

SAFEGUARDS FOR PROTECTION OF PARTIES IN ADMINISTRATIVE DISPUTE

NATASA PELIVANOVA*; MIRJANA RISTOVSKA**

*PHD

ASSOCIATE PROFESSOR AT THE FACULTY OF SECURITY– SKOPJE,
UNIVERSITY ST. KLIMENT OHRIDSKI-BITOLA,
KOZLE STREET 109, SKOPJE.

**M.SC.

TEACHING ASSISTANT AT THE FACULTY OF LAW – KICEVO,
UNIVERSITY ST. KLIMENT OHRIDSKI-BITOLA,
DIMITAR VLAHOV STREET 72, BITOLA.

ABSTRACT

The Paper – Safeguards for Protection of Human Rights and Freedoms in Administrative Dispute is structured from Introduction, two parts titled Safeguards for Protection of Human Rights and Freedoms of Parties in Proceedings and Safeguards in Administrative Dispute and Conclusions It aims at presenting safeguards offered in court proceedings for protection of the parties against actions of regular courts in the Republic of Macedonia and to analyse them when administrative dispute is concerned. Furthermore, the paper indicates to certain weaknesses in the regulation from this aspect and provides appropriate proposals for their improvement.

KEYWORDS: court proceedings, safeguards in proceedings, administrative disputes.

INTRODUCTION

The decision that courts, as independent authorities, are entrusted to assess the legality of administrative acts is practiced in a major number of countries. However, the guarantee for protection of the rights and freedoms of parties against irregular proceedings of administrative authorities not only ensures the decision – assessment of legality of the administrative acts¹ to be entrusted to the courts but also the importance of the safeguards in the court proceedings.

Authorizations of a court (administrative or regular) in terms of making decision on legality of a particular act defer from state to state.

Those authorizations also affect the difference of the safeguards provided by a court when making decision on the legality of a particular administrative act, which also have impact on the protection of the rights and freedoms of the parties in an administrative dispute. In the Republic of Macedonia

¹ Law on Administrative Disputes (Official Gazette of RM No 62/06; 150/10), Article 1 provides for that for the purpose of providing judicial protection of the rights and legal interests of natural and legal persons and in order to ensure legality, the Court in administrative disputes shall decide on the legality of the acts of the state administrative bodies, the Government, other state authorities, municipalities and the City of Skopje, organizations defined by law, legal and other persons in exercising public office (holders of public authorizations), when they decide on the rights and obligations in individual administrative matters as well as on the acts adopted in misdemeanors procedure.

the administrative disputes are currently divided as follows: disputes of legality of administrative acts and disputes of full jurisdiction. The division is made by the different extent of authorizations possessed by a court when making decision on the legality of administrative acts and decision adopted thereby. However, the safeguards offered in both types of disputes related to exercising the rights, freedoms and legal interests of the parties in an administrative dispute vary.

The exact aim of this paper is to make a review and assessment of the safeguards offered by the procedures in an administrative dispute.

SAFEGUARDS FOR PROTECTION OF THE RIGHTS AND FREEDOMS OF PARTIES TO PROCEEDINGS IN THE REPUBLIC OF MACEDONIA

Which are the safeguards for protection of the rights and freedoms of the parties to proceedings? To answer this question we will primary emphasize that the judicial function is executed on the basis of distinctive constitutional principles, which may be globally classified in two main groups: principles referred to organization of execution of judicial function, and principles related to the material type of judicial function which are connected to certain individual and collective rights.

The first group includes the principles of independent and autonomous judicial function, legality and transparency.

Namely, Amendment XXV of the Constitution of the Republic of Macedonia² provides for independent and autonomous execution of judicial function in the Republic of Macedonia, providing guarantee for objective, impartial and accountable execution of the judicial function, which must be immune to the influence by individuals and institutions. For factual independence of their judicial function, courts, both de jure and de facto, must enjoy full independence meaning that their decisions may not be taken out of court jurisdiction. However, such court setting should not certainly mean its isolation from the society and the system.

