Conference EFFECTIVE JUSTICE: CHALLENGES AND PRIORITIES FOR (ADMINISTRATIVE) COURTS

in commemoration of the establishment of the Division of Administrative Courts of the Lithuanian Association of Judges, Law Institute of Lithuania and the Law Faculty of Vilnius University

Lietuvos Respublikos Seimas, 6 May 2016, Vilnius, Lithuania

Dr. Karolina Bubnytė

The Representative of the Government of the Republic of Lithuania at the European Court of Human Rights

THE ECHR APPLICATION ISSUES IN THE JURISPRUDENCE OF THE ADMINISTRATIVE COURTS: IN THE CONTEXT OF THE LITHUANIAN CASES BEFORE THE ECtHR

The implementation of the Convention should be regarded as a "shared responsibility"[1] of the States that are parties to the Convention and the Convention organs, which implicates that the relationship between the courts responsible for the implementation of the Convention cannot be construed as blind obeisance of the national courts to the ECtHR's dictate. Furthermore, upon the entry into force of the new Protocol No. 16 to the Convention a judicial dialogue is going to become a truly normative category. It is against this background I would like to address in this contribution the ECHR application issues in the jurisprudence of the Lithuanian Administrative courts. First of all, I will refer to the Convention perspective, namely to the most significant cases against Lithuania recently

[1] E.g. see Item 3 of High Level Conference on the Future of the European Court of Human Rights. Interlaken Declaration of 19 February 2010, <http://www.echr.coe.int/Documents/2010_Interlaken_FinalDeclaration_ENG.pdf>, visited 22 November 2013.

heard by the ECtHR, aiming to reveal the attitude of the ECtHR demonstrated towards the Lithuanian courts. Next, I will turn to the Lithuanian cases pending before the ECtHR, which have been recently communicated to the Government, at this point, switching on gradually to national legal perspective, aiming to demonstrate responses given by the national courts, in this regard analysing some issues related both with erga omnes effects of the jurisprudence of the ECtHR and with the process of execution of the ECtHR judgments.

National courts have always been considered as key institutions responsible for the enforcement of the human rights protection, also and in particular guaranteed at the international level[2]. Due to *sui generis* nature of the European Convention on Human Rights (hereinafter – the ECHR) and a unique control mechanism of its implementation the impact of the European Court of Human Rights (hereinafter – the ECtHR) on the national courts of mature democracies as well as and in particular of the countries of transitional democracies, when this international court establishes certain minimum standards for the human rights protection, under which the latter are inclined to model national standards, might imply a minimum role of the national courts in the implementation of the Convention limited to mechanical transportation of the conventional requirements into national legal systems. So what is practical impetus by referring to the implementation of the Convention as a "shared responsibility"[3] in the context of the relationship between the courts responsible for the implementation of the Convention? Does it really signify a shift from the implementation of the Convention as one-way motion, when national courts used to transport the conventional standards, even if to acknowledge the most outstanding importance of the role played by the

[2] OPSAHL, T. Human rights today: international obligations and national implementation. *Scandinavian Studies in Law*, 1979, Vol. 23, p. 149–176.

[3] E.g. see Item 3 of High Level Conference on the Future of the European Court of Human Rights. Interlaken Declaration of 19 February 2010, <http://www.echr.coe.int/Documents/2010_Interlaken_FinalDeclaration_ENG.pdf>, visited 22 November 2013.

national courts, when coupling together of national legal standards with those of Convention, if I may put it in the words of honourable prof. von Bogdandy, towards two-way motion, when national courts have a possibility to participate in the process of the development of the conventional standards on their own and (or) influence them? And what are practical manifestations of this phenomenon if to analyse the Convention application issues before the Lithuanian administrative courts and its counter-evaluation given by the ECtHR in this respect.

Or, to put it in more simplistic words, taking into consideration the duality imminent to the Convention system, when the implementation of the Convention is primarily entrusted to the national courts and the control thereof – to the ECtHR, this contribution is aimed at demonstrating how the responsibility for the implementation of the Convention is actually shared between the national courts and the ECtHR and more precisely, what are possible directions of the interaction between ECtHR and the Lithuanian – in this case - administrative courts.

