Study on the Reviewing Powers of the Administrative Jurisdictions of the Republic of Armenia in Asylum Cases

Commissioned by UNHCR Armenia

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Abbreviations

AC - Administrative court
ACA - Administrative court of appeals
CACP - Code of administrative court proceedings
CoC - Court of cassation
CoE – Council of Europe
ConC - Constitutional court
ECHR European convention on human rights
ECtHR – European court of human rights
LFAAP - Law on the fundamentals of administration and administrative procedure
LRA - Law on refugees and asylum
NSS – National security service
RA – Republic of Armenia
UNHCR – United Nations High Commissioner for Refugees

Foreword

In 2015, the world experienced the largest displacement on record since the Second World War. The continuation and renewal of some 15 conflicts led to more than 60 million refugees and internally displaced persons globally. While Europe received more than one million refugees in the year, Armenia was recorded as receiving the third largest proportion of Syrian refugees per capita. According to Government of the Republic of Armenia statistics, some 20,000 persons have been displaced by the conflict in Syria to Armenia, of which approximately 17,000 remain in the country. In addition, the country has continued to experience small but steady numbers of arrivals from countries other than Syria including Ukraine, Iraq and Iran and a total of 311 asylum applications were received by the State Migration Service in 2015.

In late 2015, a large package of amendments to the Law on Refugees and Asylum was adopted by the National Assembly of Armenia, bringing the domestic legal framework more closely in line with international standards. The importance of ensuring a quality asylum procedure both in the law and in practice and throughout all stages of the procedure is emphasized by the second phase of a UNHCR project, the 'Quality Initiative in Eastern Europe', on which UNHCR works closely with its partners, namely the State Migration Service, Border Guard Service of Armenia, and the Courts to address gaps in the law, policy and practice, including through coaching and mentoring, training, experience-exchange, research and drafting of standard operating procedures.

During the monitoring of asylum decision-making carried out in 2013 – 2015 under the Quality Initiative in Eastern Europe Phase I, an EU and UNHCR jointly-funded project, UNHCR identified a tendency by the Courts to decline to comment on the merits of the refugee claim. Bearing in mind the important function of Courts in providing a check and balance to first instance decision-making, and the role of Courts in developing legal understanding of key concepts of refugee law, this Study was commissioned by UNHCR within the framework of its strategy to strengthen judicial engagement in Armenia. UNHCR was interested to explore the scope for Courts in Armenia to review asylum appeals on the merits of the case. The research highlights a common misperception regarding the nature of the State Migration Service powers in asylum decision-making and makes helpful suggestions as to application of Administrative Law principles in the asylum context, while proposing concrete recommendations including legislative amendments and capacity-building activities.

The research was carried out by an Administrative Law and Justice Expert who prepared the legal analysis and held meetings with key stakeholders, including members of the judiciary during the period of May to August 2015. This research is the first in a series of such studies, which aim to provide recommendations to

UNHCR and to its partners on ways to further enhance the judicial review of asylum cases in Armenia.

I am grateful to Mr. Zrvandyan, the author of this research for his thorough analysis and presentation of the issues. I would like to also to acknowledge and thank those institutions, which contributed to the research including the Republic of Armenia Association of Judges and the Administrative Court of the Republic of Armenia.

I trust that judges, scholars, government officials as well as advocates will find this research helpful and that together we will continue to work in ensuring a more efficient, fair and quality asylum system in Armenia.

Mr. Christoph Bierwirth

Representative, UNHCR Armenia

Summary

This work aims to study the powers of the Administrative court of the RA as they appear in the law and as exercised in practice. In particular, the study focused on the scope and intensity of judicial review by the AC in cases involving determination of status of refugee and asylum claims. Such study was necessitated by the need to have objective, systematic study of the existing law and practice of judicial review in asylum/refugee cases in order to understand the needs of further development and improvement in administrative justice of the RA in this area.

In order to accomplish the aims of the study, the relevant Armenian and foreign law, case-law and literature have been examined. In particular, the study presents the development of judicial review powers of the AC since its establishment in 2007 under the Code of administrative court procedure, the analysis of the relevant provisions of the Law on refugees, the powers of the SMS and other relevant legislation. In order to understand the practice of judicial review in cases on refugee status/asylum claims, 26 local judicial acts have been systematically examined and assessed. Short meeting and discussion with judges of the AC of the RA in July 2015 helped to understand the practice of judicial review by the AC in the relevant area.

