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HANDLING OF COURT CASES OF EXPULSION FOREIGN NATIONALS: TOWARDS THE ADOPTION OF THE CODE OF ADMINISTRATIVE COURT PROCEDURE [1]

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The author conducts a critical analysis of the draft code of administrative proceedings in the context of respect for human rights. Notes debatable nature of the legislator’s decisions concerning the enshrining of retortions in the Code of Administrative Court Procedure. Raises a number of questions on the draft law. For example, why do the authors of the draft law pay so much attention to persons expelled in order of readmission? Why do the prescriptions of the chapter not apply to deported foreign nationals? When that constitutional norms equally apply to all expelled foreigners.

Keywords: foreign nationals, expulsion of foreign nationals, deportation, readmission, code of administrative court procedure.

May 21, 2013 the State Duma adopted in the first reading the draft Code of Administrative Court Procedure of the Russian Federation. The scholarly dispute should now focus on the discussion of specific legal provisions, as well as on “the full-fledged implementation of the norm of the Constitution of the Russian Federation on administrative justice as a special form of exercising judicial power in the country” [6, 4-5]. Ideally, the final adoption and entry into force of the draft code will guarantee the rights and freedoms of powerless participants of administrative legal relations, as well as ensure the necessary balance of private and public interests. Panova I. V. marks that there will be three components of “successful and effective implementation of administrative proceedings” in the system of courts

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of general jurisdiction: court procedure, special process specialization of judges to resolve administrative cases [5, 21]. New administrative and judicial protection is intended also for immigration relations.

Foreign nationals, according to part 4 article 4 of the draft Code, are endowed procedural rights and responsibilities along with Russian ones. Exceptions to this rule, as proposed, can be established only by the norms of the Code of Administrative Court Procedure or by the Government of the Russian Federation by way of retortion. The possibility of retaliatory restriction on foreign nationals of those States, the courts of which allow limitations of procedural rights of Russian citizens and organizations, is not specified in the draft law, and is on discretion of the supreme body of executive power. This begs the question about the extent of such restrictions. For example, whether can the government deprive foreign entities the right to appeal to court with an administrative claim in whole or should it be limited to certain exceptions, diminishing separate procedural rights while maintaining all the rest? In practice, you can provide a variety of options of such restrictions. For example, they may affect certain categories of cases (deportation, etc.); degree of procedural protection (inability of proceedings in the second (third as option) instance; the level of procedural ensuring of hearing a case (in the case of diminishing of specific procedural rights: the right to qualified legal assistance, familiarization with the materials of a case, etc.).

It seems that the design of the norm does not allow introducing of a total ban for foreigners to go to court with an administrative claim, even if there are similar actions of the States of which they are nationals. Part 4 article 4 should be understood in this way: First, foreign nationals, stateless persons, foreign and international organizations (hereinafter – foreign persons) are entitled to apply to the courts of the Russian Federation for the protection of their violated or disputed rights, freedoms and legitimate interests in the sphere of administrative and other public legal relations based on authority-based subordination of one party to the other. Secondly, foreign persons shall enjoy the same procedural rights and perform procedural duties along with Russian citizens and organizations, except as otherwise expressly provided for by this Code. The Government can place retaliatory restrictions on foreign nationals of those States, the courts of which allow restrictions of procedural rights of Russian citizens and organizations. It may be appropriate to add this text in different parts of the article, stressing the inviolability of the right of recourse to the courts as such.

First of all, this decision is in conformity with national constitutional principle (article 62, part 3). The Constitutional Court of the Russian Federation explained

that this rule applies only to human rights, that is, those that arise from birth and do not require a sustainable legal connection with the State [1]. The right to appeal to court certainly falls into this category. It is fundamental and is guaranteed by the rules of international law.

