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Péter Darák

JUDICIAL EXPERIENCES – EU PROCEDURAL LAW ASPECTS[1]

Dr. Péter Darák, President, Curia of Hungary, Elnok@kuria.birosag.hu

[1] The text has been edited with the contribution of dr. Kintzly Péter, Supreme Court secretary, assistant to the President of the Supreme Court.

1. INTRODUCTION

On 9 June 2016, the European Parliament adopted a resolution for an open, efficient and independent European Union administration.[2] In this resolution, Parliament calls the Commission to come forward with a legislative proposal, as well as to consider the annexed proposal made by Parliament.

In the preamble to the above resolution, Parliament pointed out that lacking coherent, codified rules of administrative procedure, citizens of the European Union are unable to understand and enforce their rights in procedures before EU bodies and authorities. Accordingly, Parliament adopted model rules on administrative procedure which shall apply together with provisions of EU law relating to specific administrative procedures. These model rules aim to implement the fundamental principles of procedural law set by different sources of EU law, including the case law of the Court of Justice.

Proposals, which had been made by experts before the present document was adopted, articulated the vision that European administrative law will necessarily lead to the Europeanisation of national administrative laws, so harmonisation of the terms of the two systems is to be expected, which can be realised primarily for the general principles governing administrative law. At conferences held during the period of preparatory research, a concept gained ground that the content of general principles governing the administrative law of the Member States should be defined at the level of EU legislation. In my opinion, this approach is not worth supporting, as the scope of functioning of the EU administration differs significantly from the types of cases handled by the Member States' administrative authorities. In the European Union, emphasis is placed on competition law, trademarks, consumer protection, public procurement law, state assistance and access to documents, while the national administrative bodies handle building law, social law matters and tax cases. Different fields of law demand obviously different views, even in relation to the content of general principles. That is why I decided to give an overall picture in my presentation of the contents given by the case law of the Curia of Hungary to the general principles acknowledged by EU administrative procedure law. For the sake of exactness, I am going to present the judgments interpreting general principles together with the facts of each case.

2. THE RIGHT TO FAIR PROCEEDING

In this case, which was completed by the judgment of the Curia in May 2015,[3] the plaintiff's previously-obtained waste-processing permit expired in 2009, without having been

[2] European Parliament resolution of 9 June 2016 for an open, efficient and independent European Union administration (2016/2610[RSP]). Available at: www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2016-0279+0+DOC+PDF+V0//EN (Downloaded: 15.07.2017.)

[3] The Curia of Hungary, Case No. Kfv.III.37.162/2015/3.

renewed. In 2010, as a result of supervision review, the regional environmental authority established and imposed fines both for illegal waste-processing and air pollution. The second-instance authority approved the findings of the first-instance decision and raised the amount of the fine.

The plaintiff filed an action against the second-instance decision, requesting its annulation. The court of the first instance abolished the decision and ordered the second-instance authority to conduct a new procedure, as it had not examined whether the plaintiff's activity could qualify as a minor violation of law. In the aftermath, the second-instance authority instructed the first-instance authority to initiate new proceedings.

In the new proceedings, the first-instance authority imposed the same amount of fine, pointing out that the plaintiff's activity was not to be considered as a minor violation of law, as an air-pollution fine had earlier been imposed. It indicated also the exact provisions of law serving as a basis for its decision. The second-instance authority approved the first-instance decision.

The plaintiff filed an action against the new second-instance decision. He stated that the second-instance authority itself should have conducted the new proceedings, in accordance with the court order. He argued also that the fines had been imposed after the expiration of the statutory period of limitation, which resulted in the violation of his right to fair proceedings.

By its judgment, the administrative court abolished both decisions. It pointed out that even though the statutory period of limitation did not apply to repeated proceedings, the fact that no substantial measures were taken for 15 months was to be considered definitely as a violation of the right to fair proceedings.

The second-instance authority, as defendant, lodged a extraordinary appeal on points of law to the Curia, arguing that even in case of respecting the principle of fair proceeding, the same decision would have been made, and thus its violation did not have any effect on the merits of the case.

