of the contract, etc. are allegedly sufficient for filing an application. Also, as a general rule, no personal interview of the third-country applicant is required for the purpose of the interview on the visa

[7] The name is taken from the judgment of the CJEU of 9 August 1994 in Case C-43/93 Raymond Vander Elst v Office des migrations internationales (hereinafter referred to as **'Vander Elst'**), ECLI:EU:C:1994:310.
[8] Cf.: Auswärtiges Amt, *Visumhandbuch, (74. Ergänzungslieferung, März 2022),* p. 601-609.

application. Finally, when providing for deadlines and processing *'Vander Elst'* visas, application procedure should be treated *'as a matter of priority, if possible'.*

Auswärtiges Amt

VISUMHANDBUCH

Stand: Mai 2021
73. Ergänzungslieferung

In reality, nothing could be further from the truth. **Obtaining the *'Vander Elst visa'* is difficult or very often impossible**, because:

a) a worker may only file an application therefor in person at the German Embassy in Warsaw,
b) an application fee of approximately PLN 400 (approximately EUR 85) is charged,
c) the application must be accompanied by, among other things, two recent biometric photos, the original contract concluded between the employer and their German client, as well as a PD A1 document and an EHIC card,
d) waiting time for scheduling a date of filing your application is at least two weeks,
e) only one application may be submitted at a time,
f) any error results in rejection of the application, and consequently a new one must be filed (on a separate date, which has to reapplied for and for which the fee must be paid again),
g) the visa may only be collected in person at the German Embassy in Warsaw[9].

When we attempted to make an appointment at the German Embassy in Warsaw on 18 October 2021 to apply for the 'Vander Elst visa', we found that this was only possible via the website[10]. It stated that '*From now on it will only be possible to book an appointment two weeks in advance.'*[11]

After navigating to the relevant sub-page, it turned out that the CAPTCHA security feature was displaying a black rectangle instead of a string of signs, thus making it impossible to navigate to the next sub-page[12]. When we finally managed to resolve the problem, it turned out that there was only one 10-minute appointment

[9] Source: *https://polen.diplo.de/blob/489558/443d7f7592246dc5e37de00399d10e11/visa-vander-elst-data.pdf*
[10] Cf.: *https://service2.diplo.de/rktermin/extern/choose_realmList.do?locationCode=wars&request_locale=en*
[11] Source: https://service2.diplo.de/rktermin/extern/choose_realmList.do?locationCode=wars
[12] See Figure 2.

available for application submission at 8:10 a.m. When we re-entered the website after several minutes, **not a single appointment slot was available**[13].

In a further attempt on 13 July 2022, the only available appointments in the system were on 9 August at 8:00, 8:10, 8:20 and 8:30 a.m. Another attempt made on 15 July 2022 showed that the only appointments available on 9 August were at 13:20 and 13:30 (each time these were 10-minute slots).

In one of the cases, upon filing the application, the Embassy's official requested, in addition to the above-mentioned documents, also:

- documents confirming that the worker's 'centre of vital interests' had been in Poland for at least 6 months beforehand
- employment contract (which automatically excludes all other forms of employment)
- RMUA documents from the Polish Social Insurance Institution (ZUS)
- a lease agreement of an apartment in Poland
- the employee's private bank account history[14]

In the end, the German Embassy in Warsaw refused this employee a 'Vander Elst' visa in writing. The grounds given were as follows:

- the fact that the same person is a member of the board of directors in two companies, and that the companies 'basically do the same thing';
- **an assumption that it cannot be ruled out (sic!)** that the posting of this employee serves the purpose of 'transferring' workforce to Germany;
- doubt as to whether minimum wage conditions will be met – without indicating any grounds for this doubt;
- noting that, according to the submitted employment contract, the place of work is 'Krakow'.

Interestingly, the visa was requested by a manager who was to be posted to a sister company in Germany for a month in order to help build a customer service team there. Meanwhile, in the reply from the Embassy it was noted that she had applied *'in connection with her desire to work as a welder'.*

In the second case we monitored, the visa was applied for by a female Ukrainian national employed as a live-in caregiver for an elderly person. Already at the stage of the 10-minute appointment booked 2 weeks earlier, this person was told that without an employment contract and a certificate proving her professional competence, she would definitely not be granted a visa. In addition, she was obliged to **describe in writing the purposes of her previous stays in Germany (sic!)**.

To sum up, the statements in the *Visa Handbook* are completely at odds with the facts and posting of a worker, who is a Ukrainian national, to Germany *de facto* seems to be possible only if:

- the period for the service provision by the posted worker can be planned several months in advance;
- the worker is employed under an employment contract;

[13] See Figure 3.
[14] See Figure 4.

- the worker is available and flexible to such an extent that they could appear twice in person at the German Embassy in Warsaw on any date and time imposed by the system, with these dates 'chopping and changing';
- the employer will assume and bear the costs of preparing and filing the application as well those concerning accommodation and travel to Warsaw, as well as the worker's absence from work.

Legal questions

Our legal doubts in this matter boil down to obtaining answers to three questions:

1. Does § 17(1) of *the German Residence Ordinance (AufenthV),* understood as requiring Ukrainian nationals to obtain a German visa before being posted to Germany for a period of less than 90 days by an employer established in another MS fall within the limits imposed by EU law?
2. May the concept of carrying out *'paid activity'* as used in Article 6(3) of *Regulation (EU) 2018/1806* be understood to include not only job-seeking migrants in Germany, but also workers temporarily posted by employers established in another MS?
3. May § 17(1) of *the German Residence Ordinance (AufenthV)* be construed as depriving Ukrainian nationals of the right to enter for a short-time stay in Germany on the basis of their mere intention to carry out *'paid activity'* in Germany?

Ad 1.

