The Bermuda Triangle of Expulsion, Reasoning of Decision and Effective Legal Remedy in the Hungarian Legal Practice

Triunghiul Bermudelor între expulzare, motivarea deciziei şi căile de atac efective în practica judiciară maghiară

PhD ***Erzsébet CSATLÓS****
University of Szeged
Institute of Public Law
Faculty of Law and Political Sciences

Abstract

Several Iranian university students were expelled from Hungary to Iran, one of the most infected countries by the COVID-19 pandemic based on their unlawful behaviour during their quarantine period. The study aims to analyse the judgement of the Metropolitan Court which gave the final and binding judgement after the review of the administrative act that ordered the expulsion in the point of view of effective legal remedy. The case requires attention as it reveals some anomalies of the Hungary administrative legal practice that are irrespective of the pandemic.

The present study managed to draw attention to the issue that an essential condition for verifiability of legality and avoidance of arbitrariness is that authorities give adequate reasons for their decisions under all circumstances. To that end, it examined the issues relating to the obligation to state reasons in a decision on the expulsion of an Iranian student on grounds of public policy, public security, and it tried to evaluate the legal situation caused by the breach of the obligation as a procedural legal guarantee in the view of the national and international legal practice.

Keywords: *expulsion; effective legal remedy; reasoning of decisions; procedural guarantees.*

Rezumat

Mai mulţi studenţi iranieni au fost expulzaţi din Ungaria în Iran, una dintre ţările cele mai afectate de pandemia de COVID-19, în baza conduitei ilicite din perioada de carantină. Studiul își propune să analizeze hotărârea Judecătoriei Metropolitane care a pronunţat hotărârea definitivă și obligatorie după revizuirea actului administrativ care a dispus expulzarea din punctul de vedere al căii de atac efective. Cazul necesită atenție deoarece

* csatlos.e@juris.u-szeged.hu.

dezvăluie unele anomalii ale practicii administrative din Ungaria, care depășesc situația pandemică.

Prezentul studiu atrage atenția asupra faptului că o condiție esențială pentru verificarea legalității și evitarea arbitrariului este ca autoritățile să își motiveze deciziile în mod adecvat, în toate circumstanțele. În acest scop, a examinat aspectele legate de obligația de motivare a unei decizii privind expulzarea unui student iranian pe motive de ordine publică, securitate publică, și a încercat să evalueze situația juridică cauzată de încălcarea acestei obligații, ca garanție juridică procesuală în perspectiva practicii juridice naționale și internaționale.

Cuvinte-cheie: *expulzare, cale de atac efectivă, motivarea deciziilor, garanții procedurale.*

1. Introduction

Hungary's migration policy has long been the subject of debates and the pandemic has just given another reason to put this issue in the highlight. In Spring of 2020, soon after the state of emergency was announced[1] in Hungary, there was a case that received press coverage[2]. Several Iranian university students were expelled from Hungary to Iran, one of the most infected countries by the COVID-19 pandemic based on their unlawful behaviour during their quarantine period. The study aims to analyse migration policy of Hungary just wish to analyse the judgment of the Metropolitan Court (*Fővárosi Törvényszék*) which gave the final and binding judgment[3] after the review of the administrative act that ordered the expulsion in the point of view of *effective legal remedy*. The anonymised judgment was handled by the *Hungarian Helsinki Committee* who represented one of the Iranian students in question, as despite the legislation that orders the courts to upload the anonymised judgments to a public database, it is still not available in the system[4]. The case requires attention as it reveals some anomalies of the Hungary administrative legal practice that are irrespective of the pandemic.

[1] The state of emergency (from 11 March until 18 June 2020) was declared by Government Decree 40/2020. (III. 11.) and was put an end to by Government Decree 282/2020. (VI. 17.).

[2] For example, see the official government website for COVID-19 news: Coronavirus: Another 13 Iranian Students Expelled for Violating Quarantine Rules. MTI-Hungary Today 2020.03.16. https://hungarytoday.hu/coronavirus-iranian-students-hungary-expelled/ (30.11.2020) See also, News tagged with: Iranian student: https://hungarytoday.hu/tag/iranian-student/ (30.11.2020).

[3] Metropolitan Court (*Fővárosi Törvényszék*) 15.K.701.176/2020. [hereinafter: Judgment].

[4] The Author is grateful for Dr. Eszter Kirs legal officer for providing the anonymized version of the Metropolitan Court's judgement. Decisions of administrative authorities are not available for the public but the anonymised court decisions, with some exceptions, are to be published within 30 days counting from its putting in writing with free availability in an online system (Collection of Court Decisions. https://birosag.hu/birosagi-hatarozatok-gyujtemenye) according to Art. 163 of Act CLXI of 2011 on the organization and administration of courts. At the time of writing of this paper, the Judgment was not available in the database.

2. The case of the Iranian student who was expelled for being a threat to national security by violating pandemic measures

The Iranian citizen in question was a resident in Hungary for 9 years and conducted university studies. She was quarantined with a group of other Iranian students and because of their conduct during that time, they were all expelled.

She was released from the quarantine on 12 March 2020 as it was confirmed that no signs of infection had been shown and on the very next day she was interrogated by the police. A criminal procedure was opened as she was accused of committing violation of epidemic controlling measures because of leaving her hospital ward without permission once during the quarantine and behaved aggressively. She denied committing the act. On 13 March 2020, the immigration authority by its administrative act expelled her from the territory of the European Union by deportation and ordered the expulsion for 3 years[5]. The administrative authority act was based on the proposal of the police according to which the student pose a t*hreat to public security and public order* due to a well-founded suspicion of the violation of epidemic measures[6].

The Student applied for legal remedy against the authority decision and submitted a claim for judicial review. The Metropolitan Court did not contest the authority decision thus declared the action for judicial review unfounded[7]. It responded to some parts of the claim[8], but refused to re-examine the basis of the whole procedure as identified no procedural error since the authority act mentioned the police initiation as legal background and due to the obligatory nature of the police initiation the immigration authority fulfilled its obligation of reasoning. Therefore, the Metropolitan Court declared that the relevant procedural law was respected, the authority decision is conforming to the law[9], meanwhile, the reason why the Student posed a threat to public security and public order remained unknown. In addition, there were confusing changes in the police documentation on the alleged breach

[5] Judgment [3]; Constitutional complaint against Metropolitan Court Judgment 15.K.701.176/2020/4 filed as case IV/01013/2020. available in Hungarian language on the website of the Constitutional Court: http://public.mkab.hu/dev/dontesek.nsf/0/DA7553273FBDB2AFC1258589005BEB59?OpenDocument (30.11.2020) [hereinafter: Constitutional complaint] point 4; According to the judgment, the expulsion was ordered on the basis of Article 43 (2) point d) of the Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals [hereinafter: Act on TCN]. The English text is available only for subscribers in the National Legal Database. The ordering of expulsion with an official escort was based on Article 65 (1) point c) of the same Act, while the ban on re-entry was based on Article 47 (4) and Article 119 of the Government Decree 114/2007. (V. 24.) on the execution of Act II of 2007 on Act on the Admission and Right of Residence of Third-Country Nationals [hereinafter: Executive Decree].

[6] National Directorate-General for Aliens Policing Decision 106-1-33158/7/2020-Ké. not available for public. The historical facts of the case are based on the state of affairs incorporated in the Judgment [1]-[3] and the state of affairs summarised in the Constitutional complaint para. 1-4.