The Curia established, with reference to its earlier uniformity decision, that violation of procedural law may also lead to abolishment, if it is substantial, i.e. it affects the merits of the case and cannot be remedied by the court. In this respect, the right to fair proceeding is a principle that serves as an auxiliary for the interpretation of specific legal norms and forms only exceptionally a direct cause of action. In this latter case, although there is no relation of cause and effect between the violation of a procedural norm and the merits of the case, the enforceability of the party's rights has been curtailed to such an extent that it qualifies as a substantial violation of procedural law. In the present case, the statutory deadline bound the authority in an ex officio procedure, but did not create rights for the party. Accordingly, a decision made after the expiration of a statutory deadline does not lead to substantial and direct violation of the party's rights, especially in case of imposing fines.

Considering the above, the Curia accepted the defendant's claim and abolished the decision of the administrative court, on the basis that it had wrongly referred to the violation of the right to fair proceeding.

3. LAWFUL JUDICIAL DISCRETION

In the following case, closed by the judgment of the Curia in April 2016,[4] the consumer protection authority imposed a fine on an electric power supplier, as it had stopped the supply of power, though the consumer had made an overpayment and had not actually been notified on bills due for payment. The supplier argued that it had notified the consumer by mail which had been returned as 'unclaimed'. The first-instance authority pointed out that the supplier's violation of law had concerned the consumer's fundamental rights. The supplier appealed against the decision, but the second-instance authority increased the amount of fine, explaining that the supplier stopped the supply of power within 60 days counting from the due date and violated the consumer's right to information, by failure to notify her in the first reminder on the discounts available for socially disadvantaged consumers.

The power supplier filed an action against the second-instance decision, requesting the abolishment thereof and a reduction of fine. It represented that it had abided by the statutory deadline and had stopped the supply of power after 60 days. The supplier disputed also the authority's exercise of discretion, as it had failed to consider all the relevant facts when imposing the fine.

The administrative court basically accepted the plaintiff's arguments and altered the second-instance decision by decreasing the amount of fine. The court established that the supplier met the statutory deadline, but failed to comply with the lawful duty to inform the consumer on the available discounts and the possibility to register as a 'consumer to be protected'. Considering all circumstances of the case, the court found that the authority had exercised its discretion inconsistently and, as the facts to be considered had duly been revealed, remedied the violation of law by decreasing the amount of the fine. The court considered the small number of the consumers concerned (only one) and the lack of any advantage on the plaintiff's side arising from the violation of law as mitigating circumstances.

The second-instance authority, as defendant, filed an extraordinary appeal on points of law to the Curia, explaining that it had considered all the relevant circumstances and both the first and second-instance decisions detailed the reasons serving as a basis for exercising its discretionary power.

The Curia allowed the defendant's appeal, underlining that decisions on fines made at the discretion of an administrative authority may be subject to judicial reconsideration only in case of express violation of law. Otherwise, reconsideration of facts and circumstances, once evaluated by the authority, is not allowed. The consumer protection authority imposed the fine with respect to the relevant legal provisions and gave a detailed reasoning from which the aspects of consideration are identifiable. The administrative court, however, drew incorrect conclusions from the relevant legal provisions, because instead of establishing

[4] The Curia of Hungary, case No. Kf.III.37.083/2016/4.

the violation of a specific legal norm, it judged only that the fine had been exaggerated. In addition, circumstances considered by the administrative court as mitigating ones were partially evaluated by the authority earlier, partially unable to qualify as mitigating (e.g. fulfilling obligations set by law, or the lack of any advantage arising from a violation of law). The Curia also pointed out that in administrative cases, judicial review is restricted to the points of law, so only unlawful administrative acts can be abolished or altered.

In accordance with the above reasoning, the Curia abolished the administrative court's decision and rejected the plaintiff's claim.

4. NON-DISCRIMINATION RULE

The next case was ruled by the Curia in May 2010.[5] Fines were imposed on two Hungarian online media providers for advertising foreign gambling companies on their websites.

Both media providers filed an action against the administrative decision, representing that the freedom to provide services applied also to Gibraltar pursuant to the Treaty establishing the European Community, and they had been providing their services within the territory of the European Union. The plaintiffs referred to the primacy of European Union law and the direct effect of the Treaty, and pointed out also that prohibition of advertising service providers settled in the Community qualifies as restriction of the freedom to provide services and, as such, must fulfil the requirements of necessity and suitability in accordance with the test implemented by the European Court of Justice. According to their standpoint, the measure taken by the Hungarian authority did not meet these requirements, as it was obviously discriminatory.