Legality of judicial function is expressed in the possibility of court constitution and dissolution only under law³, while transparency⁴ in its function must contribute to preventing arbitrariness, non-transparency and bureaucracy of the court system, and developing its instructive and educational function.

However, most of the principles which are basis for the court functioning fall under the second group. We will mention the citizen's participation (lay judges) in trials (Article 38 of the Law on Courts⁵), two-instance decision making⁶, election without limiting the mandate of judicial function holders, judicial immunity (Amendment XXVII of the Constitution of the Republic of Macedonia⁷),

² Constitution of RM, Official Gazette of RM No 52/91, 1/92, 31/98, 91/01, 84/03, 107/05; 3/09. This Amandment was published in the Official Gazette of RM No 107/05;

³ The types, authorization, establishment, suspension, organization and composition of courts as well as the proceedings are regulated by law adopted by qualified majority of the total number of MPs - Amandman XXV of the Constitution of RM, Official Gazette of RM No 107/05;

⁴ Hearings before courts and imposing a judgment are public. The public may be excluded in cases determined by law - Article 102 of the Constitution of RM, Official Gazette of RM No 52/91.

⁵ Law on Courts, Official Gazette of RM No 58/06, 35/08, 150/10.

⁶ Amendment XXI of the Constitution of RM, Official Gazette of RM No 107/05

⁷ Official Gazette of RM No 107/05

sitting in a panel⁸, use of own language in the procedure before court, incompatibility of judicial function with performing another public function, profession or membership in a political party (Amendment XXVII Constitution of the Republic of Macedonia).

It may be established that all of these principles provide for a guarantee that a court and judges execute their function independently and autonomously in accordance with the regulations.

But what are the safeguards that immediately in the judicial procedure provide basis for protection of the rights and legal interests of the parties to proceedings. We will mention the legal and legitimacy principles, parties' equality, trial in reasonable term, equity, transparency, adversarial principle, two-instance decision, sitting in a panel, hearings, immediacy, right to defence or representation, free evaluation of evidence and cost-effectiveness (Article 10 of the Law on Courts⁹).

SAFEGUARDS IN ADMINISTRATIVE DISPUTE

Basically, there are three means of ensuring legality and protection of the citizens' rights against the administration actions. First means are specialized, accountable and effective staffs that is knowledgeable in their work. Second means are system of procedural provisions against the errors and illegalities in administration, within the administration itself. Third means is the system of external supervision performed by an entity out of the administration¹⁰.

The external supervision of legality of relevant administrative acts in the Republic of Macedonia is also exercised through the specialized administrative judiciary (Administrative Court, Higher Administrative Court and Supreme Court of the Republic of Macedonia), which is part of the single judicial authority¹¹ of the Republic of Macedonia. Administrative judiciary independence¹² and

⁸ The Court shall decide in councils. Lay judges shall participate in trials where provided for in law – Article 103 of the Constitution of RM, Official Gazette of RM No 52/91.

⁹ Official Gazette of RM No 58/06, 35/08, 150/10

¹⁰ Davitkovski Borce, Pavlovska Daneva Ana, Novata upravno-sudska kontrola nad upravata na Republika Makedonija, Zbornik na trudovi na tema: Sovremenoto pravo, pravnata nauka I Justinijanovata kodifikacija Tom II Skopje.