German courts in cases of refusal of the 'Vander Elst visas' to TCNs usually take the position that:

- Entry of a TCN, posted to Germany by an employer established in another MS is for the purpose of carrying out *'paid activity'*, therefore *'a visa required to work'* must be obtained'[15].
- Entry into Germany *'without the required Vander Elst visa'* is treated as carrying out an *'unauthorised paid activity'* and constitutes the grounds for issuing an order imposing an obligation to leave the country and a temporary ban on re-entry and residence[16].
- Such a requirement does not constitute a restriction on the freedom to provide services at all[17], since such a restriction - according to the CJEU judgments - would only be to require posted workers to have a work permit rather than to *'legalise their stay in Germany'*.
- Germany has the right to verify whether an undertaking established in another MS which posts a TCN does not exercise the freedom to provide services for a purpose other than the provision of the services in question, thus requiring an application to obtain a *'Vander Elst visa does not constitute a restriction that the CJEU found impermissible'*[18].
- *'The simplified procedure for obtaining a Vander Elst visa'* is carried out in order to verify whether the posting in question is covered by the freedom to provide services at all, and only when this is confirmed by the issuing of a visa will all restrictions be lifted.
- *'The Vander Elst visa'* is an administrative document issued *'under a simplified registration procedure'*, which gives a TCN the right of entry to Germany following a 'notification' of cross-border service at a diplomatic

[15] Cf. judgment of the Administrative Court in Dresden of 11 July 2022 – 3 K 956/21.
[16] *Ibidem.*
[17] See the judgment of the Bundesverwaltungsgericht BVerwG of 20 June 2019 - 1 B 12.19, the judgment of OVG Berlin-Brandenburg of 9 November 2018 - OVG 6 B 7.18.
[18] *Ibidem.*

post[19]. There is no indication that the procedure for obtaining a visa is an authorization, since it is an official procedure, whose nature is that of a simplified registration, and therefore complies with Article 56 TFEU[20].

- Germany may take the necessary border-control measures so the conditions under which the '*Vander Elst visa* ' is granted do not unacceptably restrict the freedom to provide services.

Furthermore, in such cases, the German courts consistently reject requests to ask the CJEU for a preliminary ruling on the grounds that *'the criteria for the granting of the Vander Elst visa have already been clarified in the case law of the CJEU'*[21]. It should be noted at this point that the notion of so-called *'admissible criteria for the granting of Vander Elst visas',* in view of a series of judgments of the CJEU explicitly prohibiting MSs from creating obstacles to the posting of TCNs, seems to be a kind of intellectual construction serving to spread the perception that making this possibility conditional on obtaining a visa does not violate the EU law.

In our view, it is not objectively possible to conclude from any of the CJEU judgments that the Court has found the so called *'Vander Elst visa'* to be admissible under the EU law, let alone that it '*clarified the specific criteria for granting it*'.

In fact, in its judgment, the Court stated, as a key element in this analysis, that **the [border] control exercised by a MS over the entry and residence of TCNs cannot be a pretext for restricting the Treaty freedom to provide services[22].**

Law on foreigners, being an act of secondary legislation, must, in the event of conflict with the freedom to provide services, 'give way' to the freedom to provide services, which is a provision of the EU's primary law[23].

Therefore, the resolution of the doubt formulated in the first question therefore boils down to establishing whether the requirement that a posted worker who is a Ukrainian national who has entered and resides legally in a sending MS must obtain a *residence title* to enter and stay in the territory of the host State prior to posting, has a **restrictive effect on the freedom to provide services**. And if it turns out that it does, whether such a requirement is **justified** and **proportionate**.

[19] Cf. judgment of the Administrative Court in Dresden of 11 July 2022 – 3 K 956/21.
[20] *Ibidem.*
[21] See the judgment of OVG Berlin-Brandenburg of 9 November 2018 - OVG 6 B 7.18., para. 47cc. See also e.g. the judgment of Bundesverwaltungsgericht of 20 June 2019 - BVerwG 1 B 10.19, ECLI:DE:BVerwG:2019:200619B1B10.19.0, para. 11.
[22] Cf. judgment of the CJEU of 21September 2006 in the case C-168/04 Commission of the European Communities v Republic of Austria (hereinafter also referred to as '**C-168/04 Commission v Austria'**), para. 60; see also the judgment of the CJEU of 3 February 1982 in joint cases 62 and 63/81 Société anonyme de droit français Seco i Société anonyme de droit français Desquenne & Giral przeciwko Etablissement d'assurance contre la vieillesse et l'invalidité, para. 12.
[23] Cf. in relation to conflict of social rights and freedoms of the Internal Market of the EU, M. Domańska, *Swobody rynku wewnętrznego a prawa podstawowe – refleksje na tle orzecznictwa TS*, Europejski Przegląd Sądowy 2012; H. Schepel, *Freedom of Contract in Free Movement Law: Balancing Rights and Principles in European Public and Private Law*, European Review of Private Law 2013, No. 5–6, p. 1223 et seq.

110. **This is particularly so given that that prohibition is intended to apply even where the worker concerned is lawfully present in the territory of the Member State from which he is posted or where he has an EU Posting Confirmation** (which, as we have seen, presupposes that the service-providing undertaking has already complied with particularly stringent requirements), whereas, in fact, in such circumstances, far from constituting a threat to public policy or to public security within the meaning of the Court's case-law, that worker provides, on the contrary, effective guarantees as to his residence in the national territory and his return to the Member State of origin after the completion of his work.

source: Opinion of the Advocate General Léger in the case C-168/04 Commission v Austria

The judgment of the Court in the case *C-168/04 of 21 September 2006, Commission v Austria*, is particularly helpful in providing an answer hereto. In said case, the Commission asked the Court, *inter alia*, to declare that Austria had failed to fulfil its obligations by refusing to grant an entry or residence permit to a TCN who was posted by an undertaking established in another Member State, **when that national had already entered the Austrian territory without a residence visa as required by national (Austrian) law**.

In response to the Commission's complaint, the Austrian government argued that the freedom to provide services does not limit a MS's ability to determine the right of entry and residence of TCNs in its territory. *„It argues that, in order to preserve public policy and public security, a visa application must be made prior to entry into the territory. Making it possible for a person's situation to be regularised in situ would have the effect of depriving the national authorities of their right to refuse a residence permit to a person presenting a risk to public policy or public security"*[24].

The Court held the contrary view. It had already noted the question of the relationship between the freedom to provide services and the rules on foreign nationals on several occasions in its earlier case law. For example, in *Commission v Luxembourg*[25] it noted that since matters relating to the posting of workers who are TCNs in the framework of the provision of cross-border services have not been harmonised at the Community level, then **any national legislation falling within that area may, notwithstanding its restrictive effect on the freedom to provide services, be justified only where:**

a) it meets overriding requirements relating to **the public interest,**

b) in so far that interest **is not safeguarded** by the provisions to which the provider of such a service is subject in the Member State in which he is established.