[7] Judgment [7].

[8] The legal basis of the expulsion (Judgment [5]); the applicability of the non-refoulement principle (Judgment [22]-[24]), the right to private life (Judgment [24]) the right to be heard during the procedure (Judgment [25]).

[9] Judgment [9].

of law: the time of commitment was changed, and the accusation of aggressive behaviour also disappeared in a later protocol[10].

To be able to examine if it was a fair procedure with procedural law guarantees and if the legal remedy was effective, first, it is necessary to have a look at the claim related to the factuality of the decision on expulsion.

3. The core issue of the case: factual grounding of decisions and the available legal remedy to contest it

3.1. The reason of expulsion

The Iranian student brought an action against the decision of the immigration claiming the annulment of the decision and the ordering of a new procedure. On one hand, the legal basis of the decision was contested as the decision missed to indicate the relevant provision of the *Act on the Admission and Right of Residence of Third-Country Nationals* (hereinafter: Act on TCN) as applicable law. According to the claim it makes the decision unsuitable for review. On the other hand, the decision of the immigration authority does not contain any factual background apart from reference to ongoing criminal proceedings where no unambiguous evidence was available, and the Student also denied the charges against her[11]. Regarding her deportation to Iran, the country information and evidence on what basis the asylum authority had issued its opinion was lacked[12].

All legal problems are linked by one core element: the *lack of factual reasoning* of decisions in the case. Both the administrative authority decision and the Court judgment referred to the facts and reasoning of a police initiation as obvious and responsive reasons of the measure taken, but none of them incorporated anything but that provision of the *Act on the Admission and Right of Residence of Third-Country Nationals* (hereinafter: Act on TCN), that makes the police initiation binding upon the immigration authority. No facts, no reasons, no explanation just the pure reference to the police initiation and its binding nature by invoking the legal norm to support that.

It is Article 43 of the Act on TCN provides for *expulsion and exclusion of third country nationals* and subsection (2) enlists those cases when the immigration authority is entitled to order these sanctions. As the legal basis of the present case, it says:

„[s]ubject to the exception set out in this Act, the immigration authority shall order the expulsion of a third-country national under immigration laws (…) d) whose entry and residence represents a threat to national security, public security or public policy; (…)"[13].

The same provision continues with following:

„An independent exclusion order, and an expulsion order under immigration laws may be issued upon the initiative of law enforcement agencies delegated under the relevant

[10] Constitutional complaint, point 3.

[11] Judgment [3].

[12] Judgment [5].

[13] Article 43 (2) d) of Act on TCN.

government decree on the grounds referred to, respectively, in (..) Paragraph d) of Subsection (2) within the framework of discharging their duties relating to the protection public policies defined by law. Where (…) expulsion is ordered under Paragraph d) of Subsection (2), the law enforcement agencies delegated under the relevant government decree shall make a recommendation as to the duration of such exclusion in cases falling within their jurisdiction. The competent immigration authority shall not derogate from said recommendation"[14].

As for the *exception* for ordering *expulsion and exclusion* set out in the Act on TCN, the application of the principle of non-refoulement and the asylum seeker status are to be mentioned[15], although in the present case, this latter does not occur.

According to the provisions on the non-refoulement, a

„[t]hird-country nationals may not be turned back or expelled to the territory of a country that fails to satisfy the criteria of safe country of origin or safe third country regarding the person in question, in particular where the third-country national is likely to be subjected to persecution on the grounds of his/her race, religion, nationality, social affiliation or political conviction, nor to the territory or the frontier of a country where there is substantial reason to believe that the expelled third-country national is likely to be subjected to the actions or conduct defined in Article XIV(3) of the Fundamental Law (non-refoulement)"[16].

Referring to the Iranian student's case, the police initiated the expulsion and exclusion for 3 years which the immigration authority ordered with respect to Article 47 (4) of the TCN and Article 119 of Government Decree 114/2007. (V. 24.) *on the execution of Act II of 2007 on Act on the Admission and Right of Residence of Third-Country Nationals (hereinafter: Executive Decree*)[17]. The claim contested the founding of the authority act as first, does not explicitly refer to Article 43 (2) d) as legal background and it can only be inferred that this part of the legislation serves the legal basis as being a threat to public order and security as reason is invoked in the decision. The same reason makes it unnecessary to interpret weather *threat to national security* or *threat to national order* was the reason of expulsion. Second, the authority act is not founded as it contains no state of affairs and proper reasoning as the act is supported only by an ongoing criminal proceeding and an interrogation where the Iranian student denied the charges against her[18]. The claim also invoked the lack of considering *personal circumstances* before the ordering of the expulsion and exclusion.

The claim referred to the lack of reasoning of the authority act, but the judgment of the Court emphasized that by invoking the initiation of the police. According to the Court, it was

[14] Article 43 (3) of Act on TCN.
[15] Article 51 of Act on TCN.
[16] Article 51 (1) of Act on TCN.
[17] Article 47 (4) and Executive Decree 119 §.
[18] Judgment [3].

enough to fulfil the fact-finding obligation this way, and as the initiation is, in fact, an order for the immigration authority according to Article 43 (3) of the Act on TCN, so due this obligation the immigration authority was not obliged to incorporate any content of it in its own reasoning[19]. As for the content of the proposal itself (and the factual reasoning), the Court invoked the interrogation of 13 March 2020 where it was presented to the Student[20].

3.2. The obligation to state reasons in fact and in law

Factual and legal reasoning is generally a procedural guarantee and key to legality of both administrative and judicial decision acknowledged as such by the Council of Europe[21], the Court of Justice of the European Union[22] and by the Hungarian constitutional practice[23]. The reasoning of an administrative decisions is the proof of its legality as well it establishes the possibility of verifying if the administration functions within the frames of law. Therefore, the obligation of reasoning is one of the guarantees of a lawful and fair process[24].

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[19] Judgment [19].

[20] Judgment [20].

[21] *Hirvisaari v. Finland* (App. no. 37801/97) ECtHR 1 July 2003, point 30; *Suominen v Finland* (App. no. 37801/97) ECtHR 1 July 2003, point 37. see also *Baucher v France* (App. no. 53640/00) ECtHR 24 July 2007, point 47-51. However, Article 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms and the caselaw refers to judicial decisions, there is no evidence that administrative procedures fall under lighter requirements for procedural. Indeed, the obligation of reasoning of decisions is one of the main administrative procedural principles. See, Stelkens, Ulrich – Andrijauskaite, Agne: *Added Value of the Council of Europe to Administrative Law: The Development of Pan-European General Principles of Good Administration by the Council of Europe and their Impact on the Administrative Law of its Member States*. German Research Institute for Public Administration, Speyer, FÖV 86 Discussion Papers, 2017, 24; Hepburn, Jarrod: The Duty to Give Reasons for Administrative Decisions in International Law. *International & Comparative Law Quarterly*, 2012, 61 (3), 641-663, available: https://ssrn.com/abstract=2405065 (30.11.2020.) p. 15; *The Administration and You. A handbook. Principles of administrative law concerning relations between individuals and public authorities*. Strasbourg, Council of Europe, 2018; p. 35-36. The right to fair procedure echoed in Article 6. is in fact determines the possible extent of judicial review. See, Dudás, Dóra Virág- Kovács, András: A közigazgatási bírósági felülvizsgálat bizonyítási-mérlegelési szabályai és terjedelme a tisztességes eljáráshoz való jog tükrében. *Jogtudományi Közlöny,* 73 (3), 2018, p. 158-159.