The court of the first instance decided in favour of the plaintiffs, underlining that pursuant to Article 49 of the Treaty of Rome, the defendant should have ignored the discriminatory provision of national law, as it was contrary to Community law.

The defendant filed an extraordinary appeal on points of law to the Curia, requesting the abolishment of the first instance decision. The authority argued that the aim of the administrative procedure was not to restrict the provision of services, but to decide the question whether the advertising activities were in accordance with national provisions of law. It added also that fines were imposed in relation to the advertisements published on the websites operated by the media providers (and not by the gambling companies). The defendant represented furthermore that one of the online gambling companies is based outside the European Community.

The Curia refused the defendant's appeal. It accepted the legal arguments presented by the court of first instance, according to which the respective provision of the Act on Business Advertising violates the non-discrimination rule, as it prohibits only advertisements related to gambling games organised abroad, while it does not imply any prohibition

[5] The Curia of Hungary, case No. Kfv.IV.37.757/2009/6.

related to gambling games organised in Hungary. The Curia referred also to ECJ case law, underlining that the prohibition in question realises a restriction of the freedom to provide services, as it affects the services provided by the gambling companies and it is suitable for restricting them directly and actually. In addition, the Curia underlined that the provision of services may be subject to restrictions by Member States for public-order, public-security, public-health purposes. Nevertheless, even these restrictions should abide by the non-discrimination rule.

As to the defendant's statement concerning the head office of one gambling company, the Curia referred to its own case law, confirming that new circumstances which were not subject of earlier proceedings cannot be referred to in the revision procedure before the Curia.

5. EQUAL TREATMENT

A very interesting case was ruled by the Curia in October 2016,[6] where the grand hall of a restaurant was used in the evening hours by a circle of friends, organised by a natural person who made a table reservation. The plaintiff entered the restaurant that evening and wanted to sit in the grand hall. The manager of the restaurant, knowing that there was bad blood between the plaintiff and the organiser of the company at table, provided catering services for him in another hall. Therefore, the plaintiff made a complaint to the consumer protection authority for violation of equal treatment, which was then refused by both the first and second instance authorities.

The plaintiff filed an action against the administrative decision, arguing that there was no private event in the restaurant at that night, so he should have been served in the hall in which he demanded.

The administrative court refused the plaintiff's action and accepted the authority's legal arguments, according to which disputes of a personal nature do not fall within its competence and even if provisions of the Act on Equal Treatment applied to the organiser, the restaurant manager's conduct would qualify as reasonable, and not as a violation of equal treatment.

The plaintiff filed an extraordinary appeal on points of law to the Curia, explaining that the defendant failed to fulfil its duty to reveal the facts of the case, and requested the abolishment of the judgment and the administrative decisions equally.

The Curia, however, rejected the plaintiff's appeal, underlining that it is considered in particular as violation of equal treatment, if the provision of services or the sale of goods is denied or neglected by reason of a certain characteristic set by law, or if labels or signs are put indicating that certain individuals are excluded from the provision of services or the sale of goods. It was clear that the manager had not denied or neglected the provision

[6] The Curia of Hungary, case No. Kfv. III.37.519/2016/6.

of services in the restaurant, and that was neither disputed by the plaintiff. As the plaintiff agreed to be served in another hall and no findings were recorded about any negative consequences to be applied by the manager in case the plaintiff would not accept his offer, the acceptance itself excludes any violation of equal treatment.

6. PROPORTIONALITY

The next case, ruled by the Curia in February 2014,[7] has EU-law relevance. The defendant administrative authority rejected a company's application for state aid available for micro-enterprises within the framework of the European Agricultural Fund for Rural Development (EAFRD). The authority argued that the plaintiff, when procuring means necessary for his project, gamed the application conditions artificially to double the amount of the aid.

The plaintiff filed an action against the administrative decision, but the court of first instance rejected his claim and rejected also his attempt to initiate proceedings before the European Court of Justice (ECJ) and the Constitutional Court of Hungary, deeming those unnecessary. The plaintiff then filed an extraordinary appeal on points of law to the Curia, stating that the court of first instance ignored the EU-law aspects of the case without due reason, and that the judgment thus violated the Treaty on the Functioning of the European Union.