First of all I would like to approach the topic from the Convention perspective, by analysing the cases against Lithuania recently examined by the ECtHR (as from 2013 to date), where at the domestic level Lithuanian administrative courts were involved, aiming to reveal possible attitudes of the ECtHR, when performing the control of the implementation of the Convention, towards those Lithuanian courts. To start with I would like to refer to those peculiar situations where the ECtHR is granted with the opportunity to perform the role of *the first instance court*. Jokšas case, Jokšas v. Lithuania judgment of 2013, might be indicated as an example of this exceptional situation, where this had happened due to very specific violation of Art. 6 found: the absence of an effective judicial review. This violation

was found due to the domestic courts' failure to assist the applicant in obtaining evidence in regard of his allegation of discrimination, which was at the heart of the applicant's complaint before the domestic courts due to his dismissal from professional military service, - while in the Court's view, a comparison between his situation and that of the other servicemen who had allegedly been allowed to continue serving after reaching their retirement age but before the expiry of their contracts was indispensable for the applicant to be able to present his grievance. This inactivity of domestic courts resulted in their failure to give consideration to the applicant's allegation regarding discrimination, therefore, this had been done by the very ECtHR in finding no violation of Art. 10 alone and in conjunction with Article 14 of the Convention. It seems ironical, when the ECtHR underlying being careful not to substitute its own assessment of the facts and evidence for that of the domestic courts, *de facto* is doing that couple of paragraphs below in that very same judgment. In this situation, upon the re-opening the case on the applicant' request the Supreme Administrative Court in its judgment of 16 September 2014 had no choice but to conclude that the discrimination issue had been analysed in detail by the ECtHR thus there is no need to analyse it complementary. Still, to be honest, I must admit that the situations like the one descried above occur on extremely rare occasions in relation to administrative courts, and should be perceived as an exception.

I won't surprise much you by telling that in most cases so-called correctional role is performed by the ECtHR, firstly, when performing procedural review in finding the violations of the Convention for non-observance of the requirements of the right to a fair trial, as guaranteed under Article 6 of the Convention – (e.g. Paliutis v. Lithuania judgment of 2015 concerning question of access to court, Jokšas case referred to above), and,

secondly, when performing not so desirable material review in finding the violations of the Convention due to the outcome of the case reached by the domestic courts. Probably, it will be interesting for you to hear that during few recent years those kind of violations were found mostly due to the size of damages awarded at the domestic level by the administrative courts (e. g. Paplauskienė v. Lithuania judgment of 2014, Mironovas and others v. Lithuania judgment of 2015). To my mind, some sort of discrepancies between the amount of money awarded by the Strasbourg court and by the national courts are understandable and even justifiable to certain extent – as it was noted by the ECtHR itself that it can also perfectly well accept that a State which has introduced a remedy, which is designed to afford compensation, will award amounts which – while being lower than those awarded by the Court – are not unreasonable, on condition that the relevant decisions, which must be consonant with the legal tradition and the standard of living in the country concerned, are speedy, reasoned and executed very quickly (Giedrikas decision of 2010, Mironovas and others judgment of 2015).

Thirdly, one can observe that there was also a case, where ECtHR even in finding the violation of the Convention acted in fact as an allegiance of the national administrative court. In depicting this quite unexpected role of the ECtHR, I refer particularly to one of the most recent judgments of the ECtHR adopted in the case of Arbačiauskienė v. Lithuania of 2016, where the violations of the applicant's rights under Articles 6 § 1 and 13 of the Convention were found due to the Lithuanian authorities' failure for many years to take the necessary measures to comply with the final judgment of the Supreme Administrative Court –the latter attitude of the ECtHR might be referred to as

strengthening – as in fact the role of national judiciary is strengthened vis a vis other State authorities with the assistance of the ECtHR;

Fourth, and probably the most desirable attitude of the ECtHR towards national administrative process and/or conclusions reached as its outcome is confirmative one – is perceived in the cases where the ECtHR either in declaring the application inadmissible, or in finding no violation of the Convention confirms the administrative jurisprudence as being in compliance with the ECHR standards; this attitude of the ECtHR might be referred to as confirmative (Savickas and others v. Lithuania decision of 2013, where it has been established the existence of a foreseeable effective remedy in respect of length-of-proceedings complaints in Lithuania also in respect of too lengthy proceedings before administrative courts, Sidabras and others v. Lithuania judgement of 2015, to be discussed in more detail after a short while) and reflects the most favourable attitude of the ECtHR towards the Lithuanian administrative courts. Needless to say, a growing favourable attitude by the ECtHR towards the Lithuanian courts (and at the same time openness of the Convention for the influence of the Lithuanian law) is dependent upon the quality of the application of the Convention carried out by the Lithuanian administrative courts.

However, the fact that correctional attitude referred to above by the ECtHR is predominant in all cases against Lithuania, also in those where Lithuanian administrative courts were involved, does not signify that we are having some serious problematic areas in regard to the application of the Convention related issues before the administrative courts. This is so, firstly, because of erga omnes effect of the ECtHR jurisprudence acknowledged and thoroughly followed by the Lithuanian administrative courts and, secondly, because of

"lengthy" justice performed by the ECtHR – giving plenty of time for the national courts to correct the mistakes by their own.