[22] Article 41 (2) c) of the Charter of Fundamental Rights of the European. OJ C 326, 26.10.2012. p. 391-407 [hereinafter: EU Charter], *cf*. Article 296 of Consolidated version of the Treaty on the Functioning of the European Union. OJ C 326, 26.10.2012. p. 47-39. [hereinafter: TFEU] In exceptional cases, especially in the case of encrypted documents, the incomplete statement of reasons may be legally recognized, but even in such situation, the argumentation shall never be deprived of its meaning. See, Lock, Tobias: Article 41-42 CFR. In: Kellerbauer, Manuel – Klamert, Marcus – Tomkin, Jonathan (eds): The EU Treaties and the Charter of Fundamental Rights. A Commentary. Oxford, Oxford University Press, 2019, p. 2207; see also: Opdebeek, Ingrid – De Somer, Stéphanie: The Duty to Give Reasons in the European Legal Are: A Mechanism for Transparent and Accountable Administrative Decision-Making? A Comparison of Belgian, Dutch, French, and EU Administrative Law. Rocznik Administracji Publicznej, 2016 (2), p. 115.

[23] The Fundamental Law of Hungary (25 April 2011) [hereinafter: FL] See English translation on the website of the Constitutional Court:

https://hunconcourt.hu/uploads/sites/3/2020/11/thefundamentallawofhungary_20191213_fin.pdf (30.11.2020.) Art. XXIV (1).

[24] Constitutional Court Decision 5/2019. (III. 11.) ABH 2019/8. p. 415. para. 13.

It is also a key to an effective legal remedy as a clear and unequivocal reasoning enable the court having jurisdiction to exercise its power of review[25].

3.2.1. Concerns about the reasoning of the immigration authority

The Fundamental Law, Hungary's constitution, specifically states that the authorities are required to give reasons for their decisions[26]. This provision along with the rest of Article XXIV (have the right to have his or her affairs handled impartially, fairly and within a reasonable time by the authorities) is a novelty as a constitutional right introduced in 2011, but the Constitutional Court and the ombudsperson had already acknowledged and interpreted these values in their practice[27]. The question may arise, however, to define the quality and quantity requirements of justification.

According to Article 46 of the Act on TCN, the decision on expulsion shall contain: (i) the scope of consideration in the case of decisions made pursuant to Article 45 (1)-(6) (*in this case, it is not relevant*); (ii) the duration of the entry and residence ban; (iii) the name of the State to which the removal is to take place; (iv) the deadline for the completion of voluntary departure from the territory of the Member States of the European Union; (v) imposing an obligation to tolerate facial image and fingerprinting; (vi) in the case of expulsion by voluntary departure, the decision ordering the expulsion must include a warning that if the third-country national does not comply with the expulsion voluntarily, the immigration authority will expel him / her[28]. It does not mean that these are the only substantive elements of the decision. The general elements of the authority decision are described generally under Title 3 of the same Act as the *General Public Administration Procedure Code* (hereinafter: Code) which contains such rules does not cover immigration cases anymore[29]. Since the entry into force of the new procedural code, immigration cases due to their specific procedural features are beyond the *general rules*, thus fall under the scope of only specific procedural acts (here in this case, it is the Act on TCN), while it does not mean that referring to general rules of order has no place[30]. Basic provisional principles

[25] See, Joined Cases T-425/04, T-444/04, T-450/04 and T-456/04 *French Republic and Others v European Commission*, 21 May 2010, ECLI:EU:T:2010:216. point 6 (para. 315); T-256/11 *Ahmed Abdelaziz Ezz and Others v Council of the European Union*, 27 February 2014, EU:T:2014:93, para. 107. T-107/15 *Uganda Commercial Impex v Council,* 18 September 2017, ECLI:EU:T:2017:628. para. 111; C-417/11 P *Council of the European Union v Nadiany Bamba,* 15 November 2012, ECLI:EU:C:2012:718. 50 and 53; C-566/14 P, *Jean-Charles Marchiani v European Parliament,* 14 June 2016, EU:C:2016:437, para. 69.

[26] Article XXIV (1) FL.

[27] Chronowski, Nóra: *Mikor megfelelő az ügyintézés? Uniós és magyar alapjogvédelmi megfontolások*. Magyar Jog, 2014, 61 (3), p. 143.

[28] Article 46 (1)-(1a) of Act on TCN.

[29] Article 8 d) of Act CL of 2016 on general public administration procedures [hereinafter: GPAP] English translation: https://njt.hu/translated/doc/J2016T0150P_20200722_FIN.pdf (30.11.2020).

[30] Patyi, András: A hatósági eljárásjogi jogviszony fogalma és tárgya: a hatósági ügy. In: Patyi, András (ed.): Hatósági eljárásjog a közigazgatásban. Budapest-Pécs, Dialóg Campus, 2012, p. 79.

at the beginning of the Code to enforce fundamental constitutional rights, thus they create a linkage between the administrative procedure and the Fundamental Law[31]. These provisions are dominating over the application of specific procedural rules as serving higher values of legality, therefore the relevant guideline findings developed by case law – regardless of whether the authority procedure is falling inside or outside of the scope of the Code – are unavoidable[32]. The practice developed continues to exist in the absence of a specific regulation, based on more abstract concepts, as the goal is still the same: to make a lawful decision suitable for judicial review[33]. The controllability of legality and to avoid arbitrariness still requires authorities to justify their decisions appropriately[34].

The Act on TCN prescribes the following the general provisions (which coincide with the provisions of the Code) for the content of the immigration authority procedure: (a) all data necessary to identify the acting immigration authority, the client and the case, (b) the resolutive part including the decision of the authority, the decision of the special authority (if there was any), the information on legal remedy options and the procedural costs; and (c) a reasoning including the statement of facts, the reasons for the opinion of the special authority[35]. In addition, a law or government decree (d) may lay down additional detailed rules for certain types of cases[36]. In case of a decision ordering expulsion, these additional elements are the ones seen above.

It follows that the requirements to have the facts and the obligation to state reasons in the authority decision that ordered the expulsion are lawful in the present case.

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[31] Article 1 of GPAP referring to Article XXIV. and XXVIII of FL; Aszalós, Dániel – Barabás, Gergely – Baranyi, Bertold – Dombi, Gergely – Forgács, Anna – Hoffman, István – Kovács, András György – Rozsnyai, Krisztina – Szabó, Krisztián – Szegedi, László – Számadó, Tamás – Tóth, András: *Kommentár az általános közigazgatási rendtartásról szóló 2016. évi CL. törvényhez*. 2019.IV.26. – Hatályos Jogszabályok Gyűjteménye – Wolters Kluwer [hereinafter: Commentary to Article…of GPAP] Commentary to Article 1 of GPAP, point 1. Article 3 of GPAP follows Hungarian administrative procedural traditions in the view of ex *offitio* proceedings, so the jurisprudence keeps on being applicable. In addition, the GPAP provides for the ex offitio declaration of the state of affairs among the principles of the procedures. Commentary to Article 3 of GPAP, point 2.