If the above conditions have been met, then:

a) the legislation in question must be **appropriate** for securing the attainment of the objective which it pursues, and

b) it must **not go beyond what is necessary** in order to attain it[26].

[24] See the Opinion of the Advocate General Léger delivered on 23 February 2006 in the case C-168/04 Commission of the European Communities v Republic of Austria (hereinafter also referred to as: **'C-168/04 Commission v Austria'**), para. 98.
[25] See the judgment of the CJEU of 21 October 2004 in the case C-445/03 Commission of the European Communities v Grand Duchy of Luxemburg, ECLI:EU:C:2004:655 (hereinafter also referred to as **'C-445/03 Commission v Luxemburg'**), para. 21.
[26] See the judgments of the CJEU of 23 November 1999 in joint cases C-369/96 i C 376/96 Arblade et al., ECLI:EU:C:1999:575, para. 34 i 35 as well as in the case C-164/99 Portugaia Construções ECLI:EU:C:2002:40, para. 19. See also the judgment of the CJEU in C-445/03 Commission v Luxemburg, para. 21 See also, similarly, CJEU judgment in the case C-514/03 Commission of the European Communities v Italy, para. 27. According to the CJEU, *'the authorities of the host Member State should in principle, take into account the requirements that the economic operators concerned and their personnel already satisfy in their States of origin'.*

In the Court's view, there is no doubt that any national provision which results in that a service-providing undertaking has no option but to ensure, before proceeding with the posting, that a visa has been requested and obtained for each worker concerned, **is liable to make considerably more complicated the provision of service in another Member State by that undertaking**. Such a provision, by making it entirely impossible for the situation of the posted worker concerned to be regularised *in situ*, exposes the worker to the risk of being expelled from the national territory and in some cases, **a prohibition on their returning to or residing within that territory**. Such a prospect is liable seriously to jeopardise the carrying out of the planned posting[27], which determines that it must be regarded as a restriction.

In the light of the foregoing, the German legislation providing for an obligation on an employer to obtain a visa before posting a worker who is a Ukrainian national and sanctioning failure to do so by expelling the worker from Germany or by returning them to the border with a prohibition on re-entering Germany, must be regarded as a restriction on the freedom to provide services.

It must therefore be verified whether the restriction is justified and proportionate to the objective it pursues. A restriction on the freedom to provide services, which, in the Court's view, is undeniably a requirement to obtain a visa before entering Austrian territory, **will only be justified if there is a genuine and sufficiently serious threat to a fundamental public interest**. In the above-mentioned Austrian case, the Court found none. In the view of Advocate General Ph. Léger, a provision denying an entry or residence title that operates automatically, appears **disproportionate** to the objective of protecting public order or public security.[28]

The only exception would be if the Court considered such a restriction to be justified on grounds linked to the protection of public policy and public security in the event of a genuine and sufficiently serious threat to a fundamental public interest[29].

Any provision, which imposes a visa requirement on a posted worker whose legal situation has already been regularised in the territory of the Member State from which he is posted cannot be justified by the overriding requirements relating to the public interest not safeguarded by the provisions to which the provider of such a service is subject in the Member State in which he is established, since such a person does not *per se* constitute a threat to public security and public policy. [30].

The German regulation appears to be even more disproportionate than the one at issue in the Court's judgment in *Commission v Austria*, as it restricts the posting of all workers who are TCNs by undertakings with the registered office in another MS. In contrast, the Austrian provision applied only to posted workers from MSs that are not party to the Schengen Agreement.

In summary, the German provision which:

a) provides that a **visa must be obtained by the worker before the posting**,
b) **excludes** any possibility of obtaining a visa after arrival in the host MS,

[27] See the Opinion of the Advocate General Léger in the case C-168/04 Commission v Austria, paras. 103-104.
[28] *Ibidem*, paras. 108 -109.
[29] Cf. the judgment of the CJEU of 21September 2006 in the case C-168/04 Commission of the European Communities v Republic of Austria (hereinafter also referred to as '**C-168/04 Commission v Austria'**), paras. 63-66.
[30] Cf. the judgment of the CJEU in the case C-168/04 Commission v Austria, para. 65.

c) provides for **the sanction of automatic expulsion**, as well as a potential prohibition on return and residence in that territory,

d) applies even if the posted worker's situation on the territory of the sending MS is lawful,

in the context of the Court's case-law, in particular its judgment *Commission v Austria*, **must be regarded as an unjustified and disproportionate restriction on the freedom to provide services.** It therefore infringes the provisions of Article 56 TFEU.

> 60. However, **the control exercised by a Member State so far as that legislation is concerned cannot affect the freedom to provide services** of the undertaking which employs those nationals (...).
>
> 61. In the present case, by making it impossible to regularise the situation of a worker from a non-Member State, lawfully posted by an undertaking established in another Member State and who has entered Austria without a visa where such a requirement exists under Austrian legislation, Paragraph 10(1)(3) of the FrG **imposes a restriction on that undertaking's freedom to provide services**. That provision exposes the worker in question to the risk of being excluded from the national territory, which is liable to jeopardise the planned posting.
>
> 62. As the Advocate General observed in point 105 of his Opinion, a service provider wishing to avoid the problems linked to the impossibility of making such a situation lawful **must therefore ensure, before it even begins the posting, that each worker concerned by that posting is in possession of a permit to enter** Austria, **which is likely to dissuade an undertaking established in another Member State from providing a service in Austria using workers posted** from a non-Member State.
>
> *Source: Judgment of the CJEU in C-168/04 Commission v Austria*

Ad 2.

In its case-law to date, the Court has not explicitly assessed whether it is permissible to understand the concept of *'paid activity'* as used in Article 6(3) of *Regulation (EU) 2018/1806* in such a way that it also covers workers who are TCNs and have been temporarily posted by an employer established in another MS.

However, in the above-mentioned case C-168/04 *Commission v Austria*, the Court found valid the Commission's complaint that a national provision, the effect of which is a systemic prohibition on making it possible for situation of a posted worker who is a TCN posted worker to be regularised *in situ* of in a situation where that worker has already entered Austria without a visa, is incompatible with EU law, since *'it is liable seriously to jeopardise the carrying out of the planned posting'* [31].