At this point in order to explain properly what I mean by telling you that I would like to switch on to national legal perspective turning to the cases communicated to the Government, which clearly leads to one very positive finding: the most Convention application problems posed therein in regard to the jurisprudence of Lithuanian administrative courts are coming from the past – currently, due to amended administrative jurisprudence they are in full or at least in part remedied (e. g. if to return back to the judgment in Mironovas and others case mentioned above, where some applicants were awarded insufficient sums by domestic courts in respect of inadequate conditions of their detention thus retaining their victim status before the ECtHR, I can't but conclude that already in the years of 2015 up to 4 times bigger amounts for inadequate prison conditions are awarded by the administrative courts if to compare them with the amounts awarded in the years of 2013 and previously; also, if to mention communicated cases related with errors committed by the State authorities in the process of property restoration or privatisation, we have quite a few, where the applicants are complaining that in remedying the said errors in the judicial proceedings initiated usually by the prosecutors seeking to defend a public interest new wrongs are created (*e.g. group of cases that Article 1 of Protocol No. 1 to the Convention was violated in view of the quashing partly/entirely of the decisions of the Vilnius Region Administration of 2001-2006, restoring the applicants' property rights to the plots of land situated in Vilnius city/region, subsequently designated as forests of national importance in the absence of compensation for the applicants' property after their titles to the plots of land had been annulled, as they preserved the right to restore their property*

rights) I am particularly glad to note significant changes in administrative jurisprudence since 2012, especially when performing a balancing exercise, whether in granting the request of the prosecutor to defend public interest would not create more damage than if not to grant it, following general principles formulated by the ECtHR that errors committed by the State authorities should not be remedied at the expense of private individuals concerned; also I would like to distinguish advanced jurisprudence of the administrative courts awarding pecuniary and no-pecuniary damages suffered by the persons for too lengthy proceedings of the restoration of property rights and so on). It goes without saying, that the Lithuanian administrative courts when formulating this jurisprudence are extensively relying to the Convention requirements as those are established in the case law of the ECtHR against other Member States to the Convention *Gashi v. Croatia; Rysovskyy v. Ukraine; Moskal v. Poland; Pincova and Pinc v. Czech Republic etc*. This jurisprudence is not only significant as marking acceptance of erga omnes effect of ECtHR judgments, and also application by domestic administrative courts of consistent interpretation principle, by harmonising Convention requirements with those of the national law, and solving inconsistencies between them, but also as preventing new violations of the Convention and even – so-called anticipatory execution of judgments adopted in cases against Lithuania, found due to problems already resolved by the national courts (as the Government in these cases would be able to argue that we do have general remedies due to amended administrative jurisprudence). This taking into account of judgments of the ECtHR by the national administrative courts from theoretical perspective could also be classified as an indirect judicial dialogue (cases where the courts take into account each other's jurisprudence).

This the most favourable attitude by the Lithuanian administrative courts towards the Convention is not surprising at all, if to remember that more than a decade ago Lithuanian Supreme Administrative Court formulated clear basic principles stemming out of the Constitution concerning the application of the Convention to be followed by lower courts, namely, the Convention being as a constituent part of the legal system of the Republic of Lithuania; also an act of direct application; and the principle of supremacy of its application over national law and the obligation to follow the jurisprudence of the ECtHR – in order to understand fully the content of the rights guaranteed by the Convention (9 November 2004 decision in administrative case No. A-3-750-2004). It is worth mentioning that the said obligation to follow the jurisprudence of the ECtHR entered into by early jurisprudence of the Supreme Administrative Court of Lithuania, in the most recent jurisprudence of Supreme Administrative Court is not perceived as an absolute one – growing application of the Convention paradoxically lead to the formation of permissible limits of its impact over national law, stemming out first and above all from the principle of the supremacy of the Constitution. I would like to refer here to the case examined by Supreme Administrative Court (3 March 2014 judgment) after Paksas judgment adopted by the GC of the ECtHR in 2011, where the ex-applicant complained for Central Electoral Commission's refusal to register him as a candidate for presidential elections referring to the State's duty to execute the judgment of the ECtHR, noted that the interpretation of the Convention given by the ECtHR does not affect the Constitutional provisions until no respective Constitutional amendments are not adopted. To my personal view, these new trends (there are also more of them) perceived in the jurisprudence of the Lithuanian

Supreme Administrative Court are regarded positively as indicating certain maturity of the national legal system.

