ADMINISTRATĪVO TIESĪBU APAKŠNOZARE

AMENDMENT OF THE CASE-LAW OF COURTS IN BULGARIA ON ADMINISTRATIVE CASES AS A CONSEQUENCE OF RESOLUTION ON ART. 6 OF EUROPEAN CONVENTION ON HUMAN RIGHTS

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I. Introduction

The research aims at analysis and assessment of the changes introduced to the administration of justice in the Republic of Bulgaria as a consequence of resolutions adopeted by the European Court of Human Rights[1] in Strasbourg and especially this part of the case-law of the Court pertaining to cases of violation of Art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

II. Obligations for the state to enforce the final resolutions of the Court

Bulgaria ratified the European Convention on Human Rights ("ECHR", "Convention") in 1992 and accepted the Court's jurisdiction by virtue of this ratification. Under Article 46 of the Convention, the Member States have the international legal commitment to implement the final resolutions of the Court pertaining to violations of the Convention. Adopting the necessary measures for implemention is controlled by the Committee of Ministers of the Council of Europe ("CM", "Committee of Ministers"). The Member States have a contractual obligation to remedy established violations of the Convention but have some discretion in regards to the means of so doing. Resolutions against the Republic of Bulgaria, posing most serious problems are dealt with by CM in "procedure of intensifeid monitoring".

Some of the more significant measures for implementing the resolutions of the ECHR are as follows: reforms in the criminal proceedings regarding the implementation and control of measures of resatraint restricting the right to freedom[2]; the introduction of a number of additional procedural safeguards in criminal proceedings[3]; payment of expenses for an interpreter in criminal proceedings[4]; overcoming barriers to relatives of crime victims to participate fully in pre-trial proceedings[5], some problems related to access to fair hearing[6]; amendments to the Law for Foreigners in the Republic of Bulgaria (FRBA) introducing safeguards in taking compulsory administrative measures on the grounds of defence of national security[7]; the amendments to the FRBA and to the Law for the Bulgarian Identification Documents pertaining to the prohibition to leave the territory of the Republic of Bulgaria[8]; introduction of the 'absolute necessity' standard in the Ministry of Interior Act (MIA)[9]; the introduction of adequate safeguards in imposing restriction to personal freedom in the case of confinement to a psychiatric clinic (Health Act)[10]; the amendments to the Act on the Liability for Damage Incurred by the State and the Municipalities (ALDISM) pertaining to the amount of state fees due during proseedings under its provisions[11]; introduction of a right of appeal against imprisonment for up to fifteen days under the provisions of the Decree on Petty Hooliganism[12]; the new MIA provisions on maintaining record base with data of persons "with criminal record who hav not been convicted"[13]; development of jurisprudence on complaints about poor prison conditions (abundant practice of national courts on claims for

damages under Art. 1 of ALDISM); amendments to art. 75 of the Implementing Regulations of the Law on Execution of Sentences and Detention regarding the examinatioin of the contents of the prisoners' correspondence[14]; improving the procedures for appeals of orders prohibiting the holding of meetings, rallies or demonstration; the introduction of a means of compensating the damages from violations of the right to hear cases within a reasonable time[15]; inclusion in the ALDISM of judicial compensatory remedy for cases of imprisonment in violation of Art. 5 of the Convention[16]; solving individual problems relating to the right to family life[17]; to freedom of religion[18]; right of access to court[19]; right of property[20]; rights of prisoners and detainees in custody[21].