The Curia allowed the plaintiff's petition, abolished the judgment and ordered the court of the first instance to rehear the case. In the reasoning part, the Curia underlined that EAFRD aid is paid from the EU budget, consequently the authorities of the Member States bear great responsibility to prevent any illegal transaction. In this respect, the Member States are also entitled to adopt implementation rules to protect the efficient use of EU funds. The Curia accepted the legal arguments of the court that the parallel nature of the relevant provisions of EU law and national law excludes any conflict between them. In accordance with the Fundamental Law of Hungary, such conflicts can be settled by ignoring provisions of national law, so it is not necessary to launch any proceeding before the ECJ or the Constitutional Court.

As one of the plaintiff's arguments was that the provisions of the respective EC Regulation enacting sanctions violate the principle of proportionality, and thus the invalidity thereof shall be established by the ECJ as a result of a preliminary ruling procedure, the Curia recalled the proportionality test developed by the ECJ, which makes any reference to preliminary ruling unnecessary. According to this test, the measure must be necessary and suitable to achieve a legitimate aim. The test implies also the legislator's obligation to choose the less restrictive measure, if available, so any disadvantage caused must not be disproportionate to the aim pursued. The restriction set by the respective EC Regulation

[7] The Curia of Hungary, case No. Kfv.IV.35.166/2013/8.

aims to prevent any misuse of the funds of the EU and its Member States. This is a legitimate aim, and the legal measures pursuing it are necessary and cannot be considered as disproportionate.

Nevertheless, as the facts of the present case had not been fully revealed, the Curia had to abolish the judgment.

7. IMPARTIALITY

In September 2016, the Curia ruled a construction law case[8] where the principle of impartiality was the subject matter of revision. The plaintiffs were obliged by the first-instance authority to remove 3 advertising panels and 13 posters from a location which was their property. The authority argued that the panels and the posters did not fit into the townscape, and referred to the provisions of municipal regulations on advertising and townscape protection.

The plaintiffs filed an action against the administrative act, but the administrative court rejected their claim by reason of unsuccessful taking of evidence, as the photos taken in the course of the administrative procedure duly supported the lawfulness of the decision. In their extraordinary appeal on points of law submitted to the Curia, the plaintiffs represented that the administrative decision actually ordered them to demolish a stone boundary wall while the court established the facts of the case contrary to the files, as the property concerned does not belong to the zone covered by the relevant municipal regulation. Finally, they raised an objection that the second instance decision was made by persons who had taken an active part in making the decision of the first instance.

The Curia, however, rejected the plaintiffs' appeal. It underlined that every person has the right to have his or her affairs handled fairly, which implies the right to an impartial procedure. Consequently, there must be an impartial body in every appeal case. Another important guarantee is that persons who took part in making the first-instance decision are excluded from the second-instance proceedings. The second-instance body cannot be considered as impartial, if the persons who took part in the first-instance procedure take part in making the second-instance decision. Accordingly, the application and the appeal cannot be handled by the same person in the same capacity, and it must be indicated in the decision itself which body or organ has made the decision.

The Curia referred also to its earlier case law, according to which the delegation of a competence to a specific unit of the administrative authority is allowed, yet does not affect the personal responsibility of the original addressee of that competence. The administrative act is lawful if it was issued by a person who was entitled by the internal rules of procedure to proceed on behalf of the original addressee of the competence, and these circumstances are clearly proved in the decision. In the present case, it was evident from the documents

[8] The Curia of Hungary, case No. Kfv.IV.37.984/2015/4.

that the first-instance decision had been issued by a department leader who acted on behalf of the mayor, and then the second-instance decision was issued by the mayor himself who was entitled to represent and act on behalf of the body of municipal representatives. Consequently, the principle of impartiality has not been violated.

For the sake of completeness, the Curia accepted the administrative court's arguments on the points of substantial law, confirming that the plaintiffs' property was subject to the municipal regulation on advertising.