This brings me to another issue I would like to deal with, related to the role of administrative courts played in the process of execution of the ECtHR judgments. This particular issue is also the most interesting from another perspective, as matching judicial dialogue properly so called. In order to demonstrate what I'm talking about, I have chosen 3 particular judgments adopted in cases against Lithuania, namely Sidabras and others v. Lithuania of 2015, Varnas v. Lithuania of 2013 and L. v. Lithuania of 2007. The first judgment depicts an extremely rare case of direct judicial dialogue, as previous applicant's before the ECtHR, namely, Mr. Sidabras, Mr. Džiautas and Mr. Rainys (ex-KGB agents addressed repeatedly the ECtHR for non-execution of the judgments adopted in their cases by the ECtHR, in particular for refusal to reinstate former KGB employee based on legislation previously found to be contrary to the Convention by the judgments of Rainys and Gasparavičius of 2005 and that of Sidabras and Džiautas of 2004). In this particular case the conclusions reached by the Supreme Administrative Court were confirmed by the ECtHR in respect of the first and the second applicants – Sidabras and Džiautas – the Court had to determine whether these two applicants had sufficiently demonstrated that the KGB Act still prevented them from obtaining private-sector employment, so as to reverse the burden of proof and to require the Government to disprove the existence of a discriminatory measure in violation of Article 14 taken in conjunction with Article 8. In the first applicant's case, the domestic court had concluded that there was no proof that, after the Court's judgment of 2004, he had been prevented from obtaining a private sector job because of the restrictions contained in the KGB Act. Furthermore, the first applicant had not provided any

particular information as to who had refused to employ him as a result of those restrictions, or when. Having regard to the documents in the Court's possession, there was nothing to contradict the domestic court's conclusion that the first applicant had been unemployed either for justified reasons or for having refused a number of job offers. As to the second applicant, he had acknowledged that he had been a trainee lawyer since 2006 and had never attempted to obtain other private sector employment. He had thus failed to substantiate his claim that he had continued to be discriminated against on account of his status. In the light of the foregoing, finding no reason to depart from domestic court's conclusions adopted in respect of the first two applicants. The ECtHR has found that they had not plausibly demonstrated that they had been discriminated against after the Court's judgments in their cases. If to look at this point in more detail to the Supreme Administrative Court' judgments adopted in respect of first and second applicants, these judgments had special significance to entire domestic legal system as the Supreme Administrative Court declared that direct application of the Court's judgments was an appropriate way to execute those judgments.

Two other judgments against Lithuania are related to cases of persons finding themselves in similar positions as successful applicants before the ECtHR and thus subsequently addressing the domestic administrative courts. First of all, I refer to the violation found by the ECtHR in famous L. v. Lithuania case for the State's failure to introduce implementing legislation to enable a transsexual to undergo gender-reassignment surgery and change his gender identification in official documents. As after the judgement no implementing legislation was ever enforced, a post-operative transsexual successfully applied for damages from the State before the domestic courts. The judgment of 29 November 2010 adopted by the Lithuanian Supreme Court awarding damages for the

State's unlawful omission to act by avoiding to adopt required legislation could be called a landmark judgment as in fact the court in directly applying the judgment of the ECtHR managed to compensate to certain extent the inactivity of the legislator. Similar situation could be expected after the Varnas judgment where unjustified difference in treatment under Lithuanian relevant legislation of remand prisoners compared to convicted prisoners as regards conjugal visits was found by the ECtHR: violation of Art 14 in conjunction with Article 8 when other detainees on remand addressed the domestic courts claiming damages for unjustified denial of conjugal visits. However, as in this case the problem of defective existing legislation and not a legislative omission was tackled, the Supreme Administrative Court addressed the Constitutional Court asking to verify whether the legislation due to which the violation of the Convention was found by the ECtHR is in compliance with the Constitution of the Republic of Lithuania. I won't speculate here in regard to the possible outcomes of the constitutional case pending or whether it was possible to examine the case without addressing the CC in directly applying the Convention – let us believe that any outcome is going to be the best one aiming at strengthening of the protection of the rights of individual.

The cases related with the execution of the judgments of the ECtHR I have just discussed could be regarded as squaring the Convention implementation circle. On the other hand, this also brings us to quite an obvious conclusion – that the implementation of the Convention should be regarded as a cyclic process, manifesting as their reciprocal interaction, and is neither limited to mechanical transportation of the conventional requirements into national legal systems by domestic administrative courts, nor to the mechanical control of the implementation of the Convention performed by the ECtHR over the Lithuanian courts in

“all or nothing” manner, i.e. not only finding violations or non-violations of the Convention. Thus I would like to end this contribution by saying that the implementation of the Convention is in fact ensured by a shared responsibility of the national administrative courts and the ECtHR.