III. *FAZLIYSKI V. BULGARIA*

A. The procedure for applicant's dismissal from MIA

Since 1995 the applicant was an official in the Ministry of Interior in the National Security Directorate with the rank of major. His duties include counterintelligence, recruitment and management of secret agents, collecting and disseminating information from secret sources, secret surveillance and others. In November 2002 a proposal was made for the dismissal of the applicant, prompted by an internal investigation which established indications that the applicant was engaged in fish farming – outside his duties in the Ministry and that he had tried to resolve disputes with his employees by threatening them with his post. It is believed that such activities are incompatible with the duties of an officer from the National Security Directorate and denigrate the reputation of the service. The proposal was not accepted due to insufficient evidence. On March 6, 2003 the Director of National Security Directorate sent a letter to the head of the Psychology Institute of the Ministry of Interior proposing the applicant to undergo a psychological assessment pursuant to Instruction № I-37. The applicant undergoes a psychological assessment on April 16, 2003. It consists of a psychological test, an interview and a polygraph test. The psychologist who carried out the assessment described the results of their observations and of the polygraph test and expressed the opinion that the applicant was mentally unfit to work for the Ministry of Interior. The document is classified and the applicant is not allowed to read it. On June 5, 2003 the Director of the National Security Directorate propeses to the Minister of Interior to dismiss the applicant from his post under Art. 253, §. 1, p. 5 of the Ministry of Interior Act of 1997 and Art. 251, §. 1, p. 6 of the Implementing Regulations. By his order of 27 June 2003, the Minister of Interior dismissed the applicant on the grounds of the legal provisions mentioned in the proposal.

B. Appeal trial proceedings

On 26 August 2003 the applicant sought judicial review of the Minister's order. He argued, inter alia, that it is not properly motivated and that the psychological assessment on which it was based was not objective. In the proceedings before the Supreme Administrative Court, the Ministry subitted a copy of the psychological assessment of the applicant. From then onwards the proceeings are classified, apparently because the materials on the case include a clssified document. With a Decision of 11 October 2004 (dec. № 50 of October 11, 2004 on adm. case № 65/2003 C, SAC, V p.), the three-member panel dismissed the applicant's appeal, finding that there have been no violations of the procedural rules in the proceedings for his dismissal. The panel also states that it has no jurisdiction to consider the results of the psychological assessment carried out by the Psychology Institute of the Ministry of Interior. Under the provision of Art. 251, §. 1, p. 6 of the Implementing Regulations of the Ministry of Interior Act of 1997, these assessments amount to irrefutable evidence of unfitness for work in the Ministry and the Psychology Institute of the Ministry is the only authority competent to decide in such matters. The applicant appealed the legality of the decision of the three-member panel that the Psychology Institute of the Ministry is the only body competent to carry out such assessments and that the court cannot control the correctness of the opinion expressed by the Institute. In additional notes submitted on March 9, 2005, he stated that in a Decision of 8 February 2005, another panel of the Supreme Administrative Court stated that the assessment of mental fitness to work in the Ministry should be subject to judicial review. With a final decision of May 17, 2005 (dec. № 12 of May 17, 2005 by adm. case № C 4/2005, SAC, 5-member panel) a five-member panel of the Supreme Administrative Court dismissed the appeal. It stated, inter alia, that the procedure

for psychological assessment had been properly carried out and that the three-member panel had rightly pointed out that it cannot exercise control over the said assessment. Since the proceedings were classified, the applicant was unable to obtain copies of the decisions of the Supreme Administrative Court. On December 5, 2005 he asked the court to issue certificates containing the operative part of the decisions and the subject-matter of the case. The chairman of the five-member panel hearing the case granted the request and on December 7, 2005 the applicant was issued two certificates, one pertaining to the decision of the three-member panel and the other pertaining to the decision of the five-member panel.

C. Declassification of the decisions of the Supreme Administrative Court

On August 30, 2006 a commission appointed by the President of the Supreme Administrative Court declassified the minutes of the hearings before the three-member and five-member panels, as well as their decisions. It did this in compliance with art. 50, §. 3 pt. 2 of the Implementing Regulations of the Law on Protection of Classified Information of 2002, which stipulates that the level of classification should be changed if it was wrongfully determined.

The applicable national law Art. 120 of the 1991 Constitution – reads as follows: courts shall review the legality of acts and actions of administrative bodies.