The study found that there was confusion in the legal practice on the nature of the powers of the SMS. The SMS claimed to have discretionary powers, while the AC in many cases failed to address such claims. In other cases the AC agreed with the SMS, while disagreed in others. In order to bring clarity to this field, the study examined the nature of the powers of the SMS. The study found that the scope and method of judicial review depended on the nature of the powers of the administrative authorities. Discretionary and non-discretionary powers of the authorities attracted different kinds of judicial review. On the basis of such finding, it was concluded that the power of the SMS to grant or refuse the recognition of refugee status is a non-discretionary "flexible" power containing open legal concepts. Since the SMS lacked discretion, the study asserted that the AC of the RA has the power to review all questions of fact and law, as well as compel the SMS to take the actions required by law. Thus, in cases involving determination of refugee status and denial of asylum the AC of the RA exercises full judicial review. It has been recommended to clarify the powers of the SMS in the LRA.

The examination of a number of judicial acts of the AC revealed that in the cases reviewed one of the most common ground for denying the recognition of the status of refugee and grant of asylum by the SMS was the presumed failure by the asylum-seekers to prove that their fear of persecution was well-founded. The study revealed that the Armenian law of administrative procedure contained number of rules on burden of proof. However, authorities and the courts mostly referred only to Article 43 of the LFAAP to deny the status and dismiss the actions. It has also been revealed

that the Armenian law does not contain standards of proof in administrative procedures. Individuals are not certain to what extent to prove the matters required by law, while the authorities benefit from freedom of free evaluation. It has been recommended to suggest amendments to the legislation with a view of (i) establishment of special burden of proof in asylum/refugee cases in administrative procedure, (ii) establishment of standard of proof in asylum/refugee cases in administrative procedure.

The study found that the authorities and, sometimes, the administrative jurisdictions felt bound by brief conclusions contained in the consultative letters of the National security service of the RA. The courts felt barred to question the brief and abstract statements contained in the NSS letters. As a result, the asylum-seekers did not have access to effective remedy in cases the NSS provided negative opinions in their cases. The study assessed this case-law in light of the case-law of the European court of human rights on the "right to court with full jurisdiction", as well as the right to equality of arms and adversarial trial. The study recommended training of judges in light of such case-law as well as development of a manual for judges addressing the main problematic aspects from the point of view of international refugee law and national administrative law as applicable in refugee status determination.

The study, generally, recommended that the UNHCR continue to cooperate with other institutions who provide trainings to the members of the legal community of the RA, e.g. School of advocates, GiZ, for the purpose of including in the training agenda skill and knowledge items that is necessary among the members of the legal community. The study concluded that some of the aspects of concern revealed by this study were of systemic nature, i.e. poorly drafted legislation, while others were matter of practice, which could be changed through cooperation and sharing of knowledge and ideas.

Introduction

A. Scope and purpose

1. The main aim of administrative justice delivered by administrative jurisdictions is to provide effective remedies to individuals against unlawful action by administrative authorities encroaching upon subjective public rights of the individuals. In order to be able to reach this important goal emanating from the constitutional principle of the rule of law, the administrative jurisdiction must satisfy certain qualities, both in law and in practice of the law. Firstly, the judicial acts of administrative jurisdiction must be binding on the administrative authority. In addition to statutory prescriptions, the administrative authority must in practice follow the judicial acts delivered by the administrative jurisdiction as a result of judicial review. Secondly, the scope of judicial review should be sufficiently wide in order to make the remedy effective. At least one instance of administrative jurisdiction should be able and willing to provide full review, encompassing review of both key issues of law and fact. If the law prohibits the court or the court at its own motion declines to review decisive aspects of law or fact, such review is not effective and falls short of international and constitutional standards. Thirdly, in connection with the second point above, the administrative jurisdiction should not be bound by the findings of fact and law by the administrative authority, when the latter had exercised binding (or flexible) non-discretionary powers. The law should authorize the court to "disagree" with the incorrect findings of fact and law of the administrative authority and to compel the authority to act in accordance with the law. When the authority is exercising discretionary powers, the court should be authorized, as a minimum, to check if the authority acted within its competence and if it abused the boundaries of discretionary powers as set out by the law.

2. This work aims to reveal and study the nature of the powers of the administrative jurisdictions of the RA in cases involving disputes on refugee status determination/asylum, both as written in law and as interpreted by the administrative jurisdictions. The necessity to conduct such a study arose as a result of examination of several judicial acts delivered by the administrative jurisdictions of the RA in cases involving determination of refugee status and asylum. The study revealed a number of shortcomings in the relevant legislation, as well as in judicial practice. Since this work, in addition to revealing the issues, also aims to aid the relevant actors to improve the law and the practice in the research areas, it has produced a number of recommendations addressed to different actors.

B. Method and structure

3. This study examines the national law and practice. In particular, the study examines the relevant provisions of the Law on refugees and asylum of the RA[1] in order to reveal the nature of the powers of the SMS, because generally the scope and intensity of judicial review depend on whether the powers of the authority was discretionary or binding. The relevant provisions of the CACP are studied in order to reveal the nature of the powers of the AC as they appear in the text of a statute. The study then explores the relevant case-law of the administrative jurisdictions in the RA in order to understand the practice of the exercise of their powers in cases relevant for this study. For this end, 26 judicial acts from the AC, ACA and the CoC have been studied. Foreign legislation on the powers of administrative jurisdictions and the case-law on asylum/statelessness cases is examined in order to extract the best practices and inform he Armenian administrative justice system.