The Court assessed the Austrian provision introducing the obligation for a posted TCN to apply for a visa **only in the light of Article 56 TFEU**, ignoring the Article 6(3) of *Regulation (EU) 2018/1806* allowing Member States to provide for derogations from the visa exemption for TCNs carrying out *'paid activity'.*

There is also no definition of **the concept of *'paid activity'*** in the context of *Regulation (EU) 2018/1806* is **in any EU secondary legislation**. The only indication is provided by bilateral agreements between the European Union and certain third countries, including, for example, the United Arab Emirates [32]. The accompanying *Joint Declaration on the Interpretation of the Category of Persons Travelling for the Purpose of Carrying Out a Paid Activity* clarifies that this category certainly does not include *'persons travelling for the purpose of **business deliberation** (**without being employed** in the country of the other Contracting Party)'.*

Undertakings established in third countries cannot post workers within the scope of the EU freedom to provide services, so for this obvious reason the category of posted workers is not included in bilateral

[31] Cf. the Opinion of the Advocate General Léger in C-168/04 Commission v Austria, para. 104 as well as the judgment of the CJEU in the same case para. 61 and 68.
[32] The Agreement of 6 May 2015 between the European Union and the United Arab Emirates on the short-stay visa waiver (OJ L 125, 21.5.2015, p. 3—9).

agreements with third countries. However, it can be concluded that since **the concept of *'paid activity'* does not include persons who perform work temporarily and without employment in the host country**, it also does not include workers temporarily posted from other MSs.

In the German case-law it has been generally presumed that a concept of ***'paid activity'*** used in EU law has the same meaning as ***"Erwerbstätigkeit'*** *(transl. paid activity)* used in national (German) law. However, this presumption violates the principle of autonomy of concepts in EU law, which requires that concepts used in EU law and in national law should be interpreted independently. *'The EEC Treaty has created its own legal system, which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply'*[33]. So, **it is NOT up to the individual MS to have their own idea of what EU law entails** (from the EU perspective, it is, *inter alia,* a question of consistency, effectiveness, and legal certainty). Autonomous concepts are also embedded in the very point of mutual recognition based on trust and in general principles of EU law[34].

Therefore, it must not be presumed that a concept of ***'Erwerbstätigkeit'*** *(transl. paid activity)* used in national (German) law, has the same meaning as ***'paid activity'*** used in EU law, specifically in Regulation (EU) 2018/1806, given the fact that they are to be interpreted autonomously.

Thus, based on the provision in national (German) law that the activity of some of the workers posted to Germany does not constitute *'Beschäftigung' (transl. employment)*, it simply **must not** be presumed that all other posted workers carry out *'paid activity'* within the meaning of EU law – **without establishing the meaning of the concept of *"paid activity"* in EU law.**

If it is established that the meaning of these concepts is not the same, as it is the case here, **the EU norm must be applied**. This stems from **the principle of the primacy of EU law**[35], according to which, in the event of conflicting norms of EU law and national law, the EU norm must be applied. In line with this principle, a concept used in EU law (in our case '*paid activity*') **MUST NOT be explained by the meaning ascribed to this concept in national law** (in our case *'Erwerbstätigkeit'),* but exactly the opposite.

Furthermore, even if the provisions of Regulation (EU) 2018/1806 permit imposing an obligation on TCNs carrying out *'paid activity'* to obtain a residence title, it must not be presumed that this obligation can be extended to posted workers, not only without firstly establishing the meaning of the concept of *'paid activity'* in EU law, but also - whether there are any EU law provisions that may prevent this.

Equating the concepts of *'Erwerbstätigkeit'* and *'paid activity'* in the case law of German courts is all the more surprising that **the obligation to apply the principle of primacy of EU law is explicitly contained in §4(1) of *the Residence Act (AufenthG)*** cited above, which stipulates that a TCN may not be required to obtain a *residence title* for entry and residence in Germany in cases where EU law provides otherwise.

In our view, insofar as the requirement of a German *residence title* for TCNs who enter Germany for the purpose of carrying out *'paid activity'* — understood as being employed by a German employer or carrying

[33] Cf. judgment of the CJEU of 15 July 1964 in the case 6/64 Flaminio Costa v. E.N.E.L., para. 3.
[34] Cf. Ch. Eckes, *International Rulings and the EU Legal Order: Autonomy as Legitimacy?*, Cleer Papers 2016/2, p. 12. See also: Ch. Eckes, Ibidem, [in:] *The European Union and International Dispute Settlement*, M. Cremona, A. Thies, R. A. Wessel (eds.), Oxford, Hart Publishing 2017.
[35] Cf., for example, M. M. Kenig-Witkowska (ed.), A. Łazowski, R. Ostrihansky, *Prawo instytucjonalne Unii Europejskiej [Institutional Law of the European Union]*, Warszawa 2011, p. 265 et seq..; B. de Witte, *The Continuous Significance of Van Gend en Loos* [in:] M. P. Maduro, L. Azoulai (ed.) *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Oxford and Portland, Oregon 2010, p. 9 et seq.

out an economic activity — is permissible under EU law[36], extending the very requirement to those posted workers who are TCNs constitutes an unjustified and disproportionate restriction on freedom to provide services. Proving this hypothesis will imply that the requirement of obtaining a German *residence title* cannot be applied to posted workers.

By the way, for example on the basis of the *Rush Portuguesa* and *Vander Elst* rulings, it seems obvious that posted workers do not enter and stay in Germany with the intention of seeking access to the German labour market, but carry out an employer's lawful instruction, who exercises the fundamental economic freedom of the European Union – which is the freedom to provide services in other MSs.

Ad 3.

The third question is an aftermath of the **practice of German police and customs officers**, during controls carried out in the German territory, **to immediately deport or return to the border** those posted workers who are Ukrainian nationals. When posted workers of Ukrainian nationality, asked by customs or the police officers about the purpose of their arrival, reply truthfully that they are 'going to work', they are requested to produce a 'Vander Elst visa', failing which they are ordered to leave Germany immediately, or even to leave the Schengen area – even if they have their place of residence and often their family in Poland. In all cases, deportation or returning to the border is usually combined with a two-year ban on re-entering Germany.