[32] Traces of the principles found in the GPAP roots to the Fundamental Law, therefore they ensure the conformity with the constitution in individual cases. Balogh-Békesi Nóra: Alapelvek a közigazgatási hatósági eljárásban. *Új magyar közigazgatás*, 9 (4), 2016, p. 14. Those procedures that do not fall under the scope of the general code due to their distinctive features are still authority procedures, therefore the constitutional requirements apply to them. See, Hajas, Barnabás: Általános közigazgatási rendtartás — Ket. kontra Ákr. *Új magyar közigazgatás*, 9 (4), 2016, p. 19; Varga Zs. András: *Az alkotmányosság követelménye és az eljárás alapelvei*. In: Patyi, András – Varga, Zs. András: A közigazgatási eljárásjog alapjai és alapelvei. Budapest-Pécs, Dialóg Campus, 2019, p. 163-169.

[33] Váradi-Tornyos, Bálint: A megújult közigazgatási eljárásról jogelméleti megközelítésben. *Jog, állam, politika*, 10 (1), 2018, p. 185.

[34] Patyi-Varga (2019) p. 41.

[35] Article 87/M (1) of Act on TCN *cf*. Article 81 (1) of GPAP, see also in relation to the previous general code, the Act CXL of 2004 on the General Rules of Administrative Proceedings and Services [hereinafter: GRAPS] Boros, Anita: Új jogintézmények a Ket. bizonyítási rendszerében. *Jogtudományi Közlöny*, 61 (11), 2006, p. 420.

[36] Article 87/M (2) of Act on TCN.

3.2.2. Concerns about the reasoning of the judicial decision

In its judgment, the Metropolitan Court states that in examining the lawfulness of the expulsion, the provisions of the Act on TCN and Executive Decree were analysed in the view of with the legislative purpose and the light of the Basic Law, in accordance with its orders on law application[37]. However, this should have led to the conclusion that the authority's decision did not meet the requirements of the applicable procedural guarantees.

It is a question of whether the obligation of the court to state reasons during the review of the official decision is appropriate, since the Metropolitan Court upheld the decision of the authority on the same legal basis, solely on the mandatory provisions of Article 43 (3) of the Act on TCN and its reasoning lacks the factuality (the behaviour and its threatening nature) same way as the authority decision did. It still did not bring it any closer to understanding the relationship between the facts and the legal consequences, the review thus seems to be purely formal.

The Constitutional Court first dealt in depth with the obligation to state reasons in case 7/2013 (III.1.). By analysing Article XXVIII (1), it found the proper reasoning of judicial decisions as a prerequisite for fair process in the view of rule of law. Following the standard enshrined by the Strasbourg court practice[38], the necessary thoroughness of the essential parts of the case is a minimum requirement when authority decision is reviewed. While doing so, the court must give an analytical explanation in a manner that is in conformity with all the circumstances of the case[39]. This requirement, and also that of Article 6 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, is not met when the superior court upholds the lower court's arguments on the substance of the case without further examination and without stating the reasons for the investigation[40]. Based on the constitutional basics, in accordance with the relevant procedural laws in a concrete case, a decision shall be justified by facts, proofs and by explication of their evaluation and the motifs behind deliberation. If the obligation for reasoning is not in conformity with these constitutional standards, it means that the procedural law is interpreted and applied in an unconstitutional manner[41].

All leads, *a maiori ad minus*, to the conclusion that in a one-step review, when the one and only ordinary legal remedy against a decision is the administrative lawsuit, the court decision shall be undoubtedly substantiated to ensure an effective legal remedy. The court it shall precisely reply to a claim that contest the factual and legal grounding of an administrative authority decision, especially when it refuses the claim with its final and binding judgment.

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[37] Judgment [11] Article 28 of FL states as follows: during application of law, the courts shall in principle interpret the laws in accordance with their objective and with the Fundamental Law. The objectives of a law shall in principle be determined relying on its preamble, and/or on the explanatory memorandums of the relevant legislative or amendment proposal. When interpreting the Fundamental Law or any other law, it shall be presumed that they are reasonable and of benefit to the public, serving virtuous and economical ends.

[38] See the cited ECtHR caselaw: Constitutional Court Decision 7/2013. (III.1.) ABH 2013, p. 387-388. [31].

[39] Constitutional Court Decision 7/2013. (III.1.) ABH 2013, p. 387-388. [31]; [34].

[40] Constitutional Court Decision 7/2013. (III.1.) ABH 2013, p. 387-388. [31].

[41] Constitutional Court Decision 7/2013. (III.1.) ABH 2013, p. 388. [34].

3.2.3. What message does it send for the reasoning of authority decisions?

It is a further issue to explore, what the specific requirements are which will result a proper grounding in accordance with the constitutional standard. The Constitutional Court interpreted the obligation of reasoning as a part of fair procedure in regards of courts, although, it invoked Strasbourg case-law, that had already been acknowledged to apply to authority decisions, to support its argumentation. Therefore, the Constitutional Court findings may also be expanded to the authority decisions. In addition, the judicial practice has already been conform to this interpretation: it referred to the duty of grounding and a procedural guarantee and the ignoration or violation of it results in an infringement of the law affecting the merits of the case even if the authority would otherwise make the same administrative decision in compliance with the guarantee rules[42]. The authority shall state the facts in the statement of reasons for its decision, including the matching of factual elements with the applicable legislation and the *detailed* explanation of the legal statements[43]. It follows that referring to merely a legal act, here in this case, the provision that makes the police initiation obligatory and explaining and interpreting this obligatory nature form different angles[44] is definitely not in conformity with the requirements established by law and defined by constitutional and judicial practice. This refers to both the court and the authority it the present case.

Here, it is also necessary to draw attention to the fact that according to the prevailing practice, the authority is obliged to indicate in its decision on which legal provision it based the rejection of the application. The complete failure to indicate legislation is a material breach of procedure, and the legal reference cannot be replaced by the court while doing its review[45]. For this reason, the finding of the Metropolitan Court that it merely argues that the legal basis on which the decision is based can be „clearly established"[46] and does not classify the deficiency, raises concerns.

At the same time, this raises other issues from the court's point of view. If the breach of procedure is of such a degree that it renders the decision inadmissible on the merits, and the problems of quality of fact and reasoning undoubtedly constitute such, the court must name that circumstance. The decision of the immigration authority cannot be changed by the court according to the law in force[47], but it may provide guidance on the conduct of the new procedure (repeated procedure) ordered in the judgment, covering all relevant points of the remedy of the established violation[48]. The practice classifies an infringement as unsuitable for a substantive review if

- the statement of reasons does not establish the legality of the decision[49];

[42] Judgment in principle EBH2017. K.8.
[43] Judgment BH2019. 91.
[44] Judgment [16]-[18].
[45] Judgment BH2016. 316.
[46] Judgment [16].
[47] Article 88/R (2) of Act on TCN. The procedure for establishing statelessness is an exception to this rule.
[48] Article 86 (4) Act I of 2017 on the code of administrative litigation [hereinafter: CAL].
[49] Administrative-Economic Decision KGD2013. 47.

▪ the decision, concerning the available data, facts, legal basis, and legal consequence, is not clear about the reasons and motifs of deliberation[50];

▪ the decision has no facts, legal reasons and does not contain the legal bases on which the decision is based[51].

