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ACCESS TO ADMINISTRATIVE JUSTICE

Systemic problems and weaknesses

1. INTRODUCTION

Access to administrative justice, among other things, includes the adoption of lawful and equitable acts and the possibility for citizens to effectively challenge administrative acts. The purpose of the administrative justice system is to guarantee that administrative acts may be reviewed by a competent, independent and impartial court or tribunal in procedures that comply with fair trial standards. Administrative justice guarantees that decision-makers are held accountable and it guarantees citizens' trust in the system.

Hence, administrative justice is a basic component of a democratic society, and its existence is fundamental in any society based on the rule of law, as it requires the Government, and thus its administration, to act within the legal powers, complying with national and international standards for administrative justice.

This discussion paper was developed by the Institute for Human Rights, as an activity within the "For Justice - Civil Society Organizations for an Independent and Efficient Judiciary" project, funded by the Foundation Open Society - Macedonia, and implemented by the Blueprint Group of Civil Society Organizations for Judicial Reforms.

The purpose of the paper is to identify the situations and challenges relating to the realization of citizens' rights in administrative procedures, including administrative disputes before the Administrative Court and the Higher Administrative Court, and to provide recommendations for improving the situation.

The main problems observed by the Institute for Human Rights by providing primary free legal aid to citizens in administrative proceedings, as well as by monitoring cases that are conducted before the Administrative Court in the area of social rights, and also determined at the round table organized with the main stakeholders in the area of administrative justice, are the following:

- **Non-compliance with the principle of active assistance to the party and the principle of service orientation of public bodies in procedures before public bodies;**
- **lack of implementation of the decisions of the Administrative Court by public bodies;**
- **lack of action by the public bodies according to the orders of the Administrative Court;**
- **delays in the execution of the judgments of the Administrative Court;**
- **weak application of decision-making on the merits by the Administrative Court in full jurisdiction;**
- **shortcomings in conducting a public hearing;**
- **weak application of standards arising under the case-law of the European Court of Human Rights in decision-making.**[1]

Furthermore, this paper will briefly elaborate on the main topics, discussed at the round table, relating to which recommendations, presented at the end of this paper, have been proposed.

1 Monitoring Report on the Work of the Administrative Court in Deciding Cases Pertinent to Social Rights, Institute for Human Rights 2023. Available at: https://shorturl.at/aqtT1

2. ADMINISTRATIVE JUSTICE REFORMS IN THE JUDICIAL SECTOR DEVELOPMENT STRATEGY 2024-2028

The Judicial Sector Development Strategy (2024-2028)2 envisages measures for the administrative justice reforms. The Strategy also emphasizes that administrative justice has been a neglected area for a long time, thus implying consequences for individuals. Central to the effective protection of human rights and respect for the rule of law is the right of individuals to appeal against administrative decisions and to have the possibility to seek legal redress through the application of fair administrative procedure rules whenever their rights, freedoms or interests have been affected.[3]

The measures envisaged in the Strategy, state that the aim is to address certain problems and challenges faced by the administrative justice despite the recent reform of the Law on Administrative Disputes.

The Strategy lists the following priorities for reforms in the administrative matter:

2.5.1 Connecting the state bodies with the Administrative Court in the process of digitization and interoperability with the Higher Administrative Court / Supreme Court

2.5.2 Integrating the administrative justice into the regular justice and redefining the administrative dispute and harmonizing the Law on Administrative Disputes with the changes to be introduced based on the SIGMA Reports[4]

2.5.3 Adopting annual reports on the execution status of decisions of the Administrative Court and the Higher Administrative Court.[5]

3. APPLICATION OF THE LAW ON ADMINISTRATIVE DISPUTES IN PRACTICE

In 2019, a new Law on Administrative Disputes6 was adopted, whereby harmonizing it with the last Law on General Administrative Procedure[7] and implementing significant standards for ensuring administrative justice, however, in practice, the same challenges that this Law was supposed to solve have remained.

