The right of access to court in matters of public administration decisions on administrative sanctions – case law of the European Court of Human rights and the Slovak Republic[294]

Soňa Košičiarová, Michal Maslen

Abstract: The paper deals with the experience of the Slovak Republic in the context of judgments of the European Court of Human Rights, which showed the discrepancy of the Slovak national legislation with the requirements of the Convention on Protection of Human Rights and Fundamental Freedoms in relation to a right of access to the courts under Art. 6. Par. 1. in matters of sanctions imposed by public authorities for administrative offenses.

Key words: Art. 6. Par. 1 of the Convention on Protection of Human Rights and Fundamental Freedoms, criminal charge, administrative punishment, case law of the European Court of Human Rights.

INTRODUCTION

The Slovak Republic and also Bulgaria as members of the Council of Europe have adopted the Convention on Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention"). They have committed to guarantee the rights enshrined in this international treaty and they have taken the commitment to follow the final decision of the European Court of Human Rights in any case to which they are parties.

This means that they are obliged in their legal systems to guarantee the rights established by this international treaty, inter alia, in the field of punishment of the individuals by public authorities. The highest values in this regard have the provisions of the Convention - Art. 6 (right to a fair trial), Art. 7 (no penalty without a law) and Art. 13 (right to an effective remedy) and the provisions of Art. 2-4 of Protocol no. 7 of the Convention (right to an appeal in criminal cases, compensation for unlawful conviction and the right not to be convicted in the same case twice).

1. The European Court of Human Rights and the Convention application in the field of punishment of the individuals

1. 1 The right to a fair trial under the Art. 6. Par. 1. of the Convention and the punishment of the individuals

An inevitable prerequisite for realizing the right to a fair trial is the right of access to court.

The Convention and the practice of the Strasbourg bodies of the rights protection have established *three groups of objects of the right* to a fair trial. The Convention in the Art. 6 Par. 1. mentions the *civil rights and obligations and criminal charges* against the entities of the right to a fair trial. The case law has extended these groups of objects also to other proceedings which either relate to the definition of civil rights and obligations or criminal charges. In practice this group includes the administrative proceedings, proceedings before the Constitutional Court, preliminary proceedings and the enforcement proceedings.

The content of the right to a fair trial are *mutual relations within the exercise of this right.* Art. Par 6. 1. of the Convention in this context refers to the guarantees of a *fair hearing of the case, the public of the court proceedings and the speed of the trial.*

The partial guarantees, which the international treaty in itself incorporates, can be divided into general and the special ones (referring to the criminal proceedings). General guarantees of a fair trial include *the principle of equality of arms, adversarial character of the court proceedings, the right to personal presence at the trial and submission of statements to the heard matter and prohibition self-incrimination.*

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The second group of the rights which forms the part of the fair hearing of the case before the court includes the *special - procedural safeguards in criminal proceedings*. These guarantees are based on the Art. 6. Par. 3. of the Convention. They include *the right to information on the nature and cause of the charge, the right to prepare a defense, the right of the defense, the right to proper evidence and the right to free assistance of an interpreter.*

1. 2 Criminal charge as an object of the right to a fair trial

Although the text of the Convention uses only the term of a criminal offense, the European Court of Human Rights (hereinafter referred to as "the Court") in order to ensure the protection of human rights and fundamental freedoms interprets through its case law the terms of criminal case, criminal proceedings, criminal offense and punishment autonomously - that means in a way that is strongly tied to the meaning attributed to such terms in legislation of the states which have acceded to the Convention.

According to the case law of the Court [Engel and others (1976), Őztűrk (1984), Weber (1990)] crucial to designate the matter as criminal for the purposes of the Convention are the importance of the rule breached, i. e. provisions defining the nature of the criminal offense, the character and nature of the offense and the severity of the possible punishment (e. g. the amount of the fine). An essential role plays the fact, what is the *nature of infringement of the protected interest, then also if the addresses of the legal norms are all individuals or only certain special subjects, and it also needs to be considered whether the threat of sanction has a repressive purpose and whether it is capable to significantly affect the sphere of the offender.*

The result of the doctrine of autonomy is that it is not important from a legal point of view, whether the act is qualified by national rules as a crime, offense or other administrative offense. The doctrine has its substantiation, because the situation in the legislation on the legal liability of the individuals in the Member States of the Council of Europe varies. For example, with regards to the competence of the authorities that are ruling on liability of persons for offenses - in France the offense is a type of a criminal deed. Even in Germany the law on offenses creates a part of the criminal law. In Slovakia and in the Czech Republic belongs the decision making on the liability for an offense and the imposition of a sanction to the competence of public administration.[295]

In Slovakia, the courts do not hesitate to use the doctrine of the autonomy, even if a particular right or principle of punishment of persons under the Convention is not explicitly enshrined in the legal regulation of the administrative punishment.[296] An important role in this situation in terms of ensuring the protection of the rights of accused persons also plays a use of the analogy iuris and analogy legis in favor of the offender of an administrative offense.

