

*Speech delivered by Dr hab. Jacek Chlebny, judge of the Supreme Administrative Court in Poland at the seminar organised on the occasion of the publication of the Handbook on European law relating to asylum, borders and immigration, Strasbourg, 11 June 2013*

## **Standards of the provisional protection against expulsion.**

### **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*”. No doubt that these arguments are also valid in relation to any individual who as a result of expulsion is denied the possibility to argue his/her case personally in the courtroom and if expelled to the country of origin his/her human rights are at risk. The importance of provisional protection for expulsion of an alien has been repeated by the Strasbourg Court on numerous occasions. For instance, in the case *Conka v. Belgium*, judgement of 5 February 2002, § 79, it is emphasized that the notion of an effective remedy under Article 13 ECHR requires that the remedy may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible and in the case of *Mamatkulov and Askarov v. Turkey*, judgement of 4 February 2005, § 124, the Strasbourg Court again underlined - *Indeed it can be said that, whatever the legal system in question, the proper administration of justice requires that no irreparable action be taken while proceedings are pending.*

2. It can be noticed that there is not one standard of provisional protection against expulsion. In fact there are differences in the treatment of aliens. The procedural safeguards may depend on the category of human right that is at stake. The requirement of provisional protection against expulsion if Article 8 is engaged, is not the same if Article 3 of the ECHR is engaged. 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. For example, whether he is a EU citizen or a third country national or just an unsuccessful asylum seeker. 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.

## **II. Different standards under EU Directives**

At first, let me present briefly different standards of granting provisional protection that are formulated at the European level. I will start with presenting procedural safeguards under EU directives and will start with examining the situation of the asylum seekers.

### **2.1. Situation of the asylum seekers**

The standard under the EU Asylum directives – strictly speaking the Procedures Directive of 2005<sup>1</sup> - is the following: the right to stay is guaranteed only until the first instance decision is taken. Under Article 7 of the Procedures Directive an applicant is allowed to remain in the Member State 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 under the Procedures Directive. 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).

### **2.2. Situation of the illegally staying third-country nationals.**

Under EU Directive of 2008 concerning returns of the illegally staying third country nationals<sup>2</sup> 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,

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<sup>1</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status

<sup>2</sup> 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

the reviewing authority should be allowed to suspend enforcement of the return decision (Article 13).

### **2.3. 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<sup>3</sup> also 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 3 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).

### **III. The Strasbourg standards of granting provisional protection**

Now I would like to turn to the Strasbourg standards. By contrast to the EU directives, neither the Convention nor the Strasbourg Court differentiate legal situations according to citizenship. 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. Before examining these procedural requirements it is worth highlighting two points.

Firstly, although Article 1 of the Protocol No 7 to the ECHR of 1984 foresees special procedural safeguards for lawful residents in the territory of the state, none of these safeguards deals with provisional protection<sup>4</sup>.

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<sup>3</sup> 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

<sup>4</sup> In this respect I refer to Article 1 of the Protocol No 7 to the ECHR of 22 November 1984. The Protocol enumerates procedural safeguards but provisional protection was not mentioned there. For further deliberation this factor ( illegal or lawful residence) is not relevant. According to Article 1 of the Protocol No 7 to the ECHR of 22 November 1984 an alien is allowed to be expelled only by virtue of a decision reached in accordance with law and should be allowed: (1) to submit reasons against expulsion, (2) to have his case reviewed (3) and to be represented for these purposes before the competent authority. However, these

Secondly, the procedural safeguards are included in two articles of the Convention: Article 6 and Article 13. There is no need to go into details, it is just enough to refer to well established case law of the Strasbourg Court and remember that the standards of the procedure in immigration and asylum cases are not defined by Article 6<sup>5</sup>. For an expulsion decision, one has to rely only on standards provided by Article 13, which requires that an individual should have an effective remedy before a national authority in respect of the rights guaranteed in the Convention.

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 independent meaning of effective remedy in relation to the provisional protection. The recent 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 is confirmed in the Grand Chamber judgement of 12 December 2012 in the case *De Souza Ribeiro v. France*<sup>6</sup>.

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procedural safeguards may not be applied when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.

<sup>5</sup> The Court in Strasbourg concluded in the *Case of Maaouia v. France*, judgement of the Grand Chamber of 5 October 2000, that Article 6 ECHR is not applicable to asylum and immigration proceedings. Decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant's civil rights or obligations or of a criminal charge against him, within the meaning of Article 6 § 1 of the Convention. However it would be wrong to say that the Convention does not set up any standards regarding the provisional protection in immigration and asylum claims. In the judgement *Klass v. Germany* of 6 September 1978, the court said: "An effective remedy is guaranteed to everyone who claims that his rights and freedoms under the Convention have been violated."