¹¹ The legislative framework governing the country's judiciary, as well as its physical and technical infrastructure, has developed considerably as a result of the comprehensive reforms carried out over the past decade. As a result, the country is now in an advanced phase requiring more complex and challenging improvements. These relate to the need to secure not only structural but functional independence of judges, improving the quality of justice and standards of service to the citizen, increasing the cost-effectiveness and value of the court system, better strategic planning, increased use of non-judicial remedies and alternative dispute resolution and improved access to justice for more vulnerable members of society - The Republic of Macedonia 2014 Progress Report of the European Parliament and of the Council <http://sep.gov.mk/>

¹² The main reforms in this area have already been largely completed, but improvements are needed to ensure the correct implementation of European standards relating to independence and quality of justice. One of the main challenges is the growing concern voiced about the selectivity of, and influence over, law enforcement and the judiciary. The basic rule of law principle, that justice must not only be done but must also *be seen to be done*, is not fully understood or respected by the authorities in terms of law enforcement actions targeted at specific persons or sectors. Questions continue to be raised both inside and outside the country about possible political influence over certain court proceedings. Although the court structure is formally independent from external influence of the parliamentary and executive branches, individual judges must also appear to be acting independently of any form of pressure, otherwise public trust will be lost and the rule of law called into question.

Defects in the current career-system for judges have still not been addressed, despite the potential threat they pose to judges' independence.

autonomy is guaranteed by the Judicial Council of the Republic of Macedonia, which is an independent and autonomous authority competent for election and dismissal of judges and lay judges, deciding on and suspension of judicial function; election and dismissal of presidents of courts; monitoring and assessment of the judges' execution; decision on withdrawal of judge immunity, and etc¹³. It is undisputable that the constitution of specialized administrative judiciary¹⁴ is one of the safeguards for protection of human rights and freedoms against relevant illegal administrative acts¹⁵.

Distinctive principles of administrative proceedings are inquisitorial, awareness and adversarial principles.

An administrative dispute is initiated by filing a complaint¹⁶ (Article 19 of the Law on Administrative Disputes).

Administrative proceedings may only be initiated by competent claimant, which means that litigant maxima apply for initiating administrative dispute. However, where administrative dispute is initiated by a complaint, for further administration thereof, the inquisitorial principle applies instead of litigant principle, empowering the court to administer the entire procedure¹⁷. Inquisitorial principle also reflects in the court authorization to administer ex-officio procedure, to establish the condition and produce proofs in order to ascertain the issue of the dispute. The court authorization, in this context, is to require from the parties to present the necessary evidence, i.e. summon them to provide statements on their own initiatives, or on the parties' proposal, to determine a hearing when it considers necessary.

Another characteristic of the administrative proceedings is application of the principle of awareness. By rule, a court does not determine a hearing but the decisions are made based on the documents of

In the area of impartiality, the provisions relating to conflicts of interest contained in the civil and criminal procedure legislation continue to function smoothly.

As regards professionalism and competence, amendments to the Law on Courts, which entered into force in 2013, have not in practice led to any significant strengthening in the merit-based recruitment and promotion of judges - The Republic of Macedonia 2014 Progress Report of the European Parliament and of the Council

¹³ Amendment XXIX of the Constitution of RM (Official Gazette of RM No 107/05);

¹⁴ OTHERWISE, PENDING THE ADOPTION OF THE NEW LAW ON ADMINISTRATIVE COURT IN RM (IN 2006), ADMINISTRATIVE DISPUTES WERE UNDER JURISDICTION OF THE HIGHEST COURT (SUPREME COURT OF RM), BY LITTLE ORGANIZATIONAL STRUCTURE FOR DECIDING ON SUCH DISPUTES (NAMELY, ONLY TWO JUDICIAL COUNCIL STRUCTURED OF THREE JUDGES WERE ORGANIZED IN FIRST INSTANCE DECISIONS). IN THAT TIME ADMINISTRATIVE DISPUTES WERE CHARACTERIZED BY TIME-CONSUMING PERIOD FROM FILING THE SUIT TO THE DECISION-MAKING THEREOF.

¹⁵ Gelevski Simeon, Upravno procesno pravo, Skopje, 2003, p. 241;

¹⁶ In accordance with the Law on Administrative Dispute in RM, natural and legal persons are entitled to initiate an administrative dispute, if they consider that an administrative act violates any right or immediate interest provided for in law (Article 3 of the Law on Administrative Disputes).