2. Recommendation R (91) 1 of the Committee of Ministers on administrative sanctions

Recommendation R (91) 1 of the Committee of Ministers on administrative sanctions (hereinafter referred to as the “recommendation R (91) 1") is crucial in terms of promoting the European standard of protection of individuals with regards to the administrative au-

[295] Norwegian legislation distinguishes only misdemeanors and felonies that belong to the criminal law. In Poland the administrative offenses are a part of the criminal law. Spanish legislation expresses the guarantees of a fair administrative punishment within the special part of the Act no. 30/1992 Coll. on the legal regime of public administration and the general administrative proceedings.

[296] According to the reasoning of the judgment of the Supreme Court of the Slovak Republic (8 Sžo 28/2007) “the requirements of the Art. 6. Par. 1. also regulate the decision making in matters of the administrative offenses. When the Convention in Art. 6. Par. 1. mentions any criminal charge, it is necessary to to provide a guarantee to those who are accused in criminal proceedings as well as in administrative proceedings because of a suspicion of having committed an administrative offense. "

thority to hear administrative offenses and impose penalties for them. Its requirements are to be applied in administrative proceedings that may result in decision imposing an administrative sanction to natural or legal person. They express the specific principles of administrative punishment without prejudice to guarantee the protection of the individual under Art. 6 of the Convention.

The administrative penalty is to be considered only administrative sanction, whose principal aim is of a punitive nature; while it is irrelevant whether such a sanction takes the form of a fine or other punitive non-pecuniary measure (for example, forfeiture of a thing, business closure, disqualification, suspension or revocation of permit or authorization required for the job, business or permissions).

When applying the principles of the recommendation R (91) the requirements of good and efficient public administration should be taken into consideration. However their application must not go at the expense of the legitimate interests of third parties (such as the protection of personal data) or so-called overriding public interests (such as the protection of public health, the environment, national security). Even then it is necessary to seek and comply with the highest degree of compliance with the general requirements of Recommendation R (91). It should be borne in mind that these requirements are an expression of the minimum standard of protection of the individuals within the decision making of the public authorities on the administrative liability. The recommendation does not discourage the Member States of the Council of Europe to adopt a higher standard of protection of such persons and it shall not be interpreted so.

The recommendation R (91) 1 reflects the following principles of administrative punishment:

– nullum crimen sine lege, nulla poena sine lege,

– prohibition of retroactivity,

– ne bis in idem,

– duty of the administrative authority to take into account penalties imposed by other administrative authorities.

Other principles set out in Recommendation R (91) 1 are part of a person's *right to a fair trial.* These are:

– reasonable time for the decision;

– right to terminate the proceedings on administrative offenses with a decision;

– special principles that apply in addition to the principles laid down by Resolution (77) 31 (a person's right to be informed about the charges and reasons for such accusations, the right to have adequate time to prepare a defense, a person's right to be informed about the evidence against him, a person's right to be heard, the right to statement of reasons, the principle that the onus of proof in proceedings is on the administrative authority, the principle of a legality control of the decision of the authority imposing an administrative sanction).

3. The principle of a legality control of the decision on administrative sanction

Recommendation R (91) 1 provides the requirement, that the act imposing an administrative sanction shall by subject to control of legality by an independent and impartial court established by law.

The result of the application of this principle is not that the legality and the correctness of a public authority decision on an administrative penalty could not have been reviewed also by the appellate body. However if the national legislation would preclude any possibility of examination of such administrative decision by the court, it would be contrary to Art. 6 Par. 1. of the Convention. This fact also confirmed the case law of the Court in relation to the Slovak Republic.

In September 1998, the Court ruled against the Slovak Republic in two cases (I. Lauko. v. Slovak Republic and J. Kadubec v. Slovak Republic) as for the breach of Art. 6. Par.

