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SEMINAR OF THE ACA-EUROPE, BRUSSELS, 9 MAY 2014

Suspensive effect of the complaint to the court[1]

I. Introduction.

1. I am going to talk about the right of an immigrant, asylum seeker or any alien to stay in the country while the procedure regarding his or her expulsion is ongoing. This right falls within the general concept of the provisional protection against administrative act. In the preamble of the Committee of Ministers of the Council of Europe Recommendation No. R (89) 8 to the Member States on provisional court protection in administrative matters that was adopted on 13 September 1989, it is argued that provisional protection is often necessary because *"...the immediate execution in full of administrative acts which have been challenged or are about to be challenged may, in certain circumstances, prejudice the interests of persons irreparably in a way which, for the sake of fairness, should be avoided as far as possible"*.

Suffice it to say that if an asylum seeker is sent back to his country of origin, he/she may be exposed to the risk of violation of the basic human rights. If an asylum seekers has been sent back a judge has to answer a difficult question of whether an applicant is still a refugee since he/she is not any more outside his/her country of origin which relates to the definition of the refugee. In relation to immigration cases, a successful outcome of the judicial dispute for an immigrant would require the restoration of his/her previous situation and it would primarily include the return of a claimant to the host country. Other implications could relate to the financial costs of return. Sometimes the severance of direct family contacts as a result of expulsion while the judicial procedure was ongoing may also result in irreparable

[1] This paper includes some parts of my speech (after an update and amendments) delivered at the seminar "European law on asylum, borders and immigration", organized on 11 June 2013 by the ECtHR and FRA in Strasburg. My text „Standards of the provisional protection against expulsion" is available on the website :http://fra.europa.eu/en/news/2013/handbook-european-law-relating-asylum-borders-and-immigration

consequences for an immigrant's family life. Needless to say that exercising the right to personal participation in the court procedure and personal presence in the courtroom seems to be elements of a fair trial and effective remedy in every case.

II. General sources of the procedural standards.

The procedural standards should be derived not only from Article 13 of the European Convention on Human Rights but also from the Charter of Fundamental Rights of the European Union. Relying, for example, on the case *Dereci C-256/11* decided on 15 November 2011 by the Grand Chamber of European Court of Justice[2] it can be argued that some immigration matters, where family life is at stake, fall in the scope of the European Union law as well. If it is true the level of protection set by the Charter of Fundamental Rights of the European Union is going to be applied and one must remember that Article 47 of the Charter guarantees the right to an effective remedy before a court and to a fair trial.

III. The Strasbourg standards

The Strasbourg Court creates a bond between the category of the convention right that is at risk of infringement and the standard of procedural safeguards required in relation to the provisional protection. There are two Convention articles that play a crucial role and are most often invoked: they are Article 3 ECHR in asylum cases and Article 8 ECHR in immigration cases. It should be said here that nothing prevents an immigrant from relying on Article 3 ECHR against expulsion, even if he/she never claimed asylum and does not intend to do so. It may happen if an expulsion decision is issued separately or as a part of any immigration procedure. It is also important to note here that both substantive provisions (Article 3 and Article 8) have influenced separately the interpretation of Article 13 and have given

[2] See paragraphs 71 and 72 of the judgement: 71. However, it must be borne in mind that the provisions of the Charter are, according to Article 51(1) thereof, addressed to the Member States only when they are implementing European Union law. Under Article 51(2), the Charter does not extend the field of application of European Union law beyond the powers of the Union, and it does not establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties. Accordingly, the Court is called upon to interpret, in the light of the Charter, the law of the European Union within the limits of the powers conferred on it (*McB.*, paragraph 51, see also Joined Cases C-483/09 and C-1/10 *Gueye and Salmerón Sánchez* [2011] ECR I-0000, paragraph 69). 72. Thus, in the present case, if the referring court considers, in the light of the circumstances of the disputes in the main proceedings, that the situation of the applicants in the main proceedings is covered by European Union law, it must examine whether the refusal of their right of residence undermines the right to respect for private and family life provided for in Article 7 of the Charter. On the other hand, if it takes the view that that situation is not covered by European Union law, it must undertake that examination in the light of Article 8(1) of the ECHR.

independent meaning of effective remedy in relation to the provisional protection. The case law clearly requires an automatic suspensive effect of any appeal only in relation to the risk of violation of Article 3 and only the possibility to request for a provision protection if Article 8 (protection of family life) is engaged. This approach has been confirmed in the Grand Chamber judgement of 12 December 2012 in the case De Souza Ribeiro v. France[3] and is repeated on many occasions by the Strasbourg Court[4].

