Chapter 8

Effective Remedies in Immigration Procedures: ECHR

“Even where an allegation of a threat to national security is made, the guarantee of an effective remedy requires as a minimum that the competent independent appeals authority must be informed of the reasons grounding the deportation decision, even if such reasons are not publicly available. The authority must be competent to reject the executive’s assertion that there is a threat to national security where it finds it arbitrary or unreasonable.”

1. Introduction

In the last two Chapters, I have dealt with the availability of and criteria for effective remedies in the field of the right to privacy and data protection law. In this Chapter and Chapter 9, I focus on the right to legal remedies in immigration law procedures. It is clear that the use of SIS, as well as the use of Eurodac and VIS, involve decisions in the field of immigration law. The information stored in these databases may lead to the refusal of admission or a visa, the detention of the immigrant, or even his or her expulsion. Considering this use of databases for border and immigration control, the following sections will explore which criteria apply to the remedies in immigration law procedures. Which human rights as protected in the ECHR and the annexed protocols are relevant for the individual at stake and when does this imply a right to a fair trial or effective remedies?

In the following sections, I will give only a brief overview of the case law of the ECtHR with regard to the underlying subject. I will not examine substantial criteria which have been formulated by the ECtHR with regard to decisions on the admission, expulsion or detention of third-country nationals. For a more elaborate study of these matters, I refer to other publications.

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2. Article 6 (1) ECHR: The Right to a Fair Trial

2.1. Maaouia: (Non-)Applicability of Article 6 in Immigration Law Procedures?

Article 6 (1) ECHR reads:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and the public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

Article 6 (1) ECHR codifies the basic principle according to which individuals have the right of access to judicial remedies. The scope of this provision is limited by the words “in the determination of his civil rights or of any criminal charge against him”. Article 6 (2) and (3) include specific safeguards for criminal law procedures, including for example the right to be informed promptly or to have the free assistance of an interpreter. Although this was disputed until the mid 1980s, it is now clear from various judgments by the ECtHR that Article 6 (1) applies to administrative procedures when the rights of the individual under civil or criminal law are at stake.3

With regard to immigration law procedures, the ECtHR has so far been reluctant to apply the standards of Article 6 (1) ECHR. In the Maaouia case of 2000, by a majority of fifteen votes to two, the ECtHR explicitly concluded that Article 6 ECHR does not apply to immigration law decisions.4 This case concerned the appeal of a Tunisian national in France, married to a French national, who was sentenced in 1988 to six years’ imprisonment for armed robbery and assault. After his imprisonment, the French authorities issued a deportation order against him. The applicant was never informed of this deportation order. He was confronted with this order for the first time on 6 October 1992 when he attended the Nice Centre for Administrative Formalities in order to regularise his status. When he refused to travel to Tunisia he was prosecuted again, this time for failing to comply with a deportation order. In November 1992, he was sentenced by the Nice

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