Evidently, German customs and police officers treat in the same way TCNs who have entered Germany to seek work there and TCNs employed in other MSs who have only been temporarily posted to Germany by their employer who wishes to exercise the freedom to provide services.

Initially, we had thought that the reason for the deportation of such persons was the failure of German customs and police officers to recognise the fundamental difference between performing a task temporarily on the orders of an employer established in another MS (posted worker) and performing work as a person directly employed by a German employer (migrant worker).

Currently, there is no doubt that by deporting Ukrainian citizens who admit during the inspection that they are 'going to work' as posted workers and fail to produce a 'Vander Elst visa' they act in accordance with the linguistic interpretation of the German provision of § 15 (2)(2a) of the Residence Act:

Section 15
Refusal of entry

(2) A foreigner may be refused entry at the border if

1. there is a public interest in expelling the foreigner,

2. there is a well-founded suspicion that the foreigner does not intend to stay in the federal territory for the stated purpose,

2a. the foreigner only possesses a Schengen visa or is exempted from the visa requirement for a short-term stay and intends to pursue an economic activity in breach of section 4a (1), sentence 2, or (...)

Source: the German Residence Act Aufenthaltsgesetz – AufenthG

It should be noted in this respect that, in the above-mentioned case *C-168/04 Commission v Austria*, the Court considered to be disproportionate, in relation to the objective pursued, a provision in Austrian law which had the effect of systemically prohibiting the granting of a visa to a posted worker who was a TCN where that

[36] Cf. Article 6(3) Regulation (EU) 2018/1806.

worker had entered Austria without a visa, since such a provision exposed the worker in question to the risk of being excluded from the Austrian territory, which could jeopardise *'the planned posting'*[37].

The practice of German police and customs officers has the same effect in this respect, so it must be concluded that it also constitutes a prohibited obstacle to freedom to provide services.

Moreover, contrary to a widespread presumption, **there is no provision in German law that would allow to consider a posted worker to be carrying out a *'paid activity'* or *'economic activity'* in Germany**. Instead, there is a provision under which the *residence title* requirement does not apply if EU law provides otherwise.

Conclusions

The judgments of the Court of Justice of the European Union allow us to reconstruct precisely the limits that the Court has set for MSs regarding the administrative procedures that they may be imposed on TCNs posted to their territory by employers established in another MS.

The CJEU has taken the unequivocal view that these procedures must be assessed solely in the light of Article 56 TFEU. This means that any such procedure must be subjected to a 'test' built on the Court's long-standing body of case-law, which requires answers to the following questions:

a) Does the national provision **obstruct** exercising of freedom to provide services by the service providers from other MSs?
b) If so, can that provision be **justified** on grounds of the protection of public policy and public security and, in particular, does it prevent a genuine and sufficiently serious threat to a fundamental public interest?
c) If so, has the purpose of that provision not been **already attained** by the rules to which the service provider is subject in the MS where he is established?
d) If not, does the provision **go beyond what is necessary** to attain the objective it pursues?

In the present case, it must be concluded that:

First of all, in the Court's view, **any administrative procedure which is not declaratory in nature constitutes a disproportionate restriction** on the freedom to provide services[38]. At the same time, it matters little what number of workers is concerned by such a procedure[39].

Secondly, control exercised by a MS over entry and residence is permissible provided, however, that it does not impose an **unlawful restriction** on the exercise of the freedom to provide services by undertakings established in other MSs which employ and post TCNs[40].

Thirdly, host States cannot justify restrictions on the posting of TCNs to their territory on grounds of public policy and security. In particular, in a situation where a TCN is already in a lawful position in the territory of the MS from which they are posted, as well as they meet the requirements of the host state's provisions on posting and therefore does not pose a threat to public policy and security *per se*[41].

[37] See the judgment of the CJEU in the case C-168/04 Commission v Austria, para. 61.
[38] *Ibidem*, para. 20.
[39] *Ibidem,* para. 66.
[40] *Ibidem*, para. 60.
[41] See the judgment of the CJEU in the case C-168/04 Commission v Austria, para. 65. A similar argument was put forward by the European Commission, which in course of the proceedings submitted that, within the framework of freedom to provide services, each service provider transfers to his employees the 'derived right' to receive a residence permit for the period needed for the provision – cf. para. 31 of the above-mentioned judgment.

Fourthly, MSs may not provide for an automatic prohibition on granting a visa to a posted worker being a TCN who has entered their territory. Such an automatic prohibition was considered by the Court to be disproportionate to the objective it serves[42].

Fifthly, Member States may not enact provisions which expose posted workers who are third-country nationals to the risk of their automatic deportation from their territory (or returning to their border) and, potentially, of a prohibition on return, since such provisions, even if they were to be regarded as justified on grounds of public policy or public security, introduce a measure which goes beyond the purpose it serves[43].

Summary

In the light of the foregoing, interpreting German law as requiring posted workers, who are TCNs with lawful situation in the sending MS, to obtain a visa before entering Germany and as providing for automatic expulsion in the event of entry without a visa, is in breach of the obligations under Article 56 TFEU.

Irrespective of the above, German case law violates the principle of autonomy of concepts in EU law, which requires that concepts used in EU law and in national law should be interpreted independently, by assuming that the notion *"paid activity"* used in the regulation (EU) 2018/1806 includes posted workers, while this does not arise from any existing EU regulation or case law. For that reason, German courts are obliged not to refuse requests for a preliminary ruling procedure to determine a binding interpretation of EU law concerning this notion.

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[42] See the judgment of the CJEU in the case C-168/04 Commission v Austria, para. 65. The Advocate General Léger in his Opinion delivered in that case pointed out that very few countries provide for such a sanction, stating that, *inter alia,* it is not provided for in Germany - cf. footnote 54 of the Opinion.
[43] See the judgment of the CJEU in the case C-168/04 Commission v Austria, para. 107 and 111.