Namely, even though the law envisages the mandatory application of the orders of the Administrative Court by the public bodies, they very often do not respect the position of the court and do not act according to the orders given in the judg-

2 Judicial Sector Development Strategy 2024-2028, available at: https://shorturl.at/sFPX4

3 Ibid, p. 34

4 SIGMA Monitoring Report on Principles of Public Administration for North Macedonia, 2021. Available at: https://www.sigmaweb.org/publications/Monitoring-Report-2021-Republic-of-North-Macedonia.pdf

5 Judicial Sector Development Strategy 2024-2028, available at: https://shorturl.at/sFPX4

6 Law on Administrative Disputes, "Official Gazette of RM", no. 96/2019 of May 17, 2019

7 Law on General Administrative Procedure, "Official Gazette of RM", no. 124/2015 of July 23, 2015 and amendments of "Official Gazette of RM", no. 65/2018

ments by which they annul their acts due to non-legality. Also, even though according to the law the Administrative Court is obliged to make a decision on the merits, if the same case is remanded for decision, the Administrative Court very rarely approaches a decision on the merits in full jurisdiction. The essence of the new Law on Administrative Disputes is that the role of administrative disputes is not limited to sanctioning non-legality, but to making just decision on the merits if the authority does not decide accordingly. However, the Administrative Court still mostly only annuls the specific administrative acts of the public bodies and remands the cases for re-deciding.

By monitoring the work of the Administrative Court, we can note that the most common reason for passing a judgment that only annuls the specific administrative act is the failure of the public body that adopted the specific administrative act to submit documents, so that the Administrative Court is unable to decide in full jurisdiction. However, to settle this problem, the Law on Administrative Disputes provides for the Administrative Court (as well as the Higher Administrative Court) to impose a fine in the amount of 20% of the monthly salary of the person who passed the disputed act, that is, took the disputed action or of the person in charge, that is, the authorized person in the public body that does not deliver the documents. In practice, we have no data that this provision is be-Due to the absence of a decision-making on the merits and remanding the case for re-deciding, the procedure is unreasonably delayed.

The new Law on Administrative Disputes also envisages an oral public hearing before the Administrative Court. The provision is complied with by the court and the parties are summoned to an oral public hearing in all cases. However, problems have been observed with compliance with the principle of effective conducting of an oral hearing and appropriate management of time and course of the hearing. At the same time, the officials-representatives of the appealed body have an unserious approach and attitude towards the Administrative Court, which is mostly evidenced by their non-attendance at public hearings.

As a problem detected, pointed out by several lawyers, is the complete annulment/cancellation of a certain act even though the appeal requests a partial cancellation, for which the party has no right to appeal afterwards because the appeal was upheld.

As a problem detected is also the lack of a system of execution and monitoring of the execution of the judgments of the Administrative Court and Higher Administrative Court.

Also, the decisions of the Administrative Court and Higher Administrative Court are not subject to an extraordinary legal remedy before the Supreme Court, except for the possibility of submitting a request for the protection of the right to a trial within a reasonable time.

3.1. UNIFORM PRACTICE IN ADMINISTRATIVE PROCEDURES

The principle of legality is stipulated in the Law on General Administrative Procedure (Article 5), which contains another additional component, that is the obligation of the public bodies to pay attention to the equal application of

the laws. The public body should always take into consideration the established practice in cases with the same legal and factual grounds. And the Administrative Court must pay attention thereto when deciding on cases with the same legal and factual grounds in order to comply with the principle of legal certainty of the citizens.

The question arises whether public bodies have established mechanisms for sharing established practice. Also, whether the judges in the Administrative Court take into consideration uniform case-law for similar cases, especially when the cases are before different judges and councils.

The principle of legality in an administrative dispute means that the court, in addition to deciding on the basis of the Constitution, laws and international agreements, should also take care of the consistency of its decisions, thereby ensuring legal certainty and equal application of laws. The uniform case-law is the basis for legal certainty also determined by the standard for a fair trial envisaged in Article 6 of the ECHR. Certainly, in exceptional situations, the court may decide differently in cases with the same factual situation, but it should be well-reasoned and leave no room for doubt about arbitrariness.

The Law on Administrative Procedure envisages for the Administrative Court to adopt the so-called "model decision" preceded by the so-called "model procedure" in cases where appeals are lodged against more than 20 administrative acts in which the rights and obligations of the applicants are based on the same or a similar factual situation. It is not clear why the law envisages a high number of 20 cases, because in different situations depending on the subject matter and the substance of the disputes, the Administrative Court may make a model decision even after only a few appeals lodged if they refer to an important issue and it is expected that a larger number of cases will follow. Therefore, it is necessary to leave it up to the court to assess how many cases will be sufficient to approach the so-called model decision.

4. PRINCIPLE OF SERVICE ORIENTATION OF PUBLIC BODIES

Based on the data obtained in focus groups with citizens and civil society organizations which are providers of free legal aid, in particular, to marginalized groups, as some of the main challenges that citizens face when exercising their rights, in particular, in the area of social protection, among others, they mentioned the failure to obtain accurate and complete information on the realization of rights by the officials, as well as the lack of interoperability among the institutions, due to which they are obliged to submit documents themselves and be burdened with additional costs.[8]

The administrative law envisages two important principles in this area, namely the principle of active assistance to the party and the principle of service orientation of public bodies (Article 17 and Article 9 of the Law on General Administrative Procedure).