The European Court of human rights also stressed the importance of judicial oversight over the activity of migration administration of the State that expels a foreigner. Its position is that the authorities of a country cannot "be free from effective oversight by the national courts" [3, 260-295]. According to it, to any measures that affect human rights, even for the sake of national security, should apply "a certain adversarial procedure in an independent public authority that is competent to assess the reasons of a decision and relevant evidence... Independent public authority must be able to respond in cases where a reference to the concept of national security is unsubstantiated or shows interpretation of "national security" in a manner that is unlawful or contrary to common sense and arbitrary. Without such guarantees the internal affairs bodies or other public authorities will be able to arbitrarily encroach upon the rights protected by the Convention" [2, paragraph 59].

By the way, the Court does not require exactly judicial oversight, although it does not exclude it. The main thing is that the check of legality of executive authority activity has to be carried out by an independent body, which has all the attributes of judicial instance: independence in evaluating of evidence and making decision, procedural form of activity, competitiveness. In the Russian legal system only the courts have such signs. Therefore, the restriction of the right to appeal with an administrative claim will significantly impact on the status of foreigners, and the lack of compensation procedure will not allow the State to provide the necessary protection of their rights, what violates constitutional and international principles.

Norm-exception should not contribute to its too broad interpretation allowing executive authority (even the highest) to enjoy significant almost unlimited powers. Doubts are raised by the indication to the fact that countermeasures will be introduced if the courts of foreign countries "allow restrictions of procedural rights of Russian citizens and organizations". There are a variety of situations. Russians may be subject to limitations established by the legal regulations of a foreign State. This also suggests two options: either Russian citizens will fall under the scope of the rules that apply to all foreigners, or the authorities will lay down the rules that worsen their legal status in comparison with other foreign entities. Anyway the Russian Federation needs means to protect its citizens, but the justifiability of retortions taken by an act of the Government is questionable. Rather, it suggests the international-legal measures of regulation. Retaliatory restrictions are also

possible, but probably only by virtue of law. Although their use requires a very serious discussion.

Let's suppose another situation: the judicial system of a foreign state is not able to function effectively. Status of foreigners (all or only Russians) in resolving their cases by the courts is diminished due to the current practice, despite a quite democratic legislation. Moreover, such incidents are rare or occur regularly, but not always. Here one should speak not so much about the restriction that requires normative consolidation, but about the violation of established procedural order, which is committed by foreign judicial authorities. Russia in such situations, of course, has to protect its citizens, but not through retaliatory measures. Otherwise it will become a country with ineffective, unfair judicial system. Solution to the problem is also to be found in the application of international-legal means.

By the way, the institute of retortion has long been known in international public and international private law. The logic of this measure is described by L. A. Lunts. The action of national legal norm is conditioned not by discrimination of its own citizens by foreign authorities. It is applied "because a State has no reason to believe that it itself or its citizens or organizations suffer any diminishing of their rights" [4, 311]. V. L. Tolstyh noted that retortions may apply to procedural rights, but more often this legal institute "is understood in the sense that in response to the restrictions of substantive rights of Russian citizens can be taken the measures to limit the substantive rights of citizens of the respective foreign state". Currently, such sanctions are hardly probable because of a possible conflict with "general principles of international public law, in accordance with which, individuals are not responsible for the actions of States" [7, 383-384].

It should be noted that the norms allowing the Russian Government to limit on the basis of reciprocity the procedural rights of foreign nationals have already been enshrined in the article 398 of Civil Procedure Code of the RF and article 254 Arbitration Procedure Code of the RF. It is no coincidence that there is no practice of their realization. First, there are already mentioned international-legal constraints. Second, retortions can disrupt the normal functioning of the judicial system. Procedural restrictions, even partial, are quite able to collide with the principle of proper judicial process or the right to a fair trial, which are common to legal orders of all democratic countries. Third, the modern states, which are open to immigration, in general try to stick to the national principle, avoiding serious restrictions of the rights of foreigners, especially related to judicial protection. Therefore, the decision of the legislator concerning enshrining retortions in the Code of Administrative Court Procedure is controversial and, at least, requires a comprehensive discussion.

Some questions are caused by their spread on procedural rights, in particular, arising in consideration of administrative disputes. Restriction of civil-procedural rights may cause difficulties in the protection of private rights enshrined by substantive rules, what will probably hurt economic (other private) relations, but will not affect the fundamentals of public policy. Impossibility of judicial protection in public relations distorts the principles, which base the system of public administration of a democratic state. Even responding to the activities of foreign authorities, a state using procedural retortions will weaken the guarantees of administrative-legal status of foreigners.

