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ADMINISTRATIVE PROCEDURES: SOME ISSUES OF PUBLIC ADMINISTRATION IN THE FIELD OF MIGRATION

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The article deals with the specificity of administrative reform in the immigration field. For a long time the state's task while regulating public administration has been the solving of economic development problems. As a result of this the procedures of legalization of foreign citizens in the Russian territory were simplified, and appeared a category of highly skilled professionals. The problem lies in the underestimation of the supervisory function of the state. It appears that the administrative reform should seek a due balance between the regulatory and protective functions of the state in the field of immigration.

Keywords: administrative law, administrative reform, foreign citizens, public services, administrative supervision, administrative expulsion.

Administrative procedures – this is one of the key categories of administrative law of any country. There are two options for their legal enshrining. The first, they rely on the basic law, single for the most subjects of public administration. The second, for each procedure there is developed an independent normative legal act, which may not always acquire the force of a law. In General, the second model is implemented in Russia, whereby the activity of executive bodies and their officials relies on bylaws – administrative regulations. Their considerable number, the lack of a unified for all of them legal framework shows the fragmentation of administrative-legal regulation of procedures, the potential of which is not used by the state to one hundred percent. As a result, the effectiveness of public administration is reduced and, at the same time, the rights of powerless parties of public legal relations are not ensured in full.

At that, things are not all that bad. Administrative reform of the last decade has revealed a new trend. A number of federal laws clearly designated an official position on the legal provision of interrelation the subjects of public administration with citizens and organizations. These relations develop in three directions: provision of public services, implementation of administrative supervision, exercising of administrative responsibility. Classic administrative procedures manifest in the first two. Administrative and jurisdictional process manifests in the third one. The category of state services seems to be the most problematic of them. This is due to the underdevelopment of the theory, as well as the existing imbalance between the doctrinal statements and the practice of administrative reform. There is a fair comment of L. A. Mitskevich, that "the very theory of public services currently looks more like a concept than as a truly developed theory".[1] In other words, the main ideas are outlined, some of the notions and a number of principles are formulated. At the same time, all this does not represent a slim complete ideology that explains the interrelation of the various elements of legal construction at all the stages of providing services.

There is a dispute about the nature of state services in the Russian science. It is largely reduced to the determination of their list. For example, under the current regulations, the issuance (change) of the passport is a state service provided by the Federal Migration Service of Russia (hereinafter – FMS of Russia). It is widely believed that such activity looks like an "imposed service", non-receipt of which is punishable by an administrative fine. As a result, this activity is denied "the right" to be referred to state services. I believe that this approach has no

1 Mitskevich L. A. Essays on the Theory of Administrative Law: a Comparative Content: Monograph [Ocherki teorii administrativnogo prava: sravnitel'noe napolnenie: monografiya]. Moscow: Prospekt, 2015, p. 165.

practical importance. This interpretation distorts the essence of the legal structure of the state service, leaving behind the boundaries of the discussion its actual purpose, aimed at simplifying the "life" of citizens when applying to the authorities. Main categories, describing the state service and delimiting it from oversight activity, are not the imposition and punishability, but the availability, timeliness, completeness. Consequently, the main emphasis in determining of state services must move to the procedure of their implementation.[2] It is in this case, citizen's rights are ensured in the course of day-to-day management activity. In this case, the category of administrative procedure makes it possible to evaluate the entire range of managerial activity of the subjects of public authority. As a result, the provision of a state service, for example informing, can be incorporated into a supervisory management structure.

