

General Principles of Administrative Law

§ 7 Administrative Procedure and Individual Rights

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§ 7 Administrative Procedure and Individual Rights

Regulations of administrative procedures

- ⇒ shall ensure that the administrative decision making process entails the “right” decisions
- ⇒ shall prevent arbitrary decisions
- ⇒ shall identify alternative solutions

Here: Only administrative procedures directed towards the control of the basic requirements, the creation and adoption of administrative acts, administrative contracts and purposefully factual acts

§ 7 Administrative Procedure and Individual Rights

Resolution (77)31 on the Protection of the Individual in Relation to the Acts of Administrative Authorities

The following principles apply to the protection of persons, whether physical or legal, in administrative procedures with regard to any individual measures or decisions which are taken in the exercise of public authority and which are of such nature as directly to affect their rights, liberties or interests (administrative acts).

Recommendation CM/Rec(2007)7 on good administration

Article 11 – Definitions

1. For the purposes of this code, “administrative decisions” shall mean regulatory or non-regulatory decisions taken by public authorities when exercising the prerogatives of public power.
2. Regulatory decisions consist of generally applicable rules.
3. Non-regulatory decisions may be individual or otherwise. Individual decisions are those addressed solely to one or more individuals

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No explicit pan-European principles on public contracts and public procurement developed within the CoE

But: The **OECD** (Organisation for Economic Co-operation and Development) developed “best-practice” instruments, above all (at least at the beginning) as a tool to fight corruption by transparency.

- [OECD Recommendation of the Council on Public Procurement \(2015\)](#)
- Exhaustive [“Public Procurement Toolbox”](#)

Perhaps: “Absorption” of this principles by the ECtHR in using the [“Demír and Baykara”](#) - Jurisprudence (see § 2 D)

§ 7 Administrative Procedure and Individual Rights

[ECtHR, judgement of 2007/04/05, application no. 18147/02 \(Church of Scientology Moscow v. Russia\)](#)

PROCEDURE

1. The case originated in an application (no. [18147/02](#)) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by the Church of Scientology of the city of Moscow (“the applicant”), on 24 April 2002.
2. The applicant was represented ...
3. The applicant complained, in particular, about the domestic authorities' refusal of its application for re-registration as a legal entity.
4. By a decision of 28 October 2004, the Court declared the application partly admissible.
5. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

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- First registration as religious association with legal-entity status in January 1994
- New law in 1997 „Religions Act“
- New registration in conformity with the new act necessary to uphold the status of a legal-entity
- Application in August 1998, refusal in June 1999 with regard to non-compliance with the new act and criminal investigation against the President of Scientology Moscow
- December 1999 new application, refusal in January 2000 with respect to non-compliance with the new law and infringements of Russian law
- February 2000: Invitation by Scientology to indicate specific violations as the reasons for refusal would have to be given explicitly
- February 2000: Answer: only legal evaluation of handed in documents necessary, not to review or clarify these documents
- March 2000: Third application with changed documents

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- June 2000: Information „Application could not be processed“, because of missing documents
- Inquiries of the applicant which documents are missing led to the answer that the authority is not competent for giving this answer
- July 2000: Fourth application with more details
- Same answer and reasoning: no processing
- Octobre 2000: Fifth application
- Same answer and reasoning: no processing
- On December 31st the time-limit for re-registration expired
- National court procedure: Re-registration ordered -> not done by administration; then review by higher court and withdrawal of first decisions
- Some more decisions and ongoing application quarrels

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- July 2002: new register under auspices of the Ministry for Taxes and Duties
- July 2002: Meanwhile eighth application to get registered under the procedure
- August 2002: refusal due to the expired first time-limit
- Again applications and court decisions
- Finally Application at the European Court of Human Rights complaining a violation of Articles 9, 10, 11, 14 of the Convention.

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[ECtHR, judgement of 2007/04/05, application no. 18147/02 \(Church of Scientology Moscow v. Russia\)](#)

91. The Court observes that the Moscow Justice Department refused to process at least four applications for re-registration, referring to the applicant's alleged failure to submit a complete set of documents [...]. However, it did not specify why it deemed the applications incomplete. Responding to a written inquiry by the applicant's president, the Moscow Justice Department explicitly declined to indicate what information or document was considered missing, claiming that it was not competent to do so [...]. The Court notes the inconsistent approach of the Moscow Justice Department on the one hand accepting that it was competent to determine the application incomplete but on the other hand declining its competence to give any indication as to the nature of the allegedly missing elements. Not only did that approach deprive the applicant of an opportunity to remedy the supposed defects of the applications and re-submit them, but also it ran counter to the express requirement of the domestic law that any refusal must be reasoned. By not stating clear reasons for rejecting the applications for re-registration submitted by the applicant, the Moscow Justice Department acted in an arbitrary manner. Consequently, the Court considers that that ground for refusal was not “in accordance with the law”.