III. Standards under EU Directives

3.1. Situation of the asylum seekers

The procedural standards for asylum seekers can be found in the EU asylum directives – strictly speaking in both asylum procedures directives of 2005[5] and of 2013[6]. Both directives provide for an effective remedy against a negative decision, although they do offer the same standards.

[3] See §§ 82-83 of the judgement § 82. "Where a complaint concerns allegations that the person's expulsion would expose him to a real risk of suffering treatment contrary to Article 3 of the Convention, in view of the importance the Court attaches to that provision and given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialised, the effectiveness of the remedy for the purposes of Article 13 requires imperatively that the complaint be subject to close scrutiny by a national authority (see *Shamayev and Others v. Georgia and Russia*, no. 36378/02, § 448, ECHR 2005-III), independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 (see *Jabari*, cited above, § 50) and reasonable promptness (see *Batı and Others v. Turkey*, nos. 33097/96 and 57834/00, § 136, ECHR 2004-IV). In such a case, effectiveness also requires that the person concerned **should have access to a remedy with automatic suspensive effect** (see *Gebremedhin [Gaberamadhien]*, cited above, § 66, and *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 200, 23 February 2012). The same principles apply when expulsion exposes the applicant to a real risk of a violation of his right to life safeguarded by Article 2 of the Convention. Lastly, the requirement that a remedy should have automatic suspensive effect has been confirmed for complaints under Article 4 of Protocol No. 4 (see *Čonka*, cited above, §§ 81-83, and *Hirsi Jamaa and Others*, cited above, § 206). § 83. By contrast, where expulsions are challenged on the basis of alleged interference with private and family life, it is not imperative, in order for a remedy to be effective, that it should have automatic suspensive effect. Nevertheless, in immigration matters, where there is an arguable claim that expulsion threatens to interfere with the alien's right to respect for his private and family life, Article 13 in conjunction with Article 8 of the Convention requires that States must make available to the individual concerned the effective possibility of challenging the deportation or refusal-of-residence order and of having the relevant issues examined with sufficient procedural safeguards and thoroughness by an appropriate domestic forum offering adequate guarantees of independence and impartiality (see *M. and Others v. Bulgaria*, no. 41416/08, §§ 122-132, 26 July 2011, and, *mutatis mutandis*, *Al-Nashif v. Bulgaria*, no. 50963/99, § 133, 20 June 2002).

[4] For example, recently see *Asalya v.Turkey*, no 43875/09, 15 April 2014, § 115.

[5] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status

[6] Directive 2013/32/EU of the European Parliament and the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast). The relevant provisions of the Directive shall be transposed by 20 July 2015.

In relation to the right to stay on the territory of the receiving country while procedure is pending the standard under the Asylum Procedures Directive of 2005 - is the following: the right to stay is guaranteed only until the first instance decision is taken, save for the exceptions specified in the directive, where even such right has not been granted, for example, if the subsequent application is not examined fully as a result of applying specific procedure - preliminary examination. There is not a requirement of an automatic suspensive effect of the appeal to the court. The Member States, only where it is appropriate, provide for the rules dealing with the provisional protection (Article 39 para.3 a., b. of the Procedures Directive).

Under the new Procedures Directive of 2013 the right to stay is guaranteed until the first instance decision is taken save for a few exceptions provided in the Directive (Articles 9 and 41). The standard of the protection has been raised in relation to the appeal procedure in comparison to the Directive of 2005. Under Article 46 (5) of the Directive of 2013 *Member States shall allow applicants to remain in the territory until the time limit within which to exercise their right to an effective remedy has expired and, when such a right has been exercised within the time limit, pending the outcome of the remedy*. There are some exceptions to this right, for example, if an application is manifestly unfounded and then the right to stay has to be individually determined by the court's decision although the applicant has always right to remain in the territory pending the outcome of the procedure to rule whether or not the applicant may remain on the territory of the Member State– Article 46 (6) and (8).