The minimum starting conditions in the introduction of the considered structure did not allow the state to cover all of its aspects. Often the attention of reformers was focused on the timing of delivery of state services. The need to reduce it goes in parallel with such concepts as "quality", "effectiveness". There are known cases when the checking of the quality of a provided service was in verification of the time allocated by the regulations for the implementation of legally significant action by the entities of public administration. So, article 14 of the Federal Law "On the Arrangement the Provision of State and Municipal Services"[3] establishes requirements to the standard of provision of state and municipal services. Of the fourteen points that make up this norm, three set chronological parameters. These are the deadline for provision of a state or municipal service; the maximum waiting time in the queue when submitting the request for provision of a state or municipal service and in case of receiving the result of the provision of a public or municipal service; the deadline for registration of the applicant's request on provision of a state or municipal service. These positions are the easiest for verification, but they are more likely exposed to a breach. However, the quality of services is reduced not only to the execution of their timing, which is only one of the conditions for achieving the availability of services. Administrative reform offers two directions designed to reveal the mentioned principle. Firstly, the places of interaction of the entities of administrative legal relations are very different. Services may be provided in the premises of bodies, as well as in

2 So, Mitskevich L. A. notes that "the German administrative law studies not so much the concept of service as the concept of a positive public administration". See: Mitskevich L. A. Op. cit. p. 168.

3 Federal Law No. 210-FL from July 27, 2010 "On the Arrangement the Provision of State and Municipal Services" (ed. from 31.12.2014) [Federal'nyi zakon ot 27 iyulya 2010 № 210-FZ «Ob organizatsii predostavleniya gosudarstvennykh i munitsipal'nykh uslug» (red. ot 31.12.2014)]. SZ RF – Collection of Laws of the RF, 2010, no. 31, article 4179.

multi-functional centers for the organization of provision state and municipal services. Secondly, the technologies for the exchange of information between authorities and citizens (organizations) are being optimized. First of all, it is associated with the electronic document circulation. In this case, there is a federal "Portal of state services" that completely automates the mechanism of interaction between citizens and authorities[4].

It should be noted that today the bodies of the FMS of Russia do not provide completely electronic services. On the portal foreign nationals are offered only two services: 1) the issuance of work permits for foreign citizens arriving in order, requiring a visa; 2) extension of the forced migrant status. In other cases, foreign citizens can apply to the resources of the Portal only for information about the activity of the FMS of Russia, their rights and duties, as well as existing administrative procedures. In addition, through the Portal it is possible to familiarize with forms of documents, fill them in and transfer them to the bodies of the FMS of Russia. This group include the following legally-significant actions: registration and issue of invitations to enter the Russian Federation for foreign nationals and stateless persons; granting to foreign nationals and persons without citizenship the residence permit of the Russian Federation; granting to foreign nationals and stateless persons a temporary residence permit; implementation of the migration registration in the Russian Federation; registration, issue, extension and restoration of visas to foreign nationals and stateless persons. Mainly the Portal is used to inform citizens about the legal regimes of services. Identical information is contained on the official websites of the bodies. They also allow implementation of partial electronic interaction among the participants of administrative procedures. Most often, this refers to making an appointment, obtaining forms of documents, information about working hours of responsible officials, as well as other contact information.

In General, the use of electronic tools in the provision of state services has simplified the life of citizens, as well as has softened the pressure on authorities. The preparatory phase of the provision of state services (issuing of blank documents, other information, counselling) "goes" to On-line, allowing officials to concentrate on implementing authoritative functions. But the introduction of these technologies is faced with a number of non-legal problems. Effective use of the electronic resources requires special culture of citizens and officials. They must

4 Provision on the federal public information system "Unified portal of public and municipal services (functions)" approved by the RF Government Decree No. 861 from October 24, 2011 [Polozhenie o federal'noi gosudarstvennoi informatsionnoi sisteme «Edinyi portal gosudarstvennykh i munitsipal'nykh uslug (funktsii)», utv. Postanovleniem Pravitel'stva Rossiiskoi Federatsii ot 24 oktyabrya 2011 g. № 861]. SZ RF – Collection of Laws of the RF, 2011, no. 44, article 6274.

trust the electronic document management system, like habitual for them paper one with traditional signatures and seals. The formation of such way of thinking requires time and effort on the part of the state. Organizational and technological study of management schemes, which should be easy in use and convenient for the participants of a procedure, is also important. These properties still don't always accompany the current options[5].