According to the principle of active assistance to the party, the public body shall not only enable all parties in the proce-

8 Report on Access to Justice, Institute for Human Rights 2022. Available at: https://shorturl.at/BFQY8

dure to exercise and protect their rights and legal interests in the most effective and simplified manner possible, but also notifies the parties about the legal provisions that are relevant for settlement of the administrative matter, for their rights and obligations, and for all other relevant information. It is also explicitly envisaged that the party is provided access to the public body electronically, as well as that the party's lack of knowledge and ignorance shall not be to their detriment. This principle is particularly significant in the administrative procedure. It means that not only should officials not prevent the parties from exercising their rights, but also they should directly assist them and instruct them about their rights and interests. Here, as a follow up to this is also the principle of service orientation. Namely, in practice, the correct application of these two principles would imply a proactive attitude of officials in assisting citizens to exercise their rights. Complying with this principle is very important, in particular, when it comes to marginalized groups of people (for example: Roma, people at social risk, people with disabilities) so that they may realize social rights in an administrative procedure.

5. THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS IN THE AREA OF ADMINISTRATIVE JUSTICE

While monitoring the proceedings before the Administrative Court, we did not have a chance to observe any referencing to cases and principles of the European Court of Human Rights. Even though the principles and standards of the European Convention for the Protection of Human Rights are almost completely incorporated into the relevant laws (Law on General Administrative Procedure and Law on Administrative Disputes), yet, the regular use of the rich case-law of the European Court of Human Rights and the direct application of the standards developed in the area of administrative justice will contribute to decisions based on established standards without further violations of rights.9

For example, the principle of proportionality is particularly emphasized in the "Romeva v. Republic of North Macedonia" case before the European Court of Human Rights. It is a case in which a natural person was granted the right to a pension in 2000, but in 2007, following an internal audit, the Pension and Disability Insurance Fund determined that the administrative act granting the retirement pension of 2000, was not correct – taking into consideration that proof of years of service in certain years (from 1963 to 1967) was missing, thus the requirement for retirement pension was not met. In 2007, the act was consequently revoked/annulled. Furthermore, a procedure was initiated for the reimbursement of pension benefits paid in the period from 2000 to 2007. The applicant had exhausted the legal remedies in the country and turned to the European Court of Human Rights. The

9 More about the Standards of the Council of Europe and the European Court of Human Rights in the Handbook on European Standards in Administrative Procedures, Institute for Human Rights 2023. Available at: https://shorturl.at/hlER4

European Court of Human Rights, in its decision, refers precisely to the principle of proportionality. It finds that it is a legitimate goal of the Pension and Disability Insurance Fund to revise its decisions and annul the specific decision, taking into consideration that it is a matter of protecting public funds. However, the Court finds that proportionality or, as it states, a "fair balance" between the public interest and the interests and rights of the party has not been achieved, that is, that the burden of the applicant is excessive. The retirement pension was not canceled (action from the moment of cancellation, onwards), but the decision was annulled, and the applicant was asked to reimburse the pension benefits paid, which undoubtedly put her in an extremely difficult financial situation. Thus, the European Court of Human Rights established a violation of the European Convention for the Protection of Human Rights (specifically its Protocol 1).

PROPOSED RECOMMENDATIONS:

- Timely and complete delivery of the necessary documents and action of the public bodies in line with the orders given by the decisions of the court;
- Imposing a fine on the person in charge for failing to submit documents in accordance with the Law on Administrative Disputes;
- Compliance with and application of the orders given by the Administrative Court when canceling an administrative act and the need for the public bodies to act upon it again;
- Compliance with the principle of effective conducting of the oral hearing (proper management of time and course of the hearing);
- Administrative judges should take care of consistency of case-law in their decisions, in order to avoid serious deviations and different decisions for the same cases, and if a different approach is necessary, it should be properly explained;
- To approach a legal amendment to the minimum of 20 cases so that the court may also adopt the so-called "model decision" even when it receives a smaller number of cases of significance for future procedures;
- Direct application of the European Convention for the Protection of Human Rights and implementation of the case-law of the European Court of Human Rights in decision-making in administrative procedures and disputes;
- Compliance with the principle of service orientation of public bodies, by enabling easier and more efficient access to justice for all citizens.

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