D. Judgement of the Court

It should be noted that under Art. 19 of the Convention, the Court's obligation is to ensure compliance with the obligations assumed by the Contracting Parties to the Convention. The Court is not an appellate court in relation to national courts[22] and it is not its role to examine the factual or legal errors allegedly committed by these courts unless and insofar as they violate the rights and freedoms protected by the Convention[23]. Hence, the Court cannot determine whether the applicant's dismissal from his post is lawful, or whether the decisions of the Supreme Administrative Court concerning the dismissal are correct in terms of Bulgarian law. The Court's task is limited to examining whether the proceedings before the Supreme Administrative Court were carried out in accordance with Art. 6 §. 1 of the Convention.

One of the cases guarantees provided in cases solving a legal dispute is that the "court" hearing the case must be competent to examine all the facts and legal issues related to that dispute [24].

In carrying out this review, the Court must take into account the fact that when approving the applicant's dismissal from his post, the Minister of Interior did not exercise his right of discretion. There is nothing wrong in that the assessment was conducted by an expert hired by the Institute of Psychology of the Ministry[25]. Art. 6 §. 1 of the Convention does not prevent national courts from relying on expert opinions prepared by specialized bodies in resolving disputes before them when this is required by the nature of the issues[26]. However, the motives of the three-member and five-members panels of the Supreme Administrative Court show that they not only took into account the assessment carried out by the Institute, but considered themselves bound by it and refused to control it in any way.

The Court must therefore consider whether the assessment of the Institute itself has been subject to direct examination by the court[27]. This is obviously not the case – the Supreme Administrative Court has explicitly stated that such assessments are not subject to any form of control.

It is also true that this Court, albeit in different contexts, has found that the legitimate concerns about national security can justify restrictions of the rights set forth in art. 6 §. 1 of the Convention[28].

Regardless, neither the Supreme Administrative Court in its reasoning, nor the Government in their statements, are trying to justify this denial of fair hearing with proper jurisdiction on grounds of legitimacy of the pursued aim or of proportionality.

Therefore, there has been a violation of Art. 6 §. 1 of the Convention on these grounds. However, it should be emphasized that, although related to the general requirement of fairness, the requirement of art. 6 §. 1 for public pronouncement of the court decision has its own independent significance. Hence, the fact that the applicant was able to get access to the aforementioned decisions at the Registry of the Supreme Administrative Court and to exercise his right to appeal cannot be considered material and decisive. What matters ultimately is whether these decisions were made available to the public, in one form or another.

In the case at hand, on the grounds of the classified nature of the proceedings, the decisions of the three-member and five-members panels

of the Supreme Administrative Court were not pronounced publicly. In addition, the case files – including those decisions – were not available to the public and the applicant was not able to receive copies of them. The decisions were declassified on 30 August 2006, more than a year and three months after the conclusion of the proceedings, apparently on the grounds that they were incorrectly classified. The conclusion is that the decisions of the Supreme Administrative Court were not given any form of publicity for a considerable period of time, and that no proper and convincing justification for this situation has been offered.

In relation to this, it should be noted that on a case concerning deportation on grounds of national security, this Court held that the complete concealment of the court decision from the public in its entirety could not be considered justified. It emphasized that the publicity of court judgments aims at ensuring the control over the judiciary by the public and is a basic means of protection against arbitrariness. It points out that even in cases that are undoubtedly related to national security, such as those associated with terrorist activities, some Member States have chosen to classify only those parts of the decisions whose disclosure would threaten national security or the safety of others, thus illustrating that there are techniques that could respond to the legitimate security concerns without completely denying fundamental procedural guarantees such as the publicity of court decisions[29].

Taking into account all of the above, it is considered that there has been a violation of Art. 6 § 1 of the Convention as the Supreme Administrative Court has refused to exercise control over the assessmentt of the mental fitness of the applicant and has not provided any form of publicity of its decisions on the applicant's case.