There are specific decisions aimed at ensuring accessibility of state services in the migration sphere. At the beginning of the twenty-first century, the state worried about the issues of reduction of queues in the premises of migration bodies, minimization of documents needed for receiving public services, the simplicity of their filling, reducing wait times for an authoritative decision. All of these factors to some extent were reflected in the law on migration registration of foreign citizens and stateless persons.[6] So, now it is possible to get migration registration in post offices of Russia. In fact, we see the embodiment of the idea of "walking distance" rendering of state services. By the way, in May 2012 the President of the Russian Federation assigned a task to increase by 2015 the proportion of citizens with access to the receiving of public services at the place of stay, including multi-functional centers, up to 90%.[7] For temporarily staying foreigners the problem was solved in 2007 (by the entry into force of the law on migration registration). Enshrined algorithm of actions of concerned subjects reduced the time for obtaining a legalizing

5 Interesting data are given in the paper of Chernyavskii A. V., Kuyanova A. V., Yuritsin A. E. devoted to quality evaluation of state services provided by the Department of the Federal Migration Service of Russia for Omsk region. The authors note that "recipients of public services come to the offices of Department of the Federal Migration Service of Russia for the Omsk region often already having sufficient information about state services provided by the migration service. The main sources of its obtaining: preliminary consultations with the employees of the Department of the Federal Migration Service of Russia for Omsk region – 1019 respondents (47.6%), obtaining additional information through the media – 908 people (42.4%), by phone – 981 people (45.8%)". See: Chernyavskii A. V., Kuyanova A. V., Yuritsin A. E. Topical Issues of Quality Evaluation by the Population of the Employees' Work of the Department of the Federal Migration Service of Russia for Omsk region in the Provision of State Services [Aktual'nye voprosy otsenki naseleniem kachestva raboty sotrudnikov UFMS Rossii po Omskoi oblasti pri okazanii gosudarstvennykh uslug]. Zakonodatel'stvo i praktika – Legislation and Practice, 2014, no. 1, p. 81.
In general, the interviewed respondents were satisfied with the quality of work of migration bodies, but there are no electronic resources, the official website of the FMS of Russia and the DFMS of Russia, the portal of public services among the channels of obtaining preliminary information about the services provided. Obviously, many people still prefer a personal contact with staff or contacts by phone than the more convenient interaction via the Internet.

6 Federal Law No. 109-FL from July 18, 2006 "On Migration Registration of Foreign Citizens and Stateless Persons in the Russian Federation" (ed. from 12.22.2014) [Federal'nyi zakon ot 18 iyulya 2006 № 109-FZ «O migratsionnom uchete inostrannykh grazhdan i lits bez grazhdanstva v Rossiiskoi Federatsii» (red. ot 22.12.2014)]. SZ RF – Collection of Laws of the RF, 2006, no. 30, article 3285.

7 Paragraph 1 "b" of the RF Presidential Decree No. 601 from May 7, 2012 "On the Main Directions of Public Administration Improvement" [Ukaz Prezidenta Rossiiskoi Federatsii ot 7 maya 2012 № 601 «Ob osnovnykh napravleniyakh sovershenstvovaniya sistemy gosudarstvennogo upravleniya»]. SZ RF – Collection of Laws of the RF, 2012, no. 19, article 2338.

document. The procedure is as follows: the receiving party fills the notice of arrival, postal worker separates the detachable part of it, affix a stamp on it and sends to the receiving party. This document affirms the right of a foreigner to stay in Russia. Since 2012 it has been also allowed to send the notice of arrival to migration body through a unified multifunctional center.