1. of the Convention. In both cases the persons were fined for the offense, and the lowest possible amount of fine of 2000 Sk was imposed. Then effective wording of the Act of the Slovak National Council no. 372/1990 Coll. on offenses stated that decisions on offenses are subjects to judicial review only if the fine imposed exceeds 2 000 Sk. So the law excluded the possibility of reviewing the lawfulness of a public authority decision, in which the fine was less than 2 000 Sk from the competence of the courts. Following this and the proposal of the Prosecutor General of the Slovak Republic the Constitutional Court of the Slovak Republic decided that the relevant provision of the Law is in conflict with the Constitution of the Slovak Republic.

The Court decided likewise in its judgment of October 20th 2009 in the case of Čanády v. Slovak Republic.

The applicant sued the Slovak Republic for violation of the right guaranteed by Art. Par. 6. 1. of the Convention. As a professional soldier he was found guilty of a disciplinary offense for which he was fined. Act which he has committed was an offense under the Act of the Slovak National Council no. 372/1990 Coll. an offense. Therefore, the court did not accept the objection of the Slovak Government that the Art. 6. Par. 1. of the Convention is not applicable to referred administrative proceedings. It stated that the complainant was not punished for the act alleging infringement of duties of a soldier. With reference to its previous decisions in similar cases the Court held that on the proceedings on the offense for which the applicant was fined, the Art. 6. Par. 1. in its "criminal" section applies.

The complainant also argued that the decision on a fine issued by the administrative authority was not under current legislation in Slovak Republic reviewable by the national court. With this in mind the Court dismissed the Government's objection that the complainant had not exhausted domestic remedies, namely an action for review of the decision within the administrative justice. It pointed out that the complainant has already once turned to the general courts in a similar case, which rejected it for their lack of competence and subsequently in 1999 he has been also rejected by the Constitutional Court of the Slovak Republic. According to the European Court complainant under the specific circumstances of this case did not have reason to expect within this case a different result, and therefore he was not required to file the mentioned action. The European Court, after examining the merits, concluded that in the applicant’s case there was a violation of the rights to a fair trial before an independent and impartial tribunal, because the administrative authority did not fulfill these attributes and its decisions were not reviewable by the courts. Given this conclusion, the European Court did not consider it necessary to examine separately the objection to the alleged injustice of the administrative proceedings.

CONCLUSIONS

From these judgments against the Slovak Republic, in which the Court held infringement of the rights under the Art. 6. Par. 1. of the Convention, the following general knowledge of the obligations of the Member States of the Council of Europe results:

a) the obligation to establish a system of courts satisfying the requirements under the Art. 6. Par. 1. of the Convention (independence, impartiality of the court established by law, power to decide on civil rights and obligations or on any criminal act of a private person), and

b) duty to ensure that such courts have full jurisdiction in those powers, i. e. the power to build on the facts of the administrative authority, once again perform the evidence already made by public authority or perform proving, waive the punishment or reduce the amount of imposed sanctions when it comes to punishment for an administrative offense clearly unreasonable,

is not itself a sufficient guarantee of a Member State to fulfill obligations under Art. 6. Par. 1. of the Convention.

Member state of the Council of Europe may not simultaneously make any, either legal or factual obstacles to the access to the court of individuals. As such a legal barrier in mat-

ters of criminal charge for which it is necessary within the meaning of the Court's case law to consider also an indictment of an administrative offense by a public authority, is the fact that the law excludes the administrative decision on administrative sanction from the judicial review.

Due to the autonomous interpretation of the concept of a criminal charge by the Court, the above mentioned requirements shall apply notwithstanding any domestic legal categorization of administrative offenses.

In terms of ensuring access to national court to a private individual in case of criminal charge it is not important, whether in the a given case the penalty imposed for an administrative offense is capable to interfere significantly the sphere of the offender of the offense, because the cited judgments were each the cases where the fine was of a negligible amount.

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ABOUT THE AUTHORS

Prof. JUDr. Soňa Košičiarová, PhD., Department of Administrative Law, Environmental Law and Financial Law, University of Trnava, Law Faculty, Phone: +421 33 5939 634, E-mail: sona. kosiciarova@truni. sk

JUDr. Michal Maslen, PhD., Department of Administrative Law, Environmental Law and Financial Law, University of Trnava, Law Faculty, Phone: +421 33 5939 636, E-mail: michalmaslen@yahoo. com

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