IV. Conclusion

In accordance with this Resolution of 16 April 2013 on FAZLIYSKI AGAINST BULGARIA (Application № 40908/05), during the next few years amendments have been introduced in the case-law of the courts for hearing cases of dismissal of employees under the provisions of Ministry of Interior Act and the Implementing Regulations for the MIA repealed with § 1 of the transitional and final provisions of Decree № 207 of July 18, 2014. The panels of the Supreme Administrative Court examine the expert assessments of the Psychology Institute of the Ministry of Interior within the judicial control over the legality of the individual administrative act.

For the sake of the completeness and scope of this study, a note should be made on the unsatisfactory level at which national courts apply the ECHR on basic procedural safeguards such as the publicity of judgments. Differences persist regarding the application of the principle of publicity of the trial due to the fact that some cases are not classified, but others continue to be heard behind closed doors on the premises that they contain classified information. The classification of information related to the psychological assessment of employees of the Ministry of Interior has not been provided for in §1 of the Law on Protection of Classified Information. Therefore, without reasonable grounds to suggest that there is a threat to national security, prerequisites for violation of Art. 6 § 3 of the Convention are created.

Amendments have also been made to the secondary regulatory framework by adopting Decree № 207 of 18 July 2014 for the adoption of the Rules of Organization and Operation of the Ministry of Interior – SG. 60 of July 22, 2014, effective as of 22 July 2014.

References

1 http://hudoc.echr.coe.int/eng#{"documentcollectionid2":["GRANDCHAMBER","CHAMBER"]}

2 Resolution ResDH(2000)109, Resolution ResDH(2000)110, Resolution CM/ResDH(2007)158, Resolution CM/ResDH(2010)121, Resolution CM/ResDH(2012)164, Resolution CM/ResDH(2012)165, Resolution CM/ResDH(2012)166, Resolution CM/ResDH(2012)167, Resolution CM/ResDH(2012)151).

3 See Resolution CM/ResDH(2013)183 Penev against Bulgaria.

4 See Résolution CM/ResDH(2012)157 Hovanesian against Bulgaria.

5 See Resolution CM/ResDH(2013)101 Seidova and others against Bulgaria.

[6] See Resolution CM/ResDH(2013)239 Atanasova v. Bulgaria;

[7] See, e.g., Resolution of the COM of March 2013 on Al-Nashif group: „4. noted with satisfaction the evolution of the domestic courts' practice and the legislative amendments introducing judicial review of expulsion orders based on considerations of national security and reforming the system of detention pending such expulsion".

[8] See Resolution CM/ResDH(2013)100, Resolution CM/ResDH(2012)156 Ignatov, Gochev and Nalbantski against Bulgaria, Resolution CM/ResDH(2013)2.

[9] "1. noted with satisfaction that the Bulgarian authorities have amended the provisions of the Ministry of Interior Act governing the use of fire-arms by the police and that the new legislative framework seems to comply with the requirements of Articles 2 and 3 of the Convention, in the light of the Court's case-law".

[10] See Resolution CM/ResDH(2010)40 „Тодев" Resolution CM/ResDH(2010)189 CM/ResDH(2010)40.

[11] See Resolution CM/ResDH(2011)8.

[12] See Resolution CM/ResDH(2013)99.

[13] Resolution CM/ResDH(2013)119, Dimitrov-Kazakov against Bulgaria.

[14] See Resolution CM/ResDH(2014)258.

[15] The Deputies …:

„1. recalled their decision adopted during their 1150th meeting (DH) (September 2012) according to which the administrative compensatory remedy recently adopted by the authorities and the judicial compensatory remedy proposed in the field of length of proceedings, taken together, seem capable of meeting the main requirements of the case-law of the Court;

2) noted with satisfaction the adoption by the Bulgarian Parliament, on 28 November 2012, of the legislative amendments aimed at introducing the above-mentioned judicial remedy; noted in this respect that according to the information submitted, the adopted provisions are identical to those already assessed by the Committee, except for those relating to the competent courts; invited the authorities to keep the Committee informed about the entry into force of the adopted provisions and to provide it with their translation;18/06.2013.

[16] See Resolution CM/ResDH(2013)102.