By the way abroad are known examples of the impact on the procedural status of foreigners. So, according to the legislation of the United States, all non-citizens are divided into two groups: receiving and not receiving official access to their territory. The latter are expelled from the country by an act of the migration authority that they have no right to appeal in court. It is emphasized that the procedural status of foreign nationals follows after the substantive one, which can be received only after legal entry into the United States [9, 844]. The literature discusses the British anti-terrorism legislation, which was formed after the terrorist attacks on USA, September 11, 2001. Its rules provide for the power of the Minister of Internal Affairs to imprison foreigners suspected of having links with terrorist organizations close to Al-Qaeda. This measure applied to cases where special services had reliable information confirming such relations, but not sufficient for the prosecution. Appealing against the ministerial act was allowed in the Special Immigration Appeals Commission (hereinafter – SIAC) – a quasi-judicial body independent of the Interior Ministry, which received the opportunity to review such cases in full [10].

The cases based on classified information were heard behind closed doors. Foreign citizen, as well as its lawyers was not present at such proceedings, the right to protection was provided by a special attorney appointed by the SIAC. It represented foreigner's interests, but had no right to disclose the classified information received at these proceedings. Only after consideration of the complaint by the Commission it was allowed to appeal to the court, which also was denied the opportunity to check the grounds of application to the foreign person of enforcement measure, and limited to verification of the procedure for its imposition. Deviations from a number of principles of court procedure were explained not by the criminal nature of cases on the application of coercive measures against foreign nationals. In particular, the limited access to the materials of the case appeared from the objective need to ensure national security, protect the lives of informants, who have

reported about the links of the suspected person with terrorists ("and this is the limit, which should not be crossed in the course of judicial oversight") [8].

These examples give rise to justifiable criticism among scholars specializing in migration and human rights. It turns out that the introduction of such restrictions for the citizens of the USA or the UK would mean the accepting by the Russian authorities of arguable and questionable practice in terms of general principles of law. At that, both the USA and Great Britain are trying to minimize the negative consequences of the action of their own legislation through establishing various compensation (quasi-judicial and etc.) mechanisms to ensure the rights of foreigners. Most likely, retaliatory measures on the part of any other State would be lopsided. Succumbing to political emotions authorities quite possibly may perceive negative foreign experience, forgetting to reflect its positive aspects. It seems that these examples even more prove the doubtfulness of reciprocal restrictions of administrative-procedural rights of foreign entities. It would be fairer if they get a full set of rights needed to protect their interests in administrative judicial process.

Finally, questionable chapter 26 of the draft, which has been titled "Proceedings on Administrative Cases on Temporary Placement in a Special Institution of Foreign Nationals Subject to Readmission". Actually its content is quite justified; articles 252-255 of the draft are designed to guarantee the rights of persons expecting readmission (expulsion on the basis of an international treaty). Norms develop constitutional provision prohibiting restriction of human freedom for more than 48 hours, otherwise than by a court decision. Other thing is not clear. Why do the authors of the draft pay so much attention to persons expelled by way of readmission? Why do prescriptions of the chapter not apply, for example, to deported foreign nationals? And this when the constitutional provisions are equally applicable to all expelled foreigners. Perhaps chapter 26 well demonstrates one of the main drawbacks of the draft Code of Administrative Court Procedure – copying of the current Civil Procedure Code of the Russian Federation. It includes chapter 26.1 "Temporary Placement in a Special Institution of Foreign Nationals Subject to Readmission", which also consists of four articles. At that, judges lacking orientation concerning the procedure for resolving issues related to the restriction of freedom during pending deportation already now in respect of such cases apply the norms of this chapter by analogy. This decision of the legislator cannot be recognized successful. Apparently, chapter 26 of the draft needs to be edited, and we should start by application its norms to the restriction of freedom of all foreign nationals expelled from Russia, regardless of the form of expulsion.

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