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The right to an effective remedy in asylum proceedings in Poland

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Introduction

In Poland cases concerning international protection are examined by the Head of the Office for Foreigners and the appeals are handled by the administrative authority called the Refugee Board. The decisions of the Refugee Board can be appealed to the Voivodeship Administrative Court in Warsaw. Its judgements can be subject to cassation proceedings conducted by the Supreme Administrative Court. In this system with two authorities carrying out administrative proceedings and two administrative courts, separate from common courts, which appeal should be considered an effective remedy and which institution should be the one that is mentioned in Recital 50 of *Directive 2013/32* [1] (Asylum Procedures Directive, APD) as ?the court??

System of administrative proceedings and administrative court proceedings in Poland

The principle of the proceedings in two instances is envisaged in the Constitution of the Republic of Poland and in the relevant procedural regulations. The decisions of the administrative authorities are subject to control conducted by the administrative courts. The notion of judicial control of administration exercised by a specially designated authority has been present in Poland for a long time, but since 2004 there is a two-level model of the administrative judicial system, separate from common courts, with the Voivodeship administrative court handling cases in the first instance and the Supreme Administrative Court examining cassation complaints.

Administrative appeal proceedings in cases concerning international protection

The two-instance administrative proceedings means that the administrative case is examined twice ? first by the authority of the first instance (in cases concerning international protection it is the Head of the Office for Foreigners) and - in case of appeal - by the authority of the second instance (Refugee Board). The latter not only verifies the decision of the first instance but is obliged to fully reexamine the case. Appeals before the Refugee Board have automatic suspensive effect and must be lodged within 14 calendar days after the decision has been notified to the applicant (in a regular procedure). The appeal is not formalised which means that the asylum seeker can basically write a letter disagreeing with the decision, in their own language. The procedure includes a full examination *ex nunc* of all the facts and points of law and decides on granting or refusing protection in accordance with article 46 (3) of the APD. Since 2016 there is a state legal aid system that covers second instance administrative proceedings. The decision of the Refugee Board is final and from the moment of its notification the applicant has 30 days to leave Poland. After this time the Border Guard is entitled to launch the return proceedings.

Administrative court proceedings in cases concerning international protection

The decision of the Refugee Board can be appealed to the Voivodeship Administrative Court in Warsaw within 30 days. This appeal does not have a suspensive effect on a final administrative decision. An asylum seeker can ask the court to grant an interim measure to suspend the implementation of the decision, if said decision can cause irreversible harm, but examining this request usually takes some time (e.g. if an applicant applies for assistance of a professional legal representative, the court asks the Regional Bar Council in Warsaw or Regional Chamber of Legal Counsellors in Warsaw to appoint a lawyer or if the place of residence of the applicant remains unknown the court appoints a curator), during which the decision of the Refugee Board is enforceable and the relevant authorities can proceed with the return process.

The system of the judicial control of administration works generally on the basis of a cassation model ? if the complaint is granted, the decision of the administrative authority is quashed and the authority is obliged to reexamine the case taking into consideration the court?s guidelines. Since August 2015 the Voivodeship Administrative Court when granting complaints against administrative decisions because of a breach of the substantive law or invalidity can oblige the authority to issue a concrete decision in a fixed period of time. No such practice has been observed in asylum cases so far.

The ruling of the Voivodeship Administrative Court in Warsaw can be appealed to the Supreme Administrative Court by lodging a cassation complaint, based exclusively on the legal conditions envisaged in the respective legal provisions.

Is the remedy effective?

Under article 47 of the *Charter of Fundamental Rights [2]* everyone has the right to an effective remedy before a court (or tribunal). This right is also mentioned in Recital 50 of the APD which specifies that ?the decisions taken on an application for international protection are subject to an effective remedy before a court or tribunal?. The notion of the court has an autonomous meaning under EU law, regardless of what national law deems to be a court. In EU law it is a body which can submit a reference for a preliminary ruling to the CJEU under article 267 TFEU. In recital 27 of the *Directive 2005/85/EC [3]* there was a direct reference to this provision. The CJEU takes into account a number of factors in order to determine whether a body can be considered a court (or tribunal), such as: being established by law, permanent character, compulsory jurisdiction, contradictoriness of the proceedings, application of the rule of law as well as its independence and impartiality (*C-506/04,Wilson v. Ordre des advocats du barreau de Luxemburg* [4], p. 48).