<sup>6</sup> 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 *Bati 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 [Gaberamadhién]*, cited above, §

#### 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 the request. However, making such a request does not have suspended enforcement of the expulsion decision with the exception of one category of aliens. The position EU citizens and their family members who are covered by the EU Directive of 2004 on the right of the EU citizens and their family members is privileged. They enjoy the right to stay until a judge takes a final decision on their request for provisional protection. Neither the asylum seekers nor third country nationals enjoy the right to stay in the country until a judge decides on granting provisional protection. The unsuccessful asylum seeker against whom an expulsion decision is taken by the administrative authority is allowed to stay in the country for a period of 30 days after a decision has been issued. Generally speaking, a similar arrangement is included in the law concerning other aliens (immigrants) against whom a decision on expulsion has been issued provided it can be believed their departure of the country was voluntarily (although the time limit for leaving the country is determined individually and may be shorter). The time limit for returning home is short. A judge may decide about a provisional protection only if an appeal meets all formal requirements (for example, court's fee). Although it is a general practice of the court to grant a provisional protection to the asylum seekers, not in every case it may occur effective if making an application itself for an interim measure does not entail suspensive effect until a decision on such a request is taken. In the case of the subsequent asylum application there are specific rules. These rules require an individual administrative decision to be taken each time in order

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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).

to allow an asylum seeker to stay in the country. Such a decision is required in order to prevent expulsion even during a primary administrative procedure since making a repeat application for asylum does not suspend enforcement of the previous expulsion decision. Administrative decisions on the suspension of expulsion may be subject to judicial review before an administrative court judge.

My criticism about Polish legislation comes from the fact that it does expressly say that making a request for an interim measure prevents deportation in all cases, save for such applications made by the EU citizens and their family members. At the same time, it should be noted that for asylum cases before an appeal is filed with the court, there are two tiers in the refugee status procedure within the administration: 1<sup>st</sup> instance decision is taken by the Head of the Office for Foreigners and the 2<sup>nd</sup> instance decision by the Refugee Board. An administrative appeal to the Refugee Board always entails an automatic suspensive effect (save for the repeated applications). Perhaps, the Refugee Board could be considered as a quasi judicial authority that meets criteria of Article 13 ECHR. Although the Refugee Board is not a part of the judiciary in Poland and their members are not judges, it enjoys a certain level of independence from the government and qualifies to a special category of the administrative authorities.

## **V. Final Conclusions.**

Before articulating concerns about the standards of provisional protection against expulsion, it is worth summarizing the main procedural safeguards under the EU directives and the Strasbourg Court. They are the following:

Number one, under the EU Directives there is not an automatic suspensive effect of the appeals against expulsion. The possibility of claiming individual provisional protection while appellate (judicial or administrative) measures are used, seems to be the only option.

Number two, EU citizens and their family members within the meaning of the EU directive of 2004 enjoy the highest procedural safeguards against expulsion. Their stay is secured until the decision on provisional protection is taken. Such a safeguard is not expressly granted to the other two categories: asylum seekers and other third country nationals.

Number three, 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 required, because the law stipulates such a consequence as a result of the appeal.

Having repeated these safeguards there are several conclusions and questions that I would like to share.

An automatic suspensive effect of the appeal is not a result of the individual decision of a judge. It is the law that entails judicial appeal with suspension of the enforcement of the expulsion decision that is challenged before a judge. Should the interim measures be applied just because Article 3 ECHR is invoked in the appeal against expulsion ? Is it possible in the general and abstract norms - and the law contains only such norms - to limit suspensive effect to those expulsion decisions in which an alien relies on Article 3 of the ECHR and in which the claim is arguable. Is an automatic suspensive effect going to be granted by law irrespective of whether the appeal has any chances to succeed ? If the answer to these questions is “no”, I should say that only under the individual decision taken in an individual procedure should provisional protection be granted. Such factors like credibility of the applicant or chances of allowing an appeal 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 contrary to Article 3 ECHR. Individual circumstances of the case can be taken into consideration only by the individual assessment of the claim. Needless to say that the legislation which provides automatic suspensive effect of the appeal only if it is based on Article 3 ECHR, may create an incentive to invoke Article 3 in every expulsion case.

It seems to me that all those concerns could be alleviated just by granting protection in individual fast track procedures in which judges could assess whether provisional protection irrespective on the article of the convention invoked shall be granted. The alternative to this could be granting, as a general principle, the right to stay in the country in every expulsion case, including immigration cases, until the first instance judge exercises judicial scrutiny. This solution seems to me the most appropriate in terms of ensuring due process of law and the right to a fair trial. Let me also indicate that 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<sup>7</sup> 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<sup>8</sup>. 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. The same standards could be required at least before the first instance court. They do not have to be extended to the judicial appeal procedure at all tiers. Neither the Convention nor the Charter requires appellate judicial procedure in immigration or asylum cases before the court of the second instance. Rejection of 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. If automatic suspensive effect is not granted, there is no effective protection and judicial control of administration may sometimes exist only "on paper".

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. The 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

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<sup>7</sup> 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.

<sup>8</sup> Article 47. Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

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 consequences for an immigrant's family life.

To sum up, all the above mentioned considerations argue for offering automatic suspensive effect while first instance judicial scrutiny is ongoing in every case where an administrative expulsion decision is being taken.