In what follows, the study seeks to answer the question of what deeper problems lie behind the case in this context. Is the investigating authority's motion (and the reasons for it) as inviolable and untouchable as it seems under the present proceedings?

3.3. The obligation of reasoning in the cooperation of authorities: their legal relationship and the procedural guarantees

First, the role of participating authorities shall be clarified. In another context, the main question to be answer is whether the statement of the Metropolitan Court is justified that irrespective of the content of the police recommendation, it qualifies as an unquestionable obligation to order the expulsion.

The Metropolitan Court argued that the criminal proceedings in which the investigating authority had the information on which the proposal was based, and the immigration authority's procedure under which expulsion and re-entry bans have been ordered, are completely separated. According to the reasoning of the Metropolitan Court judgment, the reasons of the police initiation were presented to the student at the occasion of her immigration authority hearing on 13 March 2020. This proposal was the legal basis of the application of Article 43. § (2) the Act of TCN to expel her, therefore the future of the criminal proceedings in her could have no influence on the decision of the immigration authority. As follows, her claims to the right of presumption of innocence are unfounded as it may be invoked only in criminal proceedings[52].

3.3.1. The proceeding authority and the participating authorities: roots of the legal issue

The legal remedy claim referred to the special authority like nature of the police proposal and missed the procedural guarantees that should have been thus ensured. Therefore, the next step is to define the legal institution and regulatory background to the phenomenon that appears in the present case: an authority obliges another one to issue a certain decision in a way that the proceeding authority has neither right, nor obligation to either question the merits of the proposal or give reasoning to the decision which it issues in conformity with the proposal. In fact, the decision on the merits comes from the proposal making authority (police) and the proceeding authority (immigration authority) acting in its competence seems to ensure only the formality of decision-making; however, in a reduced way.

In the present case, there two authorities appear apart from the proceeding one, each takes a different role and *de iure* none of them is neither specific authority, nor specialist

[50] Administrative-Economic Decision KGD2015. 91.

[51] Administrative-Economic Decision KGD2012. 196.

[52] Judgment [20].

according to the legal regulation of their status and their activity in the procedure. On the other hand, both produce significant and unavoidable influence on the decision itself, the expulsion. The investigating authority serves the basis for the *ex offitio* process of the immigration authority procedure and the asylum authority is interrogated in the question of the applicability of the non-refoulement principle.

The Hungarian procedural law knows two legal institution that influences substantially the content of the proceeding authority's decision: the seconded expert and the special authority. The *seconded expert* provides means of proof when the proceeding authority lacks the expertise in a significant issue that would be crucial for the outcome of the case[53]. According to the administrative procedural law of Hungary, it is the proceeding authority who decides upon the evaluation of the opinion of the seconded expert in the view of the other available evidence when makes its deliberation that leads to the decision-making. The assessment of the special authority, contrary, obliges the proceeding authority; its involvement is obligatory if an act or a government decree[54] provides so[55]. The legal practice called the attention that the law shall make the assignment of special authorities in a clear and precise manner with the description of the special issue in which the special authority shall give a professional statement[56]. Therefore, it leaves no room for deliberation; the lack of special authority assessment or its ignoration results the nullity of the proceeding authority's decision[57].

Despite the differences of the two legal institutions, there is a common element in their procedural position: both of them, as a part of the proceeding authority's decision, can be subject of legal remedy claimed against the proceeding authority decision[58]. The opinion of the seconded expert is a part of the reasoning, and the assessment of the special authority

[53] Article 62 and 71 (1) of GPAP.

[54] Government Decree 531/2017. (XII. 29.) on the designation of the competent authorities to act due to certain overriding reasons relating to the public interest.

[55] Article 55 (1) of GPAP.

[56] Immigration Law Practice Analysis Group of the Curia, Summary Report. 2012.EI.II.F.1./9. 2013. https://kuria-birosag.hu/hu/joggyak_csop/az-idegenrendeszeti-joggyakorlat-elemzo-csoport-osszefoglalo-velemenye (30.11.2020.) [hereinafter: Immigration law practice of the Curia] p. 26; see Article 78 (4) of Act on TCN. In the procedure for establishing statelessness, the authority specified in a separate legal act shall submit its resolution to the proceeding immigration authority within twenty days on the technical question whether the third-country national endangers the national security of Hungary. Upon this, see, Article 165 (1) of Executive Decree that states as follows: the Government appoints the Agency for Constitutional Protections and the Counter-Terrorism Centre to function as the special authority in proceedings for the recognition of stateless status.

[57] Article 123 b) of GPAP.

[58] Article 55 (4) of GPAP. Decision of the special authority may be contested by the legal remedy against the decision of the proceeding authority, *cf.* Article 81 (1) of GPAP. Huszárné Oláh, Éva: *A szakhatóság közreműködése*. Petrik, Ferenc (ed.): Az általános közigazgatási rendtartás magyarázata. Budapest, HVGOrac, 2017, p. 137; on legal remedy against special authority assessment see, Kálmán, János: A szakkérdés vizsgálata a magyar közigazgatási hatósági eljárásjogban. *Jogtudományi Közlöny*, 73 (2), 2018, p. 113.

appears in the resolution part and its professional argumentation is also a part of the proceeding authority's reasoning[59].

3.3.2. Procedural law guarantees in the immigration authority proceedings in the shade of cooperation of authorities: naming anonymous

To identify the legal institutional affiliation of the investigating authority (police) and thus the procedural guarantees governing it, it is worth following the historical evolution of the relevant provision related to it into the Act on TCN and its Executive Decree and examine the same in the case of the asylum authority.

3.3.2.1. The procedural status of the asylum authority

The asylum authority was approached by the immigration authority in the context of the *principle of non-refoulement* to issue a resolution on whether expulsion could be an obstacle to return to the country of origin, Iran.

The legal basis of the involvement was the Executive Decree stating as follows:

„The competent immigration authority is under obligation to request the opinion of the asylum authority to determine as to whether the principle of non-refoulement applies as regards the proceedings for ordering expulsion or for carrying out an expulsion measure. The asylum authority shall comply with the above request without delay. The competent immigration authority shall not derogate from the opinion of the refugee authority"[60].

Under the provision, the basic criteria for the special authority can be observed: it is a government decree that prescribes the obligatory involvement[61], and it leaves no discretion for the proceeding authority: the asylum authority opinion is binding. It seems, that only the assignment as special authority is missing.

The year of 2015 was a milestone on the clarification of the role of the asylum authority in the procedure: originally, the obligatory nature of its opinion was not a part of the regulation and despite the very few cases, the practice was controversial and heterogeneous[62]. The Curia, the supreme court of Hungary interpreted the previous version

[59] Article 81 (1) of GPAP The decision shall contain all data and information required for the identification of the proceeding authority, with the exception of confidential data and privileged information, the clients and the case, the operative part – including the resolution, the assessment of a special authority, information for seeking legal remedy and the procedural costs incurred –, furthermore, the reason for switching to full procedure, where applicable, and, together with confidential data and privileged information rendered unrecognizable, ascertained facts of the case, the evidence available, explanation for the special authority's assessment, the reasons for deliberation and the decision, and the specific statutory provisions on the basis of which the decision was adopted. The reasoning of the decision of the special authority, containing professional and legal arguments, shall be reasonably included by the proceeding authority in the reasons for its own decision. Józsa, Fábián: *A hatóság az eljárásban*. In: Patyi, András (ed.): A közigazgatási hatósági eljárásjog jogintézményei. Budapest, Dialóg Campus, 2019, p. 120.

