October 3, 2017, Trento

The right to be heard and the principle of good administration in return cases

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I. The principle of good administration as an umbrella provision

- **Art. 41 of the Charter**:

1. Every person has the right to have his or her affairs ***handled impartially, fairly and within a reasonable time*** **by the institutions, bodies, offices and agencies of the Union**.

2. This right includes:

a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;

c) the obligation of the administration ***to give reasons for its decisions***

- ***National (constitutional) tradition: the principle of good governance + Art. 8(1) of the Law on Public Administration:***
- **„1. An individual administrative act must be based on objective data (facts) and the norms of legal acts, and the sanctions applied (withdrawal of a licence or authorisation, temporary prohibition to engage in particular activities or to provide services, fine, etc.) must be reasoned.**

2. An individual administrative act must contain clearly formulated established or granted rights and duties, and specify the appeal procedure.“

II. Application of the principle as the general principle of EU law at the national level

Is the principle of good administration applicable to MS?

Art. 41(1) („by the institutions, bodies, offices and agencies ***of the Union****") v. Art. 51 („ The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity* ***and to the Member States only when they are implementing Union law****"*

The Return directive (Arts. 12, 15)

C-277/11 M.M. v. Minister of Justice, Equality and Law Reform:

"In the present case, with regard more particularly to the right to be heard in all proceedings, which is inherent in that fundamental principle <…>, that right is now affirmed not only in Articles 47 and 48 of the Charter, which ensure respect of both the rights of the defence and the right to fair legal process in all judicial proceedings, **but also in Article 41** thereof, which guarantees the right to good administration" (p. 82)

"It must be stated that, as follows from its very wording, that **provision is of general application**" (p. 84)

III. Profile of Lithuania

- **In general** – transit country (TCN from Asia, etc.); thus, asylum and/or removal procedures become relevant once they are detained once illegally crossing the border or stopped somewhere en route

- However, **specific groups**, seeing Lithuania as the final destination, **exist**: *Ukraine (armed conflict); Belorussia and Russia (usually politically motivated + Chechnya); Georgia + recently Kurdish nationals (cases pending: recognition that applicants qualify for asylum status, but rejection of applications on the basis of the threat to state security)*
- *Statistics: in 2016 cases of foreigners – **3 percent** (2700 cases in total)*

IV. Jurisprudence of the SACL

The right to be heard in administrative proceedings (no express provision in the Return directive and Law on the Legal Status of Aliens), but, *C-383/13 PPU, M.G., N.R. v. Staatssecretaris van Veiligheid en Justitie, para. 32. ;* ***no express provision in national law***

- **A858-2332/2011: initial stay legal; then illegal; birth of a son:** order to the applicant and her son to leave Lithuania within 15 days (VD decision): breach of the right to be heard; **in terms of procedural guaranties - no difference between voluntary departure and expulsion order**
- **A756-2681/2012: non-prolongation of subsidiary protection and VD decision:** failure of the respondent to properly evaluate all relevant circumstances (wife and child still had subsidiary protection in Lithuania);
- **A822-69/2013: rejection of asylum application of the applicant from Chechnya and expulsion order:** the obligation of the respondent, stemming from the principle of good administration, to substantiate its removal decision and to evaluate all the relevant facts (including family ties)
- **eA-2266-858/2015** – renewal of residence permit and VD decision; insufficient supporting documentation; ***the right to be heard*** (2 days term considered inadequate)
- **eA-4702-858/2017 (still pending)** – whether the right to be heard was respected when only innitial application for residence permit with supporting documents was considered?

V. Detention cases: division of competence; grounds of detention and statistics

Division of competence: district courts of general competence decide on detention of foreigners as first instance courts and their decisions may be appealed against before the Supreme Administrative Court of Lithuania (different judicial branch): ***full control of facts and law on both levels***

Grounds of pre-removal detention: 1) when it is attempted to return the foreigner who has been refused admission into the Republic of Lithuania to the country from which he arrived;

2) when a decision is taken to expel the foreigner from the Republic of Lithuania or another state to which the Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals applies.

353 persons were detained on grounds of irregular entry or presence in 2015;

292 in 2014; 363 in 2013; 375 in 2012; 241 in 2011; 132 in 2010; and 212 in 2009

VI. Jurisprudence of the SACL

„fairly and within reasonable time" (Art. 15 of the Return directive: *any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence)*

- **N822-70/2104** – slow processing of the asylum application (illegal entry; asylum application and the risk of absconding); request to the embassy of Vietnam – no response: 6 months detention for checking the identity and establish the motives of the asylum seeker
- **A-1823-822/215** – risk of absconding in the course of removal proceedings: no evidence in the case file that the applicant would try to abscond or to otherwise to obstruct the processing of his asylum application; no evidence institutions put efforts to establish the identity
- **A-3673-822/2015** – establishing the identity of detained foreigner - the argument that the embassy of the country of origin does not respond won't be accepted in order to prolong the detention in the future
- **N^{858} -90/2014 ; A-3078-822/2016** – doubts as regards the identity, risk of absconding; absence of return documents - argument for absence of response from the country of residencefor more than a year is not valid for detention over 18 months (**no express provision what to do in case 18 month period was exeeded**

VII. Conclusions

- Art. 41 CFR important as the doctrinal source of inspiration for development of the principle of good administration at the national level (*reflection of general principles of EU law*)

- As regards **the right to be heard** in administrative phase – it is seen as precursor for adoption of substantiated administrative decision and effective right of defence of a person

- In **detention cases** the principle of good administration so far mainly used as (additional) ground for evaluation of diligence of action/inaction of migration authorities when considering ***to what extent detention is still justified given the fact that these are not criminal proceedings***

Questions, comments?