Figure 1 - visa crossed out

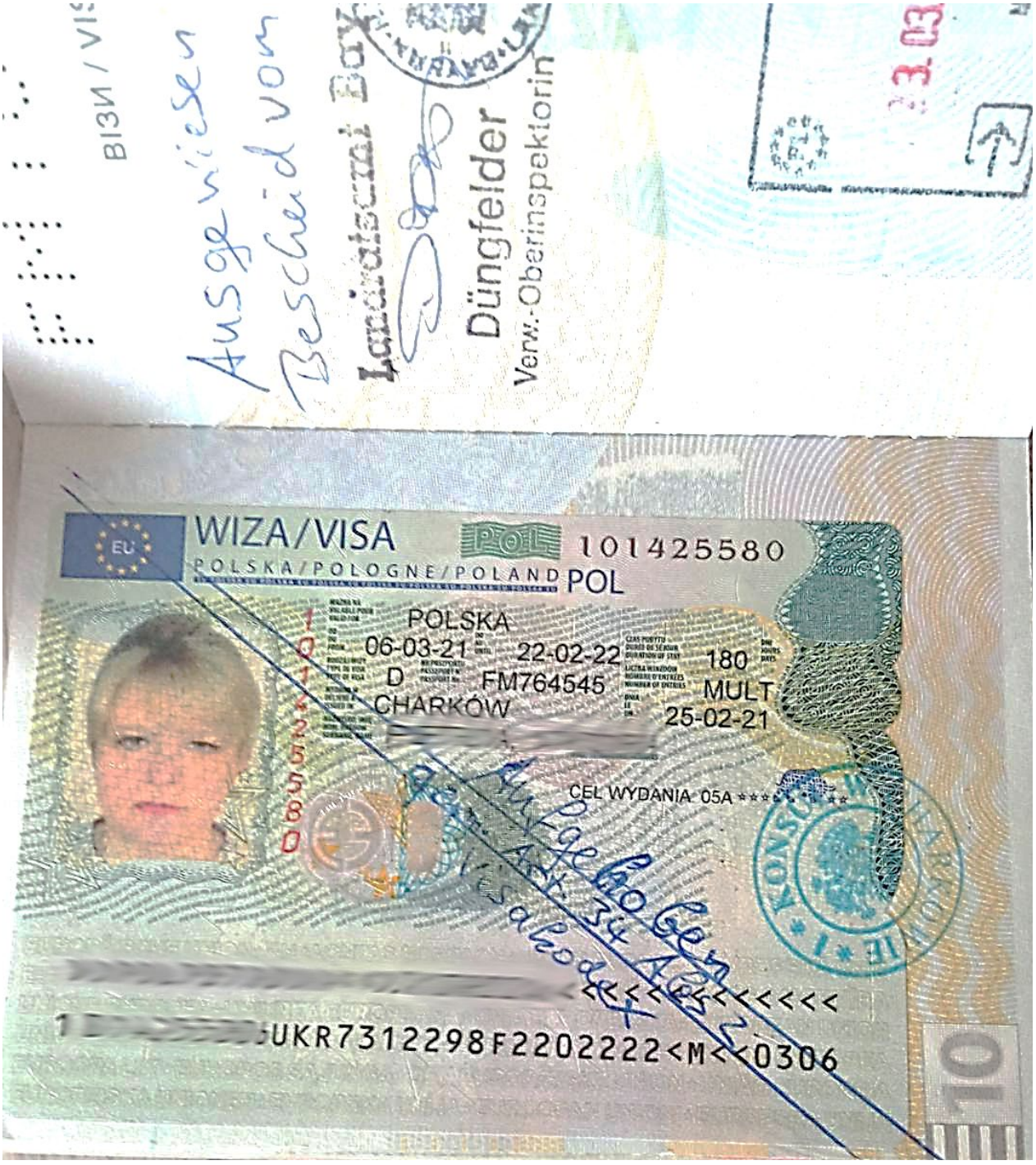

Figure 2 - the German Embassy in Warsaw website system error

Figure 3 – the German Embassy in Warsaw website no dates

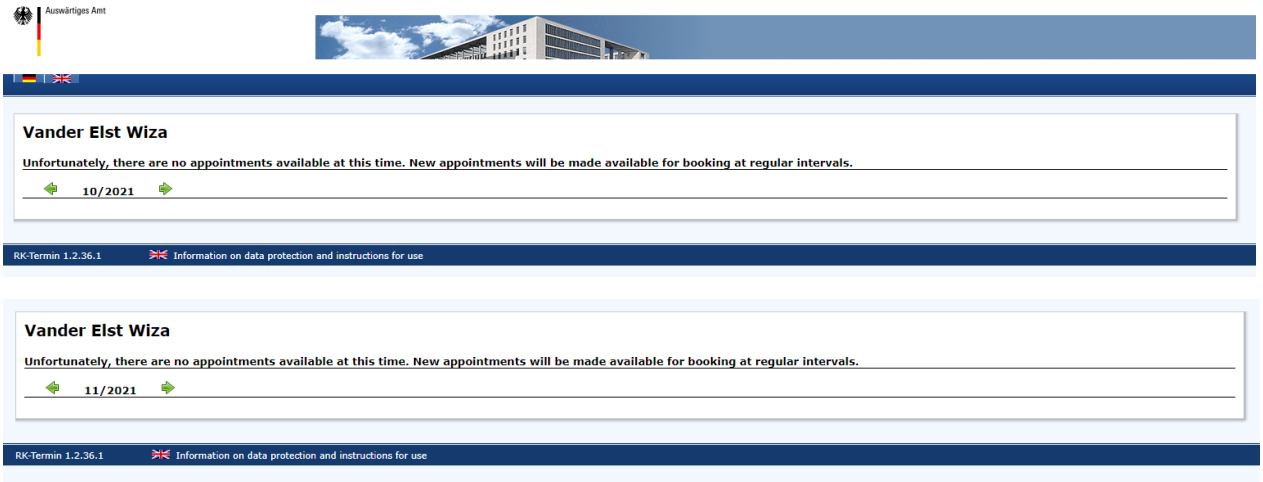

Figure 4 - email from the German Embassy in Warsaw

Від: **.WARS RK-130 Mikolajczak, Irmina** <rk-130@wars.auswaertiges-amt.de>
Date: чт, 30 черв. 2022, 12:46
Subject: Informacja [redacted]
To: [redacted]

Szanowna Pani,

prosimy o następujące informacje:

1. W punkcie 5 wniosku wizowego wpisała Pani pobyty w Niemczech. W jakim celu przebywała Pani w Niemczech w podanych przez siebie terminach?
2. Prosimy o przesłanie nam dokumentów (zeskanowanie i przesłanie w formie załączników PDF) potwierdzających, że „centrum Pani życia" jest teraz w Polsce (co najmniej od 6 miesięcy):

a) umowy o pracę

b) dokumentów ZUS-RMUA

c) umowy wynajmu pokoju / mieszkania w Polsce

d) historii Pani prywatnego konta bankowego.