¹⁷ Consequently, when the claimant has renounced the suit pending the decision making, the Administrative Court shall, in that case, dismiss the proceedings (Article 24 of the Law on Administrative Disputes).

The Administrative Court shall dismiss the suit if it establishes that: the suit is submitted untimely or prematurely; the act that is disputed is not an administrative act; it is obvious that the administrative act does not affect the plaintiff's right or their immediate individual interest defined by law; against the administrative act that is disputed an appeal might be filed, which has not been performed at all or has not been timely performed; administrative case is in question for which it is impossible to file administrative dispute, and there already exists valid judgment made in an administrative dispute for the same matter. As a result, the Court shall reject the suit in any phase of the proceeding (Article 26 of the Law on Administrative Disputes).

the case (suit, response to suit, disputed administrative act, other documents obtained by the authority in the course of the proceedings, documents submitted by the parties).

Adversarial principle in the administrative dispute designates the court obligation to notify the defendant as well as all interested parties on instigation of the administrative dispute and the obligation to provide them the response to the suit¹⁸. This principle also obliges a court to introduce the party with the facts and evidence it has obtained and interim requiring that the latter utter its opinion. This context refers also to a court obligation to introduce the claimant with the facts and evidence stated in the response to the suit, defendant and interested parties. The adversarial principle also reflects in a court obligation, in case where it establishes the state of facts on its own or through other initiatives, to enable participation of each of the parties in the proceedings.

Generally, the Administrative Court makes decision without hearing (Article 30-a of the Law on Administrative Disputes¹⁹).

Administrative dispute on legality fails to provide opportunity for the Court to define the state of fact, prove facts, maintain public hearing in the concrete case, and resolve the case legally based on the merits. In this dispute the Court is competent to only assess whether an act is legal or not and repeal it and provide legal instructions for its legal resolution. The Court in the dispute on legality is enforced to decide on the basis of the state of facts established by the authority act which is under scrutiny of legality, and a space is left for the authority that has already adopted the illegal act to decide for the second time on the same matter, which provides opportunity for that authority to delay the matter or adopt illegal act for the second time. In fact, in such dispute the Court role is mainly to perform a kind of control of the legality of acts, where the role of the Court to resolve a dispute between the parties is not evident. It must be indicated that the right to judicial protection is a benefit of the modern concept of a legal democratic state, which necessarily implies to the position of the Court as guardian of the human rights and freedoms²⁰. The right to judicial protection itself includes the possibility that the limitation between the freedoms and rights and the legal divisions in certain cases are sublimated by an independent and impartial court. This also determines the subject of judicial function as decision maker in the procedure provided for in law: human freedoms and rights and legally-based interests, disputes between citizens and other entities, punishable actions and misdemeanours and other issues in the Court jurisdiction (Article 4 of the Law on Courts) such as judicial control and protection against administrative acts and ensuring safeguards in proceedings. It must be pointed out that the application of legality in an administrative dispute also implies to legality principles (expressed in the competent parties and court obligation, when taking actions and making decisions, to observe the procedure determined by law and appropriate prescribed form as well as to properly apply substantive law); fair trial; equality of parties; trial in reasonable term

¹⁸ If the suit has neither been immediately rejected by a decision nor the act has been repealed in accordance with the Law on Administrative Disputes, the Administrative Court shall deliver a copy of the suit with the enclosures to the defendant and to the interested parties, if any, for a response.

The response shall be provided within the term determined by the Administrative Court in each case.

Within the term provided the defendant shall be obliged to submit to the Administrative Court all documents related to the case. If the defendant, even upon second demand, fails to submit the case documents, or declares that they cannot be submitted, the Court may decide even without those documents (Article 29 of the Law on Administrative Disputes).

¹⁹ The Law on Administrative Disputes provides for that the Court shall hold public hearing and pass a judgement on the administrative matter itself, if: required by the complexity of the administrative matter, if required for better clarification of the administrative matter or for establishing the state of facts, the Court produces proofs in the cases provided for in Articles 22, 36(3) and 40 of the Law on Administrative Disputes.