[60] Article 124 (3) of Executive Decree, in force since 1 August 2015.

[61] Before the entry into force of Gov. Decree 531/2017. (XII. 29.), the general procedural law let any sort of act and government decrees to assign special authorities.

[62] Immigration law practice of the Curia, p. 26.

of the provision as a possibility of deliberation as the asylum authority gives an opinion on the status of the country of origin, but it is the immigration authority who shall *individualise the statements* in the view of all other data and information of the case in front of it. In certain cases, regarding specific personal circumstances of the client of the procedure, it could result the application of the non-refoulement despite the positive evaluation of the country of origin in general. Invoking the asylum authority's opinion on the country does not make the reasoning fulfilled due to this obligation of deliberation and individualisation to the client of the case concerned, therefore, it is a violation of the obligation of grounding if this part is mission from the decision of the immigration authority. Such omission is a substantial breach of procedural rules[63]. Procedural guarantees in proceedings like that is especially significant as the non-refoulement rule raises human right and fundamental rights issues that also affects international and EU law obligations of Hungary[64]. The Curia drew attention to the practice that was established during the period of the first administrative procedural code of Hungary, that the relevant judicial practice often qualified such co-decision of the *authorities,* despite the lack of assignment, proceeding authority – special authority relationship. Later, under the auspice of the second procedural law code[65], which was in force during the legal practice analysis of the Curia, the precise and expressed assignment as a requirement was already acknowledged for the qualification as special authority[66]. Therefore, the contribution of the asylum authority is not an assessment of special authority, however, it is notable that as an obligatory part of the deliberation of the proceeding authority's decision as its grounding, the legal remedy is ensured in the form of the remedy available against the decision itself.

The legislator, however, introduced the obligatory nature of the asylum authority depriving the proceeding authority from its discretion and right to deliberate the personal circumstances and overruled the Curia legal practice summary statements deduced from the previous rulings. Since 2015, the competent immigration authority is under obligation to request the opinion of the asylum authority to determine as to whether the principle of

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[63] Based on judicial decisions FT 20.K.32.700/2011/10. and 20.K.33.146/2011/4. see, Immigration law practice of the Curia, p. 26; 112-113.

[64] See especially, Article 33 of Decree-Law 15 of 1989. on the promulgation of the convention on the status of refugees done in Geneva on 28 July 1951 and its protocol of 31 January 1967, Article 18-19 of EU Charter. See the human rights originated restrictions on expulsion of aliens: Molnár, Tamás: *A külföldiek kiutasításának korlátai a Polgári és Politikai Jogok Nemzetközi Egyezségokmányának koordinátarendszerében – 50 év távlatából*. In: Csapó, Zsuzsanna (ed.): Jubileumi tanulmánykötet az 1966. évi emberi jogi egyezségokmányok elfogadásának 50. évfordulójára. Budapest, Dialóg Campus – Wolters Kluwer, 2019, p. 184-202; see esp. Article XIV (4) of the FL and in relation with it: Tóth, Judit: „… a hazájukat elhagyni kényszerülők emberi jogainak és alapvető szabadságainak védelmére". *Fundamentum,* 19 (4) 2015, p. 63-65; Blutman, László A kiutasítás és visszaküldés az alapjogok árnyékában. *Acta Universitatis Szegediensis: acta juridica et politica*, (52) 2. 1997, p. 5-27.

[65] Act CXL of 2004 on the General Rules of Administrative Proceedings and Services.

[66] Immigration law practice of the Curia, p. 26; In the absence of a designation, a document sent to the authority shall not be considered as a special authority assessment. Curia Decision Kfv.III.37.587/2011/7. Commentary to Article 55 of GPAP, point 2.

non-refoulement applies as regards the proceedings for ordering expulsion and it shall not derogate from the opinion[67].

Due to the legislative change, the parallel to the regulation of special authority is eye-catcher as in fact, only the assignment is missing. It is to be noted, that the former procedural law code was modified in 2007[68] to avoid the similar involvement of obligatory professional opinion in the procedure but without the procedural guarantees as before, sectoral law allowed such kind of involvement without any legal background for regulating responsibility. Therefore, when the current code was formulated, obligatory special authority assignment was strictly connected to proper assignment[69].

Meanwhile, since the establishment of the Curia legal practice guidelines, the procedural law circumstances have changed: immigration cases are now taken out from the scope of the general procedural code[70], but nevertheless, the government decree on assignment of special authorities, based on the general code's empowerment, does not provide for immigration cases[71]. It is the Act on TCN that contains assignment of special authority involvement, but not in the case of non-refoulement[72]. All shall not mean, however, that the legal practice has returned to the procedural guarantee free type of

[67] Article 7 of Government Decree 204/2015. (VII. 23.) on the modification of Government Decree 375/2010. (XII. 31.).

on aid for public employment and on the legal harmonization of certain migration, asylum, and other government decrees. According to its Article 34, it entered into force on 1 August 2015.

[68] According to Article 2 (1) i) of Act CIX of 2006 on amendments to the law related to the formation of governmental organization, Article 58 (6) of GRAPS added the following lines in italics: Act or government decree may stipulate that the proceeding authority is bound by the opinion of a specific scientific or professional body or expert body on a specific issue. In such a case, *the rules on the assistance and procedure of the special authority shall apply mutatis mutandis*, provided that the same body or body of experts may not act unchanged in the appeal procedure.

[69] Commentary to Article 55 of GPAP, point 7.

[70] Article 8 (1) d) of GPAP.

[71] Article 139 b) of GPAP.

[72] In the joint application procedure, the Government designates the government office responsible for the place of employment in the first instance procedure and the Minister responsible for employment policy in the second instance procedure to determine whether the employment of a third-country national in Hungary is eligible. [Article 72/H of Executive Decree]. In the procedure for granting a temporary residence permit, a national residence permit or an EC residence permit to a third-country national – in order to determine whether the establishment of a third-country national endangers Hungary's *national security*, the Government assigns Office for the Protection of the Constitution and the Counter-Terrorism Centre at first instance:, and the Minister responsible for the management of civilian national security services at second instance as special authority [Article 97 of Executive Decree]. As for evaluation of the possible threat to national security, the county police headquarters are assigned at first instance and the National Police Headquarters at second instance [Article 97/A of Executive Decree]. To identify if there is any national political interest in relation to a third country national, the Minister responsible for national policy is the assigned special authority. [Article 106/A of Executive Decree] According to the Act on TCN, In proceedings for the determination of statelessness, the authority specified in a separate legal regulation shall submit its resolution to the proceeding immigration authority within twenty days on the question whether the third-country national endangers the national security of Hungary [Article 78 (4)] The Government designates the Office for the Protection of the Constitution and the Counter-Terrorism Centre as specialized authorities in the procedure for establishing statelessness. [Article 165 of Executive Decree].

collaboration once left behind. Legal practice, in fact, knows this phenomenon of consenting as a sui generis category, but denies the applicability of rules of special authority but formally, this means that the approbatory authority's decision cannot be contested[73]. If the rules themselves are not applicable, meanwhile, the interpretation in the view of constitutional values require the applicability of the guarantees that are connected to a special authority involvement, therefore, from the spirit of law and by virtue of legal interpretation guidelines given by the Fundamental Law, the relevant provisions of the Act on TCN shall be interpreted in a way, that it ensures the procedural guarantees around the involvement of the asylum authority the same way as law ensures procedural guarantees in case of the obligatory assessment of the special authorities[74].