The Refugee Board fulfills the majority of the criteria mentioned above, but the procedure is not contradictory (*inter partes*). Whilst the CJEU has held that this condition is not obligatory (*C-54/96, Dorsch Consult* [5], p. 31), the CJEU in administrative proceedings seems to value the possibility of holding a hearing, during which it may direct any person whose evidence is required to attend and hear both the applicant and the first instance authority present their case in person or through a legal representative (see in particular *C-199/11 Europese Gemeenschap v Otis NV [6],* para 71 on equality of arms and in competition cases on the right to adversarial proceedings see *Case C-89/08 Commission v Ireland et al [7]*, para 56). Moreover, whilst Article 13 of the ECHR doesn?t necessarily require the appeal body to be a court, but an independent body competent to review the reasons for the decision and relevant evidence, the ECtHR has stressed that measures affecting fundamental human rights must be subject to some form of adversarial proceedings (ECtHR Application no. 50963/99, *Al-Nashif v. Bulgaria* [8], p. 123).

National law allows for the interviewing of the applicant or witnesses by the Refugee Board, but it does not take place during any trial or hearing, that both the applicant and the first instance

authority or their representatives would attend. It is also worth noting that interviewing an applicant or a witness does not often happen in practice. According to data provided by the Refugee Board for the first half of 2015, there were 598 decisions issued during this period and only in 49 cases the Refugee Board decided to interview the applicant and in 1 case - a witness.

In 2012-2014 there were cases in which asylum seekers were returned to their country of origin after the Refugee Board?s decision, without having the possibility to have their case examined by the Voivodeship Adminsitrative Court in Warsaw. This problem mostly concerned asylum seekers placed in detention, who received a negative decision of the Refugee Board, which before 1 May 2014 was accompanied by a return order. Because of this practice, the Dutch court in the Hague decided to withhold a transfer of an asylum seeker to Poland under the Dublin Regulation by applying an interim measure (ruling no AWB 13/11314 from 18 June 201335). The Court stated that the practice of deporting asylum seekers before the court examines their case is inconsistent with the article 47 of the Charter and can lead to violation of the principle of *non-refoulement*. In other words ? the Dutch court found that exercising the right to an effective remedy before a court means having the possibility to have the case examined by the Voivodeship Adminsitrative Court in Warsaw, not by the Refugee Board. The Voivodeship Adminsitrative Court in Warsaw and Supreme Adminsitrative Court were of the same opinion as when they granted interim measures in cases concerning negative international protection decisions accompanied by return orders they justified that otherwise the applicant would be unable to access the court and the judicial protection would be illusory (Supreme Administrative Court ruling from 22 December 2009 II OZ 1115/09, Voivodeship Adminstrative Court in Warsaw, ruling from 28 September 2012 IV SA/Wa 2141/12.)

However since 1 May 2014, when the asylum and return proceedings were separated and the negative asylum decision is no longer accompanied by a return order, the administrative courts generally do not grant interim measures in international protection cases. There have been rulings in 2015, in which the Supreme Administrative Court stated that launching return proceedings should be withheld until the court decides on the international protection case (Ruling of the Supreme Administrative Court from 1 April 2015 *no II OZ 218/15* [9]), but the general line of the Courts? jurisprudence is the opposite (following rulings of the Supreme Administrative Court: from 9 January 2015 no II OZ 1384/14, from 21 April 2015 no II OZ 309/15 from 7 May 2015 no II OZ 378/15, from 8 May 2015 no II OZ 402/15, from 28 January 2015 *no II OZ 41/15 [10]*).

The Administrative Courts do not withhold the execution of the negative decision on international protection, because it does not pose a direct threat of irreparable consequences to the applicant. Only a return decision does so, but the return proceedings are launched separately and - contrary to the international protection proceedings - the complaint to the Voivodeship Administrative Court in Warsaw, lodged together with the request for interim measure against the second instance administrative decision issued by the Office for Foreigners, has a suspensive effect (until the Court examines the request for interim measure). However there are issues such as legal aid or the possible outcome of the proceedings that also should be looked at. Legal aid is not granted in return proceedings to the same extent as in asylum proceedings. Moreover, it is only within the international protection proceedings that an applicant can be granted refugee status or subsidiary protection. Last but not least, these amendments do not give an answer to the question as to whether the Refugee Board or Voivodeship Administrative Court in Warsaw is a court under EU law regarding asylum. Since there has been no preliminary reference coming from either of these, the CJEU has also not yet ruled on the issue.

Conclusion

As the CJEU claimed in the judgement in the case HID and BA, it is necessary to assess as a

whole the system of granting and withdrawing international protection in order to determine whether it is capable of guaranteeing the right to an effective remedy (*C-175/11, H.I.D. and B.A* [11], p. 102). Therefore the applicant should have a right to have their international protection application examined not only by the Refugee Board, but also by the Voivodeship Adminsitrative Court in Warsaw, before the return proceedings are launched.

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(This journal entry is an expression of the author's own views, and not necessarily those of EDAL or ECRE)

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Effective remedy (right to)
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