²⁰ Kambovski Vlado, *Sudsko pravo*, Skopje, 2010, p.136.

(meaning duration of the proceedings, length of which must not reflect the quality of the court decisions, nor an infinitely long procedure); two-instance decisions (an appeal may be filed against the decision of the Administrative Court to the Higher Administrative Court – Article 39 of the Law on Administrative Disputes); free evaluation of the evidence (expressed through the opportunity that the court assesses the evidence on its own judgement, based on bona-fide and thoughtful assessment of each and all proofs as well as on the basis of the outcome of the entire procedure); cost-effectiveness (which means administering the proceeding against unnecessary delay, expenses and waste of the parties' time).

The new Law on Administrative Disputes in the Republic of Macedonia for regulation of specialized administrative judiciary, by way of the enumeration clause, also increased the number of cases in which the administrative judiciary may act in a dispute of full jurisdiction.

In the Republic of Macedonia the Administrative Court, which is competent for legality of administrative dispute, has jurisdiction over disputes of full jurisdiction. Characteristic for a dispute of full jurisdiction²¹ as well as guarantee for protection of human rights and freedoms in the Republic of Macedonia is the Court competence to provide evaluation on the legality of an administrative act and resolve the administrative case itself, i.e. to decide on the rights, obligations and interests in individual cases, if it has established that the administrative act is illegal. In this way, the Court actually, compared to the dispute of legality, enforces the law and resolves a dispute between two parties, where usually public and private conflicts of interest are concerned, in particular where subject of the administrative dispute are authority acts i.e. magisterial acts²². The Court, in particular, when resolving a disputed wills, certainly must not allow subordinate relationship and only because it is in a position of one of the powers to protect the administration will, i.e. the public interest without being concerned in the private interest. This also refers to disputable administrative contractual relations – subject to administrative dispute, where public administration is one of the contracting parties, and the subject of the contractual relationship is gaining a public interest²³.

The Court, in a dispute of full jurisdiction, may determine, establish, modify or repeal a legal situation as is the case in civil litigations, i.e. it substitutes the administrative act with its decision, whereby it must always observe and apply the principle of equality of the parties. In this type of dispute, the Administrative Court has a wide field of action, i.e. it establishes or founds legal

²¹ Pursuant to the Law on Administrative Disputes, the Administrative Court of the Republic of Macedonia has a full jurisdiction to decide in administrative dispute on: legality of individual acts adopted in the election procedure and on individual acts of elections, appointment and dismissal of holders of public office, if determined by law as well as on the acts of appointment, nomination and dismissal of officials, unless otherwise determined by law; dispute arising from enforcement and implementation of the provisions provided for in concession contracts, public procurement contracts and on each contract where a state body, public organization, public enterprise, municipality or Skopje City is one of the contracting parties, concluded for public interest or providing public service; individual acts by the administrative authorities, the Government, other state bodies, municipalities, Skopje City, organizations established by law, legal or other persons performing public authorizations, and in the case of second instance decision against such act no other legal protection has been ensured; conflict of authorizations between the state bodies and Skopje City, between municipalities and Skopje City as well as in disputes arising or in connection with conflict of authorizations between municipalities and Skopje City and holders of public authorizations, if provided for in law, and the Constitution and laws fail to provide different judicial protection.

²² Milkov Dragan, *Upravno pravo (upravna delatnost)*, Naučna knjiga, Beograd, 1988, str.21.

²³ Grizo Naum, Gelevski Simeon, Davitkovski Borce, Pavlovska-Daneva Ana, *Administrativno pravo*, Skopje, 2008, p. 345.

situation, engages into assessment of the discretion evaluation of the administrative authorities, and exactly by rules valid for a discretion assessment of regular courts it establishes the state of facts in the concrete case. The court decision in this case entirely replaces the abrogated act, whereby the legislator of such administrative act is obliged to only enforce the court title.