3.2. Situation of the illegally staying third-country nationals.

Under EU Directive of 2008 concerning returns of the illegally staying third country nationals[7] issuing a return decision allows a third country national the right to stay between 7 and 30 days and this period may be, in specified circumstances, even extended. There is also a possibility that such a period for voluntary departure is not granted - for example if the third country national poses a risk to public or national security. The right to stay under the EU Directive concerning third country nationals does not include an appeal procedure. However, the reviewing authority should be allowed to suspend enforcement of the return decision (Article 13).

[7] Article 7 of the Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals

3.3. Situation of the citizens of the European Union and their family members.

The citizens of the European Union and their family members may also face expulsion from another Member State. The EU Directive of 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States[8] regulates protection on expulsion of the EU citizens and their family members. As a basic rule, an appeal against the expulsion decision of those under this Directive does not entail automatic provisional protection. A person against whom an expulsion decision has been issued must apply for provisional protection. However, the EU citizen is allowed to stay in the territory of the Member State until judicial decision is taken on such a request (Article 31). It means that removal cannot be enforced before the request for a provisional protection has been examined by a judge. There are only exceptions to that in the Directive (for example, if an expulsion decision is based on imperative grounds of public security, the person concerned may be expelled before his/her application for a provisional protection has been examined).

IV. Polish approach to a provisional protection against expulsion.

It is a general rule in Polish law that an appeal to the court made by an unsuccessful asylum seeker or immigrant does not entail an automatic suspensive effect. It has to be decided individually on request. It is standard practice of the court to grant provisional protection to the asylum seekers, but not always the immigrants.

Under the new Aliens Law of 12 December 2013 (Journal of Laws 2013, item 1650) that entered into force on 1 May 2014 a deadline for a voluntary return (ranging from 7 to 30 days) has to be determined, save for a few exceptions (for example, if the presence of an alien poses a risk to a nationality security). There is a risk of prior enforcement of the expulsion before filing an appeal to the court if a voluntary return is not determined or when a deadline for return is shorter than 30 days. The time limit for an appeal to the court is 30 days. The appeal is filed with the court not directly but through the administrative authority that has issued the contested administrative act. It is not excluded delay with the agency what additionally may create a risk of removal before granting provisional protection by a judge.

[8] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC

V. Conclusions

By contrast to the EU directives, neither the Convention nor the Strasbourg Court differentiate legal situations according to citizenship. A closer look at the EU directives shows that procedural safeguards in relation to the provisional protection may depend on the category of aliens to which an individual belongs: whether he/she is a EU citizen or a third country national. These differences may or may not be reflected in the national laws and practices. While examining the national standard of protection, one must always remember that according to the principle of subsidiarity it is always the duty of a national judge to make sure that the level of protection in the national court is not lower than that set by international human rights instruments. Making this level of protection possible, may sometimes be a challenge and require a lot of judicial activism.

If Article 3 ECHR (or Article 2) is engaged in the expulsion case the Strasbourg jurisprudence requires an automatic suspensive effect of the appeal. An automatic suspensive effect means that no individual decision is needed, because the law stipulates such a consequence as a result of the appeal. Should the suspensive effect be applied just because Article 3 ECHR is invoked in the appeal against expulsion ? Such factors like credibility of the applicant or chances of allowing an appeal or whether the claim is arguable cannot be assessed in abstract. The law does not answer the question of whether applicant X is credible and there is a real risk of suffering treatment of maltreatment such as described in Article 3 ECHR. Needless to say that the legislation which provides automatic suspensive effect of the appeal may create an incentive to invoke Article 3 ECHR in every appeal against a removal (return) decision. Rejection of the differentiation of the procedural rights depending on the right that is at stake (Article 8 or Article 3 ECHR) seems to be justified because of the importance of procedural rights in exercising the individual right to a fair trial irrespective of the category of the cases. The question is whether the above mentioned considerations argue for offering automatic suspensive effect while the first instance judicial scrutiny is ongoing in every case where an administrative expulsion decision is being taken. It is also important to note that none of the EU directives provides for an automatic suspensive effect of the appeal against return (expulsion) decision.