No matter what it is called or how the available legal practice is twisted, the interpretation of the constitutional requirements, supported by the relevant international and domestic caselaw, the duty to incorporate the opinion of the asylum authority shall be a part of the argumentation of the immigration authority and be available for legal remedy. In fact, in the Iranian Student's case, the Metropolitan Court did a review the statement on Iran and the applicability of the non-refoulement principle although came to the same conclusion as the immigration authority[75].

Thereafter, the question remains as to why the content of the investigating authority's proposal was not examined despite the explicit request.

3.3.2.1. The procedural status of the investigating authority

The role of the police is *ab ovo* different from the role of the asylum authority. The investigating authority is not an actor in the procedure, but its contribution led to the opening of the immigration authority procedure. This type of relationship with the proceeding authority does not qualify special authority involvement not in the case if it leads to an obligatory starting of procedure[76]. It cannot be a categorised as a related procedure either as it would assume a decision on the side if the police, however, there is no such thing, but a proposal based on some presumption[77].

The legislator has introduced the provision that is the basis of the whole procedure in 2010 but prior to 1 January 2018[78], the proposal of the investigating authority was a recommendation and not a binding order. Currently, the Act on TCN expressly states that the competent immigration authority shall not derogate from the recommendation[79]; it is

[73] Judicial Decision BH1996.446, see also Commentary to Article 55 of GPAP, point 7.

[74] Supreme Court Kfv.X.37.055/2001/5. and Kfv.X.37.055/2001/5.), see also Commentary to Article 55 of GPAP. point 7. and Article XXVII. (7) of FL.

[75] Judgment [22]-[23].

[76] Metropolitan Regional Court Fővi. Ít. 2.Kf. 28.405/2004/2, see also Commentary to Article 55 of GPAP para. 7.

[77] Article 45 of GPAP and its legislative motifs (available in database).

[78] It was Article 38 of the Act CXLIII of 2017 on amendments to the law related to the migration that inserted the provision into the Act on TCN.

[79] Article 43 (3) of Act on TCN, see also p. ex. Administrative-Economic Decision KGD2019. 105 stating, that the ordering of the expulsion of a third-country national staying illegally on the territory of Hungary is not a discretionary decision, the relevant immigration rules are mandatory.

not entitled to override it, neither the proposal of expulsion not the proposed time of the ban on re-entry[80]. It makes the provision another example of *sui generis* legal phenomenon: the proposal maker authority does the fact finding, the evaluation of the facts and the deliberation and also *de facto* the decision- making, while the competent proceeding authority ensures the *de iure* decision-making when it acts as ordered. In the present case, the full documentation (the detailed matter of facts, and the reasoning of the argumentation that led to the final consequences of expulsion) of this kind of cooperation does not appear in the proceeding authority's decision, thus it raises the question of the legal relationship of authorities that makes this practice possible. Otherwise, the authority decision is, due to its serious insufficiency, unsuitable for a substantive review.

The present case is a procedure is *ex offitio* whereas another authority gave the reason to act[81], however, analogy does not help this time either: there is no similar legal institution in the Hungarian legal practice as all fails at the 'obligatory order' nature of the initiation[82]. Similar institution is known only on the obligation to open the procedure but even in such cases, the deliberation is the right and duty of the proceeding authority[83].

In lack of concrete legal provisions, the legal principles may serve as a fulcrum, notably, in this case, the officiality and the clarity of administration. The authority is obliged to enforce the principle of officiality from the beginning of the procedure, through the conduct of the procedure, until its completion and the execution of the decision. This includes the obligation to establish the facts[84], and, in close connection with that, the appropriate statement of reasons in the light of the principle of fair process[85]. The Constitutional Court pointed out that the right to a fair procedure (and thus good administration) and ultimately the rule of law is contrary to such authority activity, which interprets the purpose of the legislator in order to ensure effectivity but at the cost that makes the client vulnerable, and in fact, essentially defenceless against the action of the public authority[86]. Simplicity (the principle of intelligibility) also serves the interests of the client in this respect, as the conduct of the procedure and the decision itself shall be understandable and clear[87].

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[80] Article 43 (3) of Act on TCN and legislative motifs to Article 38 of Act CXLIII of 2017.

[81] Commentary to Article 104 of GPAP, point 1.

[82] *Cf*. Article 2/A –3 (1) of Act CLXV of 2013 on complaints and public interest notifications (a továbbiakban: Panasztv.). It cannot be categorised as claim either, see Barabás, Gergely – Baranyi, Bertold – Boros, Anita – Demjén, Péter – Dobó, Viola – F. Rozsnyai, Krisztina – Fazekas, János – Fazekas, Marianna – Forgács, Anna – Hoffman, István – Hoffmanné Németh, Ildikó – Huber, Gábor – Kapa, Mátyás – Kovács, András György – Kovács, Tamás – Lapsánszky, András – Mudráné Láng, Erzsébet – Nagy, Marianna – Szalai, Éva – Szegedi, László: Nagykommentár a közigazgatási hatósági eljárás és szolgáltatás általános szabályairól szóló 2004. évi CXL. törvényhez (archív) [hereinafter: Commentary to Article. … of GRAPS] Commentary to Article 29. § (1)-(2) of GRAPS, point 4. b).

[83] Commentary to Article 29. § (1)-(2) of GRAPS, point 4. d), cf. Commentary to Article 15 of GRAPS, point 4. b), see also: Lapsánszky, András: *A hivatalbóli eljárás.* In: Patyi, András (ed): A közigazgatási hatósági eljárásjog jogintézményei. Budapest, Dialóg Campus, 2019. p. 419-420.

[84] Constitutional Court Decision 30/2015. (X. 15.) ABH 2015, p. 787, 792 [39]; [53].

[85] Article XXIV of FL and Curia Judgment Kfv.I.35.066/2016/7.

[86] Constitutional Court Decision 165/2011. (XII. 20.) ABH 2011, p. 1302. point V.1.1.

[87] Commentary to Article 2 of GPAP, point 5.

The rules on formal decisions are intended to ensure that the client has a complete picture of the facts which the authority has revealed, which had been considered and been refrained in formulating the opinion and in accordance with which legal provisions the decision has been made. This point of view has been consistently guiding legal practice for decades[88], maturing this way the requirement that the operative part of the decision and the statement of reasons must be consistent to a *general principle of law*[89].

The decision is well-founded and lawful only if the factual and legal reasons set out in the statement of reasons duly substantiate the authority decision[90]. The justification shall be comprehensive, cover all parts of the decision-making process, and the authority's reasoning logic should be traceable[91]. Thus, the adequacy of the content of the decision is a guarantee that the decision can be verified later, and its correctness and legality can be judged on this basis[92].

All in all, in the lack of exact legal provision or the possibility to use analogy, the requirement of the principle of officiality including the clarification of facts and reasoning of the decisions together with the constitutional practice and method of interpretation, the following conclusion is deduced: the authority decision examined by the Metropolitan Court in the frames of administrative lawsuit, by not containing the facts and justification established by the investigating authority, was incomplete to such an extent that a substantive review was not possible, therefore, excluded the possibility of an effective legal remedy. Therefore, under the current rules to apply, the Metropolitan Court should have annulled the authority decision and ordered the immigration authority to reopen the proceedings[93].