What is necessary in the disputes of full jurisdiction is the application of the principle of transparency when establishing the state of facts. Unfortunately, the current Law on Administrative Disputes provides for the possibility that the Administrative Court makes decisions by rule of non-public session (Article 30 of the Law on Administrative Disputes) even in a Council²⁴.

For that purpose it is necessary to amend the Law intended for extending the obligation for mandatory establishing the state of facts particularly by first instance administrative judiciary when producing proofs in a concrete case, in order to introduce mandatory verbal, immediate and public hearings²⁵.

It must be stressed out that in exercising judicial power and when administrative dispute is concerned, the principle of fair and equitable application of law is to be induced irrelevant of the position and capacity of the parties, especially due to the fact that the decision of only one authority is esteemed in such proceeding; in this case those are administrative acts which frequently consider individual interest and protect public interest. Ensuring equity, fairness and non-discrimination, particularly due to the conflict of public and individual interests which is usually the matter in administrative dispute, will be imperative for ensuring legal security based on the rule of law.

CONCLUSIONS

Administrative dispute is usually a type of dispute related to conflict of public and private interests. This conflict of interests exactly makes the issue of safeguards in proceedings very important, which are offered by the administrative-judicial proceedings for protection especially of the private interest of the parties. It is a fact that administrative judicial proceedings offer standard safeguards for protection of the parties in a proceeding; it is however necessary to additionally affirm certain principles in the administrative judiciary. In this regard is the obligation of the court when acting upon a suit in each concrete case to establish the state of facts as well as the obligation to apply the principles of transparency, immediate and verbal hearing. Of special importance is to provide for the obligation of the first instance administrative court, when making decision, to determine, establish, modify or annul a legal situation, i.e. by its decision to substitute the repealed administrative act which will lead to the court role to resolve a dispute between two parties.

²⁴ A council and an individual judge decide in first instance disputes. In this case the council comprises three judges (Article 18-b of the Law on Administrative Disputes). The individual judge in administrative dispute decides in cases determined by the Law on Administrative Dispute (Article 18-a).

Higher Administrative Court decides in a council structured of three judges (Article-d of the Law on Administrative Disputes).

²⁵ The Court shall hold public hearing and pass judgment on the administrative matter itself, if: required by the complexity of the administrative dispute, it is necessary for clarification of the administrative matter or establishing the state of facts, the Court shall produce proofs also in the cases provided for in Articles 22, 36(3) and 40 of the Law on Administrative Disputes (Article 30-a).

REFERENCES

Gelevski Simeon, Sudska kontrola I zakonitost na administrativnite akti, Zbornik na Pravniot fakultet vo Skopje, Skopje, 1997;

Gelevski Simeon, Upravno-procesno pravo, Skopje, 2003;

Grizo Naum, Gelevski Simeon, Davitkovski Borce, Pavlovksa-Daneva Ana, Administrativno pravo, Skopje, 2008;

Davitkovski Borce, Pavlovska Daneva Ana, Novata upravno-sudska kontrola nad upravata na Republika Makedonija, Zbornik na trudovi na tema: Sovremenoto pravo, pravna nauka I Justinijanovata kodifikacija Tom II Skopje;

Milkov Dragan, Upravno pravo (upravna delatnost), Naucna knjiga, Beograd, 1988;

Kambovski Vlado, Sudsko pravo, Skopje, 2010;

Constitution of RM, Official Gazette of RM No 52/91, 1/92, 31/98, 91/01, 84/03, 107/05.

Law on Courts, Official Gazette of RM No 58/06, 35/08, 150/10;

Law on Administrative Disputes, Official Gazette of Republic of Macedonia No бр.62/06, 150/10;

Law on Administrative Disputes Official Gazette of SFRY No 7/77, Official Gazette of RM No 44/02;

The Republic of Macedonia 2014 Progress Report of the European Parliament and the Council <http://sep.gov.mk/>.