8. LAWFUL EXPECTATIONS

The next case concerned local taxation.[9] In June 2015, the plaintiff company obtained sites in an industrial park. According to the municipal regulation on local taxes in force, properties located within the territory of the industrial park were exempt from real-estate tax for a period of three years dated from the acquisition. Accordingly, the municipal tax authority established the property tax at 0 HUF for the year 2015. After that, a new regulation on local taxes was adopted, which enacted 'tax districts' in the municipality area, including also the industrial park. Pursuant to the provisions of this new regulation, the company was obliged to pay a property tax of HUF 1,575 million per property for the year 2016.

The plaintiff filed an action against the decision of the municipal tax authority, arguing that the regulation enacted a confiscation tax and did not provide due time to prepare for the application of the new legal provisions. The administrative court stayed the proceedings and referred the case to the Municipality Panel of the Curia which is entitled to examine the compliance of municipal regulations reliant on higher-level provisions of law (except the Fundamental Law). The administrative court pointed out that the new municipality regulation was adopted on 30 November 2015 and entered into force as of 1 January 2016, so no due preparation time was given.

The Curia accepted the arguments presented by the administrative court, underlining that the plaintiff expected on good grounds that he would be exempted from property tax until 2018. Consequently, the Curia had to examine whether the modification of local taxation provisions affected lawful expectations. In Hungary, legislative 'promises' can be withdrawn only in conformity with the principle of legal certainty. According to the case law of the Constitutional Court, a tax discount already obtained for a definite period implies a lawful expectation following from the legislator's promise, so decreasing or withdrawing them before the expiration of the definite period violates legal certainty. It is important to distinguish between short-term and long-term tax discounts. In case of short-term discounts, legal certainty is a clear barrier to any decrease or withdrawal, while in case of long-term discounts, opportunity shall be given to the legislator to decrease or

[9] The Curia of Hungary, case No. Köf.5036/2016.

even withdraw the discounts in case of fundamental changes in circumstances given at the time of providing the discounts. A tax exemption for a period of five years was to be considered by the Constitutional Court as a short-term discount.

In the present case, the municipality abolished the tax exemption by providing a preparation time of one month only, although the plaintiff trusted on lawful grounds that he would remain exempt from taxation until the expiration of the given period, so he had a lawful expectation.

Besides the above, the Curia examined and accepted the plaintiff's argument concerning the discriminatory nature of the new regulation. The Curia established that in the 'industrial park' district, only the plaintiff's properties were subject to taxation, so the abstract legal norm applies to one taxpayer, and that qualifies as negative discrimination. As a result, the Curia abolished the municipality regulation with a retroactive effect to 1 January 2016.

9. THE RIGHT TO PRIVACY

The next case[10] involves a municipality regulation again which was abolished by the Municipality Panel of the Curia. The procedure falls within the exclusive competence of the Curia and can be initiated also by the Government Office of the county concerned. The Office initiated proceedings against a municipal regulation about social-aid payments. The Curia partially allowed the petition, for the following reasons.

In Hungary, a specific type of social aid or benefit can be granted to inactive young people and their families. This benefit is subject to terms and conditions set partially by the Social Assistance Act, partially by the municipality regulation adopted by authorisation of the former Act. The municipality can define, as a condition of granting, the applicant's obligation to maintain the habitat (apartment, house, garden, pavement) etc. in a good and hygienic condition.

The municipality regulation in question prescribed the verification of lawful use of the property in which the applicant lives by indicating the specific legal title. Nevertheless, the regulation did not define what should be understood under the term 'lawful use', neither did it regulate how the lawful use should be verified. The regulation set a specific term in case for applicants living in newly built apartments: social aid was subject to a valid certificate of usability or a valid operation permit (the latter in case of illegal construction), as well as to due lighting, ventilation and heating facilities. These are specific rules of construction law and the municipality had no authorisation to set such rules as a condition of granting social aid. Consequently, the Curia abolished them.

The applicant also had to make declarations in respect of the property, e.g. to make lawful use of public utility services, to pay all the utility bills no later than two months after due date, to install waste bins etc. By prescribing these rules, the municipality had not

[10] The Curia of Hungary, case No. Köf.I.5.051/2012/6.

gone beyond its authorisation given by the Social Assistance Act, so the Curia refused to abolish these provisions.