Despite the superficial effect, the conversion of the legislation has remained partial. For example, it is unclear why the reform has not affected the institute of administrative supervision. After all the simplification of legalization was being carried out against the background of considerable "illegal immigration". According to some estimates, in the first decade of the 21st century in violation of the legislation there were up to 15 million men in the country.[8] Today this figure has apparently declined, but only slightly. Simplification of the procedure of legalization of foreigners has created an opportunity for abuse of the provided right. For example, there are cases of registration of temporary staying foreign nationals with using forged documents, as well as a few dozen people in one residential premise. For example, according to the data of immigration offices (Department of the Federal Migration Service of Russia for Irkutsk region) for the period from January 1, 2009 to November 30, 2009, citizen L. placed on migration registration 680 people at the address of her registration.[9] Indeed, postal workers are not public servants, they do not have necessary knowledge, abilities and skills to identify such situations, and most importantly they do not have powers of authority. They perform the function of a transmission mechanism, and the Russian FMS employees nowadays carry out verification only after receipt and processing of notifications of arrival. Finally, the reform of migration legislation of 2006-2007 did not affect the statuses of temporarily and permanently staying foreign nationals, who still had to visit the premises of immigration bodies, gather and provide packages of documents required to obtain a permission to stay or residence permit. The situation for them has changed somewhat in 2010, with the permission to file documents necessary for legalization via the Internet, including the unified portal of state and municipal services.

An interim conclusion is as follows. The Russian State has significantly simplified the procedures for providing public services in the field of immigration.

8 Thus, the United Nations Department for Economic and Social Affairs in the Human Development Report of 2009 provided the following information on the number of illegal immigrants: "Estimates of the number of illegal migrants in several countries – including the Russian Federation, Thailand, Republic of South Africa – ranges from 25% to 55% of the population". Chapter 2. People in Motion: Who, Where and Why Move [Glava 2 Lyudi v dvizhenii: kto, kuda i pochemu peremeshchaetsya]. Official site of the United Nations Department of Economic and Social Affairs, available at : http://www.un.org/ru/development/hdr/2009/hdr_2009_ch2.pdf (accessed : 04.07.2015).

9 Official site of the FMS of Russia, available at : http://www.fms.gov.ru/press/news/news_detail.php?ID=50859&sphrase_id=1016154 (accessed : 06.01.2012).

At that, it did not take care about the targeting of the reform. The most preferential mode of legalization was set for temporary staying foreigners, by whom the cohort of "illegals" is mainly replenished. Temporarily and permanently residing foreign citizens acquire their status after all sorts of verifications, proving their loyalty to the Russian rule of law. But the procedures for registration, as well as the subsequent interaction with bodies of FMS of Russia remain for them quite burdensome. The peculiarity of administrative reform in the immigration field has become the fact that it affected only the significant categories of foreign nationals, but the attitude of an individual person towards the Russian rule of law, his usefulness to Russia almost was not taken into account. Just a year ago, the state has attempted to enter a point system for foreign nationals and tied the term of ban on entry after deportation to the danger of an expelled foreigner. Ideally, the situation should change. The state is required to build up an individual relationship with each immigrant, depending on his behavior. The greater danger he represents, the more thorough verifications must be. Conversely, with persons, who do not represent danger, the State should build relations, relying on the principle of trust. The mentioned policy has not been adequately implemented into life yet. Administrative procedures should become an institute that brings together all kinds of management activity of public entities. They allow combination of both rendering services and exercising of supervision. For example, through incorporating positive managerial structures (informing, etc.) into supervision proceedings. "Administrative procedures, as noted by N. Yu. Starilov, are an integral and ever-present in modern administrative system of a constitutional state area of administrative-legal regulation, the main goal of which is to establish the principles of administrative procedures, the order for adoption of administrative acts, the ensuring of the rights, freedoms and legal interests of individuals and legal entities, as well as settlement of administrative-legal disputes through appropriate procedural forms"[10].

Partly the imbalance of positive and negative regulation in the immigration field is due to the poor development of the principles, on which all administrative procedures must be based. However, a number of fundamental principles in the first decade of the twenty-first century was being actively put into the practice of public administration. The most famous of these is the principle of proportionality.