Przesyłam wyrazy szacunku

za ambasadę

Irmina Mikołajczak

Wydział Prawno-Konsularny

Ambasada Republiki Federalnej Niemiec

[English]

Dear Madam,

please provide us with the following information:

1. In section 5 of your visa application you have entered stays in Germany. For what purpose did you stay in Germany on the dates you indicated?
2. Please send us the documents (scanned and sent as PDF attachments) confirming that the "centre of your vital interests" has now been in Poland (for at least 6 months):
(a) employment contract
b) ZUS-RMUA documents
c) a lease agreement of a room/apartment in Poland
d) your private bank account history.

I send my regards
On behalf of the Embassy
Irmina Mikołajczak
Legal and Consular Section
Embassy of the Federal Republic of Germany

MIEJSCE ZDARZENIA / PLACE OF THE INCIDENT / МІСЦЕ ПОДІЇ
GÖRLITZ
DATA ZDARZENIA/ DATE OF THE INCIDENT / ДАТА ПОДІЇ
08.05.2022
IMIĘ I NAZWISKO PRACOWNIKA / EMPLOYEE'S NAME
ANONIMISED DATA

I. RELACJA PRACOWNIKA \ EMPLOEE'S STATEMENT

„8 мая ночью меня двое полицейских забрали с автобуса, вместе с вещами.Меня отвезли в участок, там я была раздета полностью, как преступница.Женщины-полицейские осматривали меня на предмет хранения наркотиков в различных частях моего тела..Потом все мои вещи пересматривались, очень подробно, до копейки пересчитали мои деньги.Перечитали все мои записи , все, что было у меня в папке.Телефоны мои отобрали и вернули только уже после пересечения границы с Польшей.Меня долго допрашивали, я очень сильно плакала,была напугана.Переводчик пришел позже, но я немецкий знаю и все понимала, что мне говорят и без переводчика. Я сидела одна в комнате после допросов или между допросами. Я очень сильно плакала все время, но меня никому не было жаль. Сняли отпечатки пальцев, фотографии, я подписала бумаги, потому что у меня уже был нервный срыв из-за испуга, мне уже было все все равно. Под утро меня посадили в машину, высадили на границе с Польшей, на мосту.Я сказала им, что буду помнить их всегда.Они сказали, что будут помнить меня тоже.И уехали.Я под холодным ливнем, очень замёрзла, с двумя чемоданами и сумкой брела по чужому городу, сонная, конечно же , очень уставшая и разбитая морально полностью. Я очень плакала, после я думала, что мои глаза перестанут видеть.У меня не было польской мобильной связи, никакой связи ни с кем.В маленьком приграничном городке надо было очень долго и далеко идти к крупному торговому центру, чтобы просто иметь возможность приобрести мобильную связь и сообщить родным и знакомым, что со мной произошло.О том , что делать дальше - я даже думать не могла. Мне помогли найти попутную машину, которую я ждала 12 часов на улице, ночью, под дождем, потом ехала с несколькими не очень трезвыми мужчинами, которые ещё и курили , в направлении Варшавы.Меня высадили за 30 км до Варшавы и дальше я уже добиралась на такси, опять же среди ночи.Это было отдельное дело. Конечно, я в момент, когда это случилось- думала не переживу, хотела даже просто броситься в реку, потому что была в отчаянии, напугана и в нервном стрессе.Я не могла найти место для ночлега и двое суток не спала, было холодно, дождь и я единственное место, где могла согреться-торговый центр в приграничном городке, а ночью ждала попутную машину просто на холоде и под дождем.

Не дали мне документов о депортации сказали что я в какой то системе и все будут знать что я депортирована".

*** TŁUMACZENIE NA JĘZYK POLSKI ***

„8 maja dwóch policjantów zabrało mnie z autobusu wraz z moimi rzeczami i zawiozło na komisariat, gdzie zostałam całkowicie rozebrana, jak przestępca. Policjantki zbadały mnie na obecność narkotyków w różnych częściach ciała... Następnie sprawdzono wszystkie moje rzeczy, szczegółowo przeliczono moje pieniądze co do grosza. Zabrali mi bilingi i oddali je dopiero po przekroczeniu granicy Polski. Po przesłuchaniach lub między nimi siedziałam sama w pokoju. Cały czas dużo płakałam, ale nikt się nade mną nie użalał. Pobrali odciski palców i zdjęcia, a ja podpisałam papiery, bo już miałam załamanie nerwowe z przerażenia, już mi nie zależało. Rano wsadzili mnie do samochodu, wysadzili na polskiej granicy, na moście, powiedziałem im, że zawsze będę o nich pamiętała, a oni powiedzieli, że o mnie też będą pamiętać. Byłam w małym przygranicznym miasteczku, musiałam pokonać duże odległości, aby zdobyć telefon komórkowy i poinformować krewnych i przyjaciół o tym, co się stało. Nie mogłam nawet myśleć, co robić dalej. Z pomocą w znalezieniu samochodu musiałam czekać 12 godzin pod gołym niebem w nocy w deszczu, a potem złapać stopa z jakimiś palaczami, którzy nawet nie byli trzeźwi. Wysadzili mnie 30 km od Warszawy i musiałam wziąć taksówkę w środku nocy. Oczywiście nie mogłam przeżyć

momentu, w którym to się stało. Byłam zrozpaczona, przerażona i zestresowana. Nie mogłam znaleźć miejsca na nocleg i nie spałam przez dwa dni, było zimno, padało i jedynym miejscem, gdzie mogłam się ogrzać, było centrum handlowe w przygranicznym mieście, a ja tylko czekałam w zimnie i deszczu na taksówkę przez całą noc. Nie dali mi dokumentów deportacyjnych, powiedzieli, że jestem w jakimś systemie i wszyscy będą wiedzieli, że jestem deportowana".