ECtHR, judgement of 2007/04/05, application no. 18147/02 (Church of Scientology Moscow v. Russia)

92. Examining the applicant's complaint for a second time, the District Court advanced more specific reasons for the refusal, the first of them being a failure to produce the original charter, registration certificate and the document indicating the legal address [...]. With regard to this ground the Court notes that the Religions Act contained an exhaustive list of documents that were to accompany an application for re-registration. That list did not require any specific form in which these documents were to be submitted, whether as originals or in copies [...]. According to the Court's settled case-law, the expression "prescribed by law" requires that the impugned measure should have a basis in domestic law and also that the law be formulated with sufficient precision to enable the citizen to foresee the consequences which a given action may entail and to regulate his or her conduct accordingly [...]. The requirement to submit the original documents did not follow from the text of the Religions Act and no other regulatory documents which might have set out such a requirement were referred to in the domestic proceedings. [...]. In these circumstances, the Court is unable to find that the domestic law was formulated with sufficient precision enabling the applicant to foresee the adverse consequences which the submission of copies would entail. [...].

ECtHR, judgement of 2007/04/05, application no. 18147/02 (Church of Scientology Moscow v. Russia)

92. [...]. Furthermore, the Court considers that the requirement to enclose originals with each application would have been excessively burdensome, or even impossible, to fulfil in the instant case. The Justice Department was under no legal obligation to return the documents enclosed with applications it had refused to process and it appears that it habitually kept them in the registration file. As there exists only a limited number of original documents, the requirement to submit originals with each application could have the effect of making impossible re-submission of rectified applications for re-registration because no more originals were available. This would have rendered the applicant's right to apply for re-registration as merely theoretical rather than practical and effective as required by the Convention [...]. It was pointed out by the applicant, and not contested by the Government, that the Moscow Justice Department had in its possession the original charter and registration certification, as well as the document evidencing its address, which had been included in the first application for re-registration in 1999 and never returned to the applicant. In these circumstances, the District Court's finding that the applicant was responsible for the failure to produce these documents was devoid of both factual and legal basis.

93. The Nikulinskiy District Court also determined that the applicant had not produced information on the basic tenets of creed and practices of the religion. The Court has previously found that the refusal of registration for a failure to present information on the fundamental principles of a religion may be justified in the particular circumstances of the case by the necessity to determine whether the denomination seeking recognition presented any danger for a democratic society [...]. The situation obtaining in the present case was different. It was not disputed that the applicant had submitted a book detailing the theological premises and practices of Scientology. The District Court did not explain why the book was not deemed to contain sufficient information on the basic tenets and practices of the religion required by the Religions Act. The Court reiterates that, if the information contained in the book was not considered complete, it was the national courts' task to elucidate the applicable legal requirements and thus give the applicant clear notice how to prepare the documents [...]. This had not, however, been done. Accordingly, the Court considers that this ground for refusing re-registration has not been made out.

94. [...] In any event, as the Court has found above, the applicant's failure to secure re-registration within the established time-limit was a direct consequence of arbitrary rejection of its earlier applications by the Moscow Justice Department.

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- A) Right to Fair and Clear Treatment**
- B) Right to Objectiveness and Neutrality**
- C) Right to be heard**
- D) Right to be Advised by the Administration?**
- E) Right to Information in an Administrative Procedure**
- F) Obligation of the Administration to give reasons**
- G) Principle of judicial Investigation**
- H) Consequences of Defects in Procedure**

A) Right to Fair and Clear Treatment

Recommendation CM/Rec(2007)7 on good administration

Article 13 – Requests from private persons

1. Private persons have the right to request public authorities to take individual decisions which lie within their competence.
2. Decisions in response to requests to public authorities shall be taken within a reasonable time which can be defined by law. Remedies for cases where no such decision has been taken should be foreseen.
3. When such a request is made to an authority lacking the relevant competence, the recipient shall forward it to the competent authority where possible and advise the applicant that it has done so.
4. All requests for individual decisions made to public authorities shall be acknowledged with an indication of the expected time within which the decision will be taken, and of the legal remedies that exist if the decision is not taken. An acknowledgement in writing may be dispensed with where public authorities respond promptly with a decision.

A) Right to Fair and Clear Treatment

Principle of fair treatment is more general:

- No surprises, no Kafkaesque situations
- If the public authority can choose between different forms of action, it has to be clear which form will be chosen
- If one request is divided into different “segments” it has to be clear which “segment” is the subject of the procedure
- A written request should be responded to in written form
- ...

B) Right to Objectiveness and Neutrality

Recommendation CM/Rec(2007)7 on good administration

Article 4 – Principle of impartiality

1. Public authorities shall act in accordance with the principle of impartiality.
2. They shall act objectively, having regard to relevant matters only.
3. They shall not act in a biased manner.
4. They shall ensure that their public officials carry out their duties in an impartial manner, irrespective
5. of their personal beliefs and interests.