10 Starilov Yu. N. About the Two Main Modern Directions of the Development of Russian Administrative and Administrative-procedural Legislation (thesises) [O dvukh glavnykh sovremennykh napravleniyakh razvitiya rossiiskogo administrativnogo i administrativnogo protsessual'nogo zakonodatel'stva (tezisy)]. Vestnik Voronezhskogo gosudarstvennogo universiteta – Bulletin of the Voronezh State University, Ser: Pravo, 2014, no. 3, p. 7.

Perhaps for the first time its practical value was seen in the implementation of coercive measures applied to foreign nationals. Its entering is due to the practice of the European Court of Human Rights and the Constitutional Court of the Russian Federation in cases of expulsion of foreign nationals. For example, there are determinative decisions of the European Court of Human Rights: "Chahal v. the United Kingdom" on November 15, 1996[11]; "Soering v. the United Kingdom" on July 7, 1989[12]. For Russia, this principle was reflected in the case of "Liu and Liu v. the Russian Federation" on December 6, 2007[13]. In General, the Constitutional Court fully accepted the position of the European Court (Ruling No. 55-O from March 2, 2006 "On the complaint of a citizen of Georgia Kakhaber Todua"[14]; Ruling of the Constitutional Court of the RF No. 155-O from May 12, 2006 "On the complaint of a citizen of Ukraine X. against violation of his constitutional rights by paragraph 2 article 11 of the Federal Law "On the Prevention of Spread in the RF of a Disease Caused by the Human Immunodeficiency Virus (HIV)", by paragraph 13 article 7 and paragraph 13 article 9 of the Federal Law "On the Legal Status of Foreign Citizens in the Russian Federation"[15], etc.). These positions have been reflected in the practice of courts of general jurisdiction.

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11 Resolution of the European Court of Human Rights from November 15, 1996 "Chahal v. the United Kingdom" [Postanovlenie Evropeiskogo suda po pravam cheloveka ot 15 noyabrya 1996 «Chakhal (Chahal) protiv Soedinennogo Korolevstva»]. Konsul'tant Plus. Professional version [Electronic resource], Moscow: 2015.

12 Resolution of the European Court of Human Rights from July 7, 1989 "Soering v. the United Kingdom" [Postanovlenie Evropeiskogo suda po pravam cheloveka ot 07 iyulya 1989 «Sering (Soering) protiv Soedinennogo Korolevstva»]. Konsul'tant Plus. Professional version [Electronic resource], Moscow: 2015.

13 Resolution of the European Court of Human Rights from December 6, 2007 "Liu and Liu v. the Russian Federation" [Postanovlenie Evropeiskogo suda po pravam cheloveka ot 06 dekabrya 2007 «Delo "Lyu i Lyu (Liu and Liu) protiv Rossiiskoi Federatsii»]. Konsul'tant Plus. Professional version [Electronic resource], Moscow: 2015.

14 Ruling of the Constitutional Court of the RF No. 55-O from March 2, 2006 "On the complaint of a citizen of Georgia Kakhaber Todua against violation of his constitutional rights by paragraph 7 article 7 of the Federal Law "On the Legal Status of Foreign Citizens in the Russian Federation" [Opredelenie Konstitutsionnogo Suda RF ot 02 marta 2006 № 55-O «Po zhalobe grazhdanina Gruzii Todua Kakhabera na narushenie ego konstitutsionnykh prav punktom 7 stat'i 7 Federal'nogo zakona «O pravovom polozhenii inostrannykh grazhdan v Rossiiskoi Federatsii»]. Konsul'tant Plus. Professional version [Electronic resource], Moscow: 2015.