*** ENGLISH TRANSLATION ***

"On May 8, at night, two policemen took me from the bus with my belongings. I was taken to the police station, where I was completely undressed to naked body, like a criminal. Female police officers examined me for drug possession in various parts of my body. Then all my belongings were reviewed, in great detail, my money was counted to a penny. They read all my notes, everything that was in my folder. My mobile phones were taken away and returned only after crossing the border with Poland. I was interrogated for a long time, I cried very much, I was scared. The interpreter came later, but I speak German and I understood everything that I was told without an interpreter. Between and after interrogations I was left alone sitting in a room. I cried very hard all the time, but no one felt sorry for me. They took fingerprints, photos, I signed the papers, because I already had a nervous breakdown due to fright, I didn't care. In the morning I was put in a car, dropped off on the border with Poland, on the bridge. I told them that I would always remember them. They said that they would remember me too. And they left. I was in a cold downpour, very cold, with two suitcases and a bag wandering around a foreign city, sleepy, of course, very tired and broken morally completely. I cried a lot, after I thought that my eyes would stop seeing. I had no Polish mobile communication, no connection with anyone. In a small border town it was necessary to go very long and far to a large shopping center just to be able to purchase a mobile connection and inform relatives and friends what happened to me. They helped me find a passing car, for which I waited 12 hours on the street, at night, in the rain, then I was driving with several not very sober men who also smoked, in the direction of Warsaw. I was dropped off 30 km before Warsaw and then I was already getting a taxi, again in the middle of the night. This was a separate case. Of course, at the moment when this happened, I thought I would not survive, I even wanted to just throw myself into the river, because I was in despair, frightened and in nervous stress. I could not find a place to sleep for the night and did not sleep for two days, it was cold, rain and the only place where I could warm up was a shopping center in a border town, and at night I was waiting for a passing car just in the cold and in the rain. They did not give me deportation documents and they said that I was registered in some kind of system and everyone would know that I was deported."

II. RELACJA PRACODAWCY \ EMPLOYER'S STATEMENT

„W zeszłym tygodniu została deportowana z Niemiec do Polski moja pracownica mająca obywatelstwo ukraińskie. Ma zakaz wjazdu na 2 lata. Było to na przejściu jak jechać na Drezno. Pani jest pod ochrona czasową w Polsce, ma PESEL i odciski biometryczne, wjechała po 24.02.2022 do Polski, jest z obwodu Donieckiego czyli uciekała przed wojną. Pani jechała do Niemiec w busie z innymi Paniami. W Niemczech bus zatrzymała Policja i sprawdzała dokumenty wszystkim Paniom z Paszportami z Unii Europejskiej. Powiedzieli OK i szczęśliwej drogi, Pani S. powiedział, że ona nie prawa przebywać na swoim paszporcie w Niemczech i powiedzieli, żeby ona poszła z nimi na komendę. Pani płakała. Policjanci szukali jej walizki. Walizka otworzyła się i powypadały z niej rzeczy Pani - Policjanci kazali jej zbierać rzeczy i iść z tą walizką za nimi do samochodu - kierowca busa wyszedł i pomógł Pani zbierać rzeczy i zanieść wszystko do policyjnego samochodu. Pani była w stresie, non stop płakała. Od razu zabrali jej komórkę i mała torebkę (bardzo mocno to było powiedziane żeby oddała komórkę i torebkę ze Pani przestraszyłaś i od razu wszystko oddala) , ona widziała jak robili foto wszystkiego co było w komórce. Pani poprosiła oddać jej komórkę - powiedzieli ze nie oddadzą. Była cala noc w Policji na przesłuchaniu. Był tłumacz, ale kiedy Pani chciała zapytać co i jak , to Pani bardzo chłodno dała odpowiedź, że wszystko jej powiedzą później i Pani S. już dalej bała się cos u tłumacza zapytać. Powiedzieli rano że Pani została deportowana do Polski dlatego, ze nie poddała się niemieckiemu art. 24 i nie ma prawa przebywać w Niemczech - oczywiście powiedzieli gdzie ma i co ma podpisać (wszystko po Niemiecku napisane). Powiedzieli, że mandat przyjdzie jej na adres, który ona podała (a podała ona Ukraiński adres). Potem wsadzili z innymi osobami tez z Ukrainy, które już były na Policji do samochodu i przywieźli do granicy Polski - wysadzili i powiedzieli „iść". Oni poszli. Jak weszli na terytorium Polski to podjechali samochodem i oddali wszystkim paszporty. Pani nie miała przy sobie pieniędzy, żeby jechać, nie miała co jeść i pić, ktoś jej pomógł dojechać do Warszawy".

*** ENGLISH TRANSLATION ***

"Last week, my employee , a Ukrainian citizen, was deported from Germany to Poland. She has a ban on entry to Germany for 2 years. It was at the crossing as to go to Dresden. She was granted temporary protection in Poland, she has PESEL and biometric fingerprints, she entered Poland after 24.02.2022, she is from the Donetsk region, i.e. she was fleeing from the war. The lady was going to Germany in a bus with other ladies. In Germany, the bus was stopped by the Police, who have checked the documents of all women with EU Passports. They said OK, have a safe trip. They told Ms. S., that she was not allowed to enter in Germany with her passport and told her to go with them to the police station. The lady was crying, they were standing looking for her suitcase. When they found it, the suitcase opened and the lady's belongings fell out - The policemen ordered her to collect things and go with this suitcase with them to the car - the bus driver went to help her collect things . He's helped her to put everything in the police car. The lady was under stress and continued to cry. They immediately took her cell phone and a small purse (it was very strongly said that she ought to give her cell and purse. The lady was scared and immediately gave away everything). She saw how they took a photo of everything that was on the cell. When the lady asked for her cell phone - they refused to give it back. She spent all night at the police station being interrogated. There was an interpreter, but when she wanted to ask why was she detained, the interpreter very coldly gave the answer that they would tell her everything later. Mrs. S. was afraid to ask the interpreter anything else. In the morning they said that she was being deported to Poland because she did not submit to the German Article 24 and has no right to stay in Germany - of course, they told here where to sign a document (all written in German). They said that she would receive the fine by post to her home address, which she gave (and she gave the Ukrainian address). Then they put her and other people, also from Ukraine, who were already at the Police station, in the car and drove them to the Polish border - they let them out and said "walk". So they went. When they entered the territory of the Poland, they drove up by car and gave everyone their passports back. The lady had no money with her to go, she had nothing to eat or drink, someone has helped her to get to Warsaw."