[17] See Resolution CM/ResDH(2012)153 Mincheva against Bulgaria, Resolution CM/ResDH(2012)162 Bevacqua against Bulgaria, Resolution CM/ResDH(2013)22.

[18] See Resolution CM/ResDH(2012)169 Boychev and others against Bulgaria, Resolution CM/ResDH(2011)193 Hassan et Tchaouch et Haut Conseil Spirituel de la communauté musulmane contre Bulgarie.

[19] See Resolution CM/ResDH(2012)150 Bulinvar OD and Hrusanov against Bulgaria;

[20] See Resolution CM/ResDH(2012)149;

[21] See, e.g, Resolution CM/ResDH(2013)98 Kashavelov case against Bulgaria, Resolution CM/ResDH(2012)160 Simeonov against Bulgaria.

[22] See Yordanova and Toshev v. Bulgaria, №5126/05, § 65, 2.10.2012.

[23] See, among others, Csősz v. Hungary, № 34418/04, § 33, 29.01.2008.

[24] See Terra Woningen B.V. v. the Netherlands, 17.12.1996., 1996-VI, § 52; Chevrol v. France, № 49636/99, § 77, 2003-III; I.D. v. Bulgaria, № 43578/98, § 45, 28.04.2005.; Capital Bank AD v. Bulgaria, № 49429/99, § 98, 24.11.2005.; Družstevní záložna Pria and Others v. the Czech Republic, № 72034/01, § 107, 31.07.2008., Putter v. Bulgaria, № 38780/02, § 47, 2.12.2010.

[25] See mutatis mutandis, Стефан.

[26] See Csősz v. Hungary.

[27] See mutatis mutandis, Обермайер, § 70; I.D. v. Bulgaria, § 53; Capital Bank AD v. Bulgaria, § 104.

[28] See Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom, 10.07.1998., § 76, 1998-IV; Rowe and Davis v. the United Kingdom, № 28901/95, § 61, 2000-II; P.G. and J.H. v. the United Kingdom, № 44787/98, § 68, 2001-IX; Devenney v. the United Kingdom, № 24265/94, § 26, 19.03.2002.; Dağtekin and Others v. Turkey, № 70516/01, § 34, 13.12.2007.

[29] See Raza v. Bulgaria, № 31465/08, § 53, 11.02.2010.

Anotācija

Cilvēktiesību ievērošana saskaņā ar Eiropas Cilvēktiesību konvenciju ir viens no svarīgākajiem Eiropas Savienības kopējās politikas veidošanas un pakāpeniskas attīstības priekšnoteikumiem. Minētā prioritāte ir iespējama tikai tad, ja dalībvalstis un to iestādes vienveidīgi un konsekventi ievēro konvencijā un tās protokolos noteiktās prasības, saskaņā ar Monteskjē noteikto varas dalīšans principu dažādās sabiedrisko attiecību jomās.

Galvenā uzmanība rakstā pievērsta Eiropas Cilvēktiesību tiesas lēmumam saistībā ar šīs konvencijas 6. panta pārkāpumu, jo konkrētajam lēmumam par tiesībām uz taisnīgu tiesu būtu jātstāj paliekoša ietekme uz nacionālo tiesu praksi. Jautājums ir aktuāls, jo skar stabilitāti un labklājību Eiropā, kontekstā ar migrācijas dinamiku un ģeopolitisko attīstību.

Аннотация

Уважение прав человека в соответствии с Европейской конвенцией по правам человека является необходимым условием для формирования и прогрессивного развития общей политики Европейского Союза. Достижение этой приоритетной задачи возможно только на основе равного и добросовестного выполнения Конвенции и протоколов к ней государствами и их органами в соответствии с изложенным Ш.Монтескье принципом разделения властей в различных сферах общественных отношений. Основной тезис данной статьи: ст. 6 ЕКПЧ является актуальной для стабильности и процветания европейского политического пространства в контексте динамики миграции и геополитических перспектив.