Besides the above, the municipality regulation included a long sentence stipulating the exclusion of all circumstances from the property which would jeopardise the child's socio-cultural environment and would be harmful to the development of his or her personality. The Curia confirmed that the protection of future generations has been given high priority by the Hungarian legislation, but the sentence in question was hardly understandable, so this provision violated the legislator's obligation to adopt clear and understandable legal norms.

The regulation prescribed also that neither industrial nor business activities are allowed on the properties concerned, and it is forbidden to keep materials, instruments or animals which fully occupy at least one room in the property. The Curia pointed out that these provisions, restricting the freedom of enterprise, cannot be deduced from the authorising provisions of the Social Assistance Act, as there is only a weak relationship between the obligation to maintain the property in good condition and the storage of goods or livestock.

The Government Office in charge referred also to the municipality going beyond its authorisation by stipulating that the applicant and all other persons living in the property should care for their own personal hygiene. The Curia established first that this provision applied not only to the applicant but to other persons as well, thus it violated the Social Assistance Act. In addition, this provision affects privacy as well, which is protected by Article 8 of the European Convention of Human Rights. Pursuant to resolution No. 428/1970 of the Parliamentary Assembly of the Council of Europe, this right implies the integrity of and minimum interference with every person's private life. Personal hygiene and clothing are covered by terms protecting privacy, as being closely connected to physical integrity. According to the case law of the Constitutional Court of Hungary, personal autonomy has a core which neither the state nor other persons can interfere with, and which can only exceptionally be subject to legislation. Prescribing the maintenance of personal hygiene is irrelevant to the granting of social aid payments, and counts also as a violation of privacy. Accordingly, the Curia abolished the provision in question.

10. LOSS OF OBTAINED RIGHTS

In this case, finished in March 2014,[11] the Curia had to decide whether a bricked-up doorway could lawfully be reopened. The plaintiffs filed an action against the decision of the construction authority ordering them to brick up the doorway, as it had been erected without construction permit and in violation of rules of construction.

The court of the first instance abolished the decision of the defendant authority, accepting the plaintiff's argument that the doorway had existed already in 1969, before

[11] The Curia of Hungary, case No. Kfv.II.37.064/2014/4.

the neighbouring site was divided from their property, so construction provisions in force do not apply to it. The court also agreed with their argument that the reopening of the doorway did not affect any element of structure, so it was not subject to permission. The defendant authority filed a extraordinary appeal on points of law to the Curia, explaining that by bricking up the doorway decades ago, the plaintiff lost their right to use it, so the reopening of same could be allowed only in accordance with the legal provisions in force, in particular those relating to the distance between buildings.

The Curia allowed the defendant's appeal, pointing out that the court of the first instance drew incorrect legal consequences from the matters of fact. The doorway had been bricked up for decades, until it was reopened in 2011. Accordingly, the plaintiffs had to abide by the legal provisions which were in force in that year. Namely, even in case of construction activities which can be pursued without permission or notification, the construction authority shall examine whether the activity in question complies with the relevant legal norms. The Curia underlined that by bricking up the doorway, the plaintiffs lost their right to it, so the fact that it had been existed before the neighbouring house was erected has no relevance, and neither has the fact that anyone had knowledge about the earlier situation. And in the absence of any obtained rights, the construction authority had to order the elimination of that building part, as it violated the provisions concerning the minimum distance between buildings.

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Dr. Péter Darák (Elnok@kuria.birosag.hu) became Doctor of Law in Pécs at the Faculty of Law of Janus Pannonius University. He started his judicial career in 1987 as a clerk at the Prosecutor's Office in Zalaegerszeg, and in 1990 he became prosecutor in charge of civil and supervision cases. In 1991 he became judge at the Court of Zalaegerszeg, proceeding in civil law and administrative law cases. He became judge of the Supreme Court in 2000, and was appointed President of the Curia of Hungary with effect from 1 January 2012.

Besides his positions as judge and president, he is Assistant Professor at the Financial Law Department of the Faculty of Law at Eötvös Loránd University. He is president of the Hungarian Division of International Federation of European Law (FIDE). He is director of the specialist training programme in real-estate law at the Deák Ferenc Institute of Pázmány Péter Catholic University. His main fields of interest are administrative and tax jurisdiction, administrative procedure law, environmental law and real-estate law.