3.3.3. To what extent can the two procedures be separated?

In relation to the presumption of innocence, the Metropolitan Court referred to the completely separated nature of criminal proceedings and official proceedings[94]; the question is whether this may have an impact on the content of the authority's decision.

The Constitution contained the presumption of innocence as a value in criminal proceedings therefore for long, its interpretation in administrative authority procedures was out of question[95]. The present Fundamental Law has preserved it among the basic rights but it does not mean that the application is widely expanded; considering it as a guideline is rather intended to prevent the infringement which may be caused by legal disadvantages

[88] See, Supreme Court Judgment Kfv.I. 35.534/1999; Metropolitan Court of Appeals 4.Kf.27.031/2005/9. and 4.Kf.27.369/2006/7, see Commentary to Article 80 of GPAP, point 5.

[89] See, Supreme Court Judgment Kfv.V.35.538/2009/5; Curia judgment Kfv.III.35.425/2015/7; Commentary to Article 80 of GPAP, point 5.

[90] See, Supreme Court Judgment Kf.IV.37.291/2004/2. Commentary to Article 80 of GPAP, point 5.

[91] See, Supreme Court Judgment Kfv.III.37.191/2006/7.

[92] Commentary to Article 1 of GPAP, point 6; Metropolitan Court of Appeals 2.Kf.27.236/2008/6. and 2.Kf.27.237/2008/7.

[93] Article 88R (2) of Act on TCN, Article 90 (3) d) and Article 92 (1) d) of CAL, *cf*. Article 92 (1) a).

[94] Judgment [20].

[95] The Constitution 57. § (2) and Supreme Court Judgment Kfv.III.27.519/1997/6. and Kf.II.25074/1994/4.

applied in the absence of liability established in the course of proceedings conducted in accordance with the law and which were subsequently left without repair[96]. Legal practice is consistent in requiring the demarcation in reviewing procedures: the activity of the police, as an investigating authority, and its procedural activities in relation to investigations is not subject of administrative litigation[97], the court acting in administrative court capacity has no constitutional empowerment to the legality review of activities related to criminal procedures[98]. Among other things, this may explain the fact that the content of the proposal of the investigating authority – the facts establishing the threat to public order and its classification – could not be examined by the Metropolitan Court. However, this explanation cannot save the lack of obligatory elements of the immigration authority decision. It could have been saved by one exception: in case of classified information in the reasoning in relation with the qualification of being a threat to national security and legal order. Such information shall not be a part of the decision[99]. Nevertheless, it still does not mean that it cannot be contested: in case of classified information, the documentation is available outside the scope of the immigration authority procedure upon the claim submitted to the authority that qualified it as such. If the claim is denied, the decision of denial is subject of individual legal remedy[100]. Therefore, even if the existence of classified information relieves the proceeding authority from its obligation to give a detailed factual and legal reasoning in its decision, the consultation of the documentation and the legal remedy is available[101]. Even international practice acknowledges if the documentation in a case is not a part of the reasoning but available in a separated document[102]. In the case of the Iranian student, there were no classified information; however, the example of its legal regulation makes the lack of procedural guarantees in this case more conspicuous.

Summing up, the case is a message for the legislator to pay more attention to the regulation of procedural guarantees for the sui generis legal institution recently introduced to the legal system.

Epilogue

The expulsion was carried out on 16 April 2020 with official escort to the state border of Hungary. The legal representant of the Iranian student submitted a constitutional

[96] Article XXVIII (2) of FL; Commentary to Article 1 of GPAP, point 10.

[97] Judicial Decision BH2011. 179.

[98] Curia judgment Kfv.III.37.315/2012/4, see also Commentary to Article 7 of GPAP, point 8.

[99] Administrative-Economic Decision KGD2016. 27. In this case, the proposal was made by the Counter-Terrorism Centre.

[100] Article 11 of Act CLV of 2009 on the protection of classified information.

[101] See similar case, refusal of constitutional complaint in the case of decision of the Metropolitan Administrative and Labour Court 42.K.32.031/2019/8. by Constitutional Court Order 3171/2020. ABH 2020, p. 899, [14]-[15].

[102] C-16/65 *Firma G. Schwarze v Einfuhr – Und Vorratsstelle Fuer Getreide und Futtermittel, Frankfurt Am Main*, ECLI:EU:C:1965:117, p. 888; C-119/97 P *Union française de l'express (Ufex), formerly Syndicat français de l'express international (SFEI), DHL International and Service CRIE v Commission of the European Communities and May Courier,* 4 March 1999, ECLI:EU:C:1999:116, para. 57.

complaint to the Constitutional Court of Hungary to require the annulation of the Metropolitan Court judgment due to its unconstitutional decision. The complaint referred to the violation of the right to effective legal remedy, the right to presumption of innocence and the disrespect of the right to private life[103]. Decision until the close of the manuscript was not yet available, although the National Immigration Authority by its letter dated on 29 October 2020, informed the Constitutional Court about the termination of the investigation in the case of violation of pandemic measures. Following this, the legal representant initiated the withdrawal of the ban on re-entry, thus the National Immigration Authority, on 14 July 2020 made a request to the police. As a result, the Budapest Police Headquarters declared that the Iranian student is no longer means a threat to public policy or public security, therefore, in respect of this statement the immigration authority withdrew the measure by its decision of 9 October 2020[104].

The problem appears to have been solved in this case, but it does not clarify the issues related to its regulatory environment as it is seen from the 14 other constitutional complaints in the case of expulsion for breaches of pandemic measures[105].

The present study aimed to draw attention to the issue that an essential condition for verifiability of legality and avoidance of arbitrariness is that authorities give adequate reasons for their decisions under all circumstances. To that end, it examined the issues relating to the obligation to state reasons in a decision on the expulsion of an Iranian student on grounds of public policy, public security, through the judgment of the Metropolitan Court that made a review and it tied to evaluate the legal situation caused by the breach of the obligation as a procedural legal guarantee in the view of the national and international legal practice.

[103] See, Constitutional complaint, p. 5-15.

[104] The letter is available as attached to the case files of the Constitutional complaint: http://public.mkab.hu/dev/dontesek.nsf/0/DA7553273FBDB2AFC1258589005BEB59?OpenDocument (30.11.2020).

[105] The other Iranian Students also submitted constitutional complains for different reasons of alleged unconstitutional procedure. The 14 complaints were submitted between 3 June and 18 September 2020. See, Alkotmánybíróság.
https://alkotmanybirosag.hu/ugykereso/talalatok?hatarozat_sorszam=&hatarozat_evszam=&ugyszam_sorszam=&ugyszam_evszam=&dontes_szerv=&lezaras_modja=&befejezo_dontes_tartalma=&rendelkezo_resz=&indoklas=&velemenyek=&alkotmanybiro=&ugyszaki_jelleg=&inditvanyozo_tipusa=&eljaras_tipusa=&ugyallapot=2&alkotpanasz_ugyall=&jogszabaly=&lenyeg=&feltetel1=2&feltetel2=2&befejezes_tipusa= (30.11.2020).