This right is also considered to be applicable to public procurement procedures

It may be guaranteed by :

- rules excluding certain civil servants from specific procedures (relatives etc.)
- the right to claim “fear of prejudice” before the head of the public authority

C) Right to be Heard

Recommendation CM/Rec(2007)7 on good administration

Article 14 - Right of private persons to be heard with regard to individual decisions

If a public authority intends to take an individual decision that will directly and adversely affect the rights of private persons, and provided that an opportunity to express their views has not been given, such persons shall, unless this is manifestly unnecessary, have an opportunity to express their views within a reasonable time and in the manner provided for by national law, *and if necessary with the assistance of a person of their choice.*

C) Right to be Heard

Resolution (77)31 on the Protection of the Individual in Relation to the Acts of Administrative Authorities

I - Right to be heard

1. In respect of any administrative act of such nature as is likely to affect adversely his rights, liberties or interests, the person concerned may put forward facts and arguments and, in appropriate cases, call evidence which will be taken into account by the administrative authority.
2. In appropriate cases the person concerned is informed, in due time and in a manner appropriate to the case, of the rights stated in the preceding paragraph.

C) Right to be Heard

Resolution (77)31 on the Protection of the Individual in Relation to the Acts of Administrative Authorities

Explanatory Memorandum

15. In conformity with the underlying idea of the resolution - to achieve a high degree of fairness in the relations between the administration and the individual - this principle provides that the person concerned is given an opportunity to be heard during the administrative procedure: **he may put forward facts and arguments and, where appropriate, call evidence.** The person concerned will thus be enabled to participate in the procedure concerning an administrative act and can defend his rights, liberties and legitimate interests.

The term "right to be heard" is not to be taken literally. The person concerned may present his case in writing or orally, whichever is more appropriate.

C) Right to be Heard

Opportunity to bring forward facts, arguments and to call for evidence

Essential: The involved person has to be informed about the purpose of the procedure

It is only a “right” to be heard, not an obligation for the participant

Scope

- “administrative act” of such nature as it is likely to affect adversely the rights, liberties or interests of a citizen
- “administrative act” may include unfavourable factual acts and decisions not to conclude a contract

Exceptions

- Immediate decision seems necessary
- Danger for public interest

D) Right to be Advised by the Administration?

- No general principle detectable
- Administration in general seems not to be obliged to assist the citizens by informing them about their rights and possible solutions
- Obligation to take legal advice?

E) Right to Information in an Administrative Procedure

Resolution (77)31 on the Protection of the Individual in Relation to the Acts of Administrative Authorities

II - Access to information

At his request, the person concerned is informed, before an administrative act is taken, by appropriate means, of all available factors relevant to the taking of that act.

**Access to information
in an administrative
procedure by the persons
concerned**



**Transparency and
Freedom of Information**



F) Obligation of the Administration to Give Reasons

Resolution (77)31 on the Protection of the Individual in Relation to the Acts of Administrative Authorities

VI - Statement of reasons

Where an administrative act is of such nature as adversely to affect his rights, liberties or interests, the person concerned is informed of the reasons on which it is based. This is done either by stating the reasons in the act, or by communicating them, at his request, to the person concerned in writing within a reasonable time.

Recommendation CM/Rec(2007)7 on good administration

Article 17 – Form of administrative decisions

1. Administrative decisions shall be phrased in a simple, clear and understandable manner.
2. Appropriate reasons shall be given for any individual decision taken, stating the legal and factual grounds on which the decision was taken, at least in cases where they affect individual rights

F) Obligation of the Administration to Give Reasons

The obligation to give reasons:

- may show if it is worth challenging the act
- may enhance the acceptance
- may explain the content of the act and prove it
- may give cause for self-control

G) Principle of Judicial Investigation

- The authority shall determine the facts of the case ex officio and shall not be bound by the participants' submissions
- The authority shall take account of all circumstances that are important in an individual case (including those facts that are beneficial to the participants)
- The authority shall not refer to illegal methods of investigation and circumvent the legal limits of investigation
- The citizen involved may participate in the investigation and may claim evidence but he is not obliged to do so when it is not foreseen by law
- **Problems:**
 - Which “degree” of probability is sufficient to assume that a fact has happened?
 - What happens in case of insufficient evidence?
 - Can human action be foreseen?
 - What about “troublemakers” (barraters)?

H) Consequences of Defects in Procedure

General questions:

- Is a decision that is taken in an illegal procedure illegal itself?
- Can defects of procedure be undone (after the decision has been adopted)?

Strictly bound administration: Procedure has only a “serving character”

Discretion/Margin of appreciation: Procedure guarantees the correctness of the decision (only partly submitted to judicial review)

The decision in general can only be considered as being illegal if it is probable that another decision would have been adopted in a correct procedure

Who has to prove this?

Special problem: How can be dealt with the evidence that is illegally obtained:
Exclusion of evidence?