15 Ruling of the Constitutional Court of the RF No. 155-O from May 12, 2006 "On the complaint of a citizen of Ukraine X. against violation of his constitutional rights by paragraph 2 article 11 of the Federal Law "On the Prevention of Spread in the RF of a Disease Caused by the Human Immunodeficiency Virus (HIV)", by paragraph 13 article 7 and paragraph 13 article 9 of the Federal Law "On the Legal Status of Foreign Citizens in the Russian Federation" [Opredelenie Konstitutsionnogo Suda RF ot 12 maya 2006 g. № 155-O «Po zhalobe grazhdanina Ukrainy X. na narushenie ego konstitutsionnykh prav punktom 2 stat'i 11 Federal'nogo zakona «O preduprezhdenii rasprostraneniya v Rossiiskoi Federatsii zabolevaniya, vyzyvaemogo virusom immunodefitsita cheloveka (VICh-infektsii)», punktom 13 stat'i 7 i punktom 13 stat'i 9 Federal'nogo zakona «O pravovom polozhenii inostrannykh grazhdan v Rossiiskoi Federatsii»]. Konsul'tant Plus. Professional version [Electronic resource], Moscow: 2015.

It may be noted that nowadays the courts when deciding on the expulsion of foreigners from Russia weigh the right of the family members of an expelled person to family well-being, as well as health condition. The latter value is indicative. The law is imperative: a HIV-positive foreign national is subject to deportation. The Constitutional Court of the Russian Federation has left in the country a citizen of Ukraine, referring to the fact that his expulsion will affect on his wife and daughter – Russian citizens living in Moscow. The foreigner himself is not dangerous for the Russian legal order, since his lifestyle is not asocial; he performs the prescriptions of doctors. Courts of general jurisdiction have gone even further. For example, one of the courts of Nizhny Novgorod citing humanitarian considerations did not apply deportation to a HIV-infected foreigner. All relatives of the foreign citizen were the residents of Russia, and he had nobody at his homeland. He needed care. If the expulsion took place, the patient would be in much worse conditions than those in which he existed on the Russian territory.

Nevertheless, the principle of proportionality has not become a general principle of public administration activity. First of all, this is due to a lack of common doctrine. Even in cases of expulsion, there are cases of its improper use. Courts often rely on unverified data. For example, a court established the existence of an immigrant's wife – a Russian citizen, according to oral information provided by the foreigner. In the end, he stayed in Russia. In general, the presence of family members, who reside in the territory of Russia, almost always allow foreigners to avoid deportation. In such cases, the balance of individual and public interests is not complied. Not all the elements of proportionality are studied: affordability, reasonableness, equality. As a result, it creates the preconditions for the abuse of right, for example, when entering into sham marriages. The solution is seen in the comprehensive development of this principle, in the adaptation of existing practice to other cases requiring the weighing of interests. Its postulates have to be implemented by public administration authorities already in the consideration of a case. We should not forget about other principles defining the basis of administrative procedures. Exactly the principles, which are properly formulated, understood by law enforcers and implemented in their activity, are designed to remove the dispute about the admissibility of administrative discretion. It is obvious that building of effective governance is impossible without the discretion; the desire to foresee all the managerial incidents in regulations is futile. Therefore, a body must always have a legal tool allowing carrying out its powers in non-standard, not expressly prescribed situations. In such circumstances, the principles are

an important support.[16] Examples of immigration practices show this well.

In conclusion, we should make some conclusions of a general nature. 1. Administrative procedures should receive a permanent "residence" in the domestic administrative law. 2. There is a need for effective doctrine providing adequate legal regime of administrative procedures, suitable for all spheres of public administration. Perhaps, the study of general and specific principles should go first. And the principle of proportionality should become the first of them. 3. After that, it will be possible to realize the idea of a general law (Code) on administrative procedures.

16 Regarding administrative discretion, see: Davydov K. V. Judicial Control over Discretionary Administrative Acts: European Experience [Sudebnyi kontrol' za diskretsionnymi administrativnymi aktami: evropeiskii opyt]. Aktual'nye voprosy publichnogo prava – The Topical Issues of Public Law, 2014, no. 5, pp. 9-26.

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10. Resolution of the European Court of Human Rights from July 7, 1989 "Soering v. the United Kingdom" [Postanovlenie Evropeiskogo suda po pravam cheloveka ot 07 iyulya 1989 «Sering (Soering) protiv Soedinennogo Korolevstva»]. *Konsul'tant Plus. Professional version* [Electronic resource], Moscow: 2015.

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