4. On 17 July 2015, the researcher held a short meeting with the Chairman and three judges of the Administrative court of the RA. During this meeting the researcher presented to the judges the research questions, methodology and aims of the study. There was a short and informative discussion on general issues of administrative law and refugee law of the RA, which helped the UNHCR to have better understanding of certain justice issues in the RA with regard to refugee law.

5. Since Armenian administrative law literature is not rich with analysis on administrative procedures and the powers of the AC, the study utilized and refers to foreign literature covering relevant aspects and controversies of administrative procedure and the powers of administrative jurisdictions. The relevant Armenian law and practice are assessed in light of national and international standards. As a result of such assessment, the study produced recommendations for reforms and improvement of the practices and laws.

[1] HO-211-N (adopted: 27 November 2008, entry into force: 23 December 2008)

II. Outline of domestic law

6. This part of the study outlines the domestic legislation relating to the powers and procedures of the SMS, as well as the powers of the AC of the RA in relation to judicial review of the administration exercised by administrative authorities. Firstly, the development of the Armenian administrative procedure law, both specific and general, as well as judicial procedural law is presented in a chronological order, including the history and significance of the amendments. Secondly, the powers of the SMS and of the AC are evaluated individually and in interaction with each other.

A. Administrative procedure in the RA

7. The powers of the SMS to make final decisions on matters related to asylum and refugee status are laid down in the LRA. The LRA defines the notion of "refugee", lays down the administrative procedures of refugee status determination, termination of such status, as well as the roles of other state organs in this area of regulation. Thus, both the provisions of the LRA and the LFAAP apply to the administrative procedure of refugee status determination conducted by the SMS. However, the provisions of the LRA, as the more specific law, have priority of application. In the absence of specific regulation in the LRA, the rules of the LFAAP apply.

8. Article 6 of the LRA defines the notion of "refugee" as a person who

> owing to well- founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is out- side the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it,
>
> or
>
> foreign national who was compelled to leave his state of nationality, and, in case of stateless person, to leave the state of his permanent residence due to widespread violence, external attack, internal conflicts, widespread violation of human rights or due to other serious events posing threat to public order.

9. Article 32 of the LRA lists ten state bodies[2] that have various competences related to refugees and asylum matters and prescribes that legislation may designate other competent state bodies. Article 34 prescribes that the SMS is the authorized state

[2] The Government, the Police, the National security service, municipalities

body in the field of refugees and asylum and grants exclusive competence to the SMS to conduct the administrative procedures and adopt final decisions on asylum claims. This means that only the SMS is authorized to make final decisions on the status of refugee and grant of asylum in the RA. Other bodies with competence in this field have only consultative functions aiding the SMS in matters related to determination of refugee status.

B. Administrative proceedings

i. Judicial remedies

10. The AC was established by the adoption of the Judicial Code of the RA in 2007[3]. The powers of the AC and the rules of procedure were laid down in the CACP of 2007[4], which was replaced by the CACP of 2013[5]. Both versions of the CACP prescribed, generally, six types of remedies:

- Provisional judicial protection;
- Quashing administrative acts;
- Compelling adoption of administrative acts;
- Compelling real acts (i.e. action or inaction);
- Recognition of legal relationships, voidness of administrative acts etc.;
- Quashing normative acts.

11. Uncovering of the nature of the powers of the AC of the RA is crucial for the purposes of this study. In order to complete this task, it is necessary to study the legal contents of the rules prescribing these remedies, as they appear in the text of the law and in the interpretations found in the case-law. The legal contents of these remedies differ in both versions of the CACP. The tables below list both versions of the four out of six remedies followed by a brief explanation of the significance of the amendment.

Action for quashing	**CACP 2007, art. 65**	**The plaintiff may claim to quash or to amend an interfering administrative act in whole or in part by bringing an action for quashing**
	CACP 2013, art. 66	1. The plaintiff may claim to quash an interfering administrative act in whole or in part by bringing an action for quashing (including the interfering part of the combining administrative act). 2. If the interfering administrative act was appealed before

[3] HO-135-N (adopted: 21 February 2007, entry into force: 18 May 2007)
[4] HO-269-N (adopted: 28 November 2007, entry into force: 1 January 2008)
[5] HO-139-N (adopted: 5 December 2013, entry into force: 7 January 2014)

	bringing the action, then the action shall include the claim of quashing the administrative act adopted as a result of the administrative appeals

12. The legislator made substantial and significant changes in the amendment of the provision on Action for Quashing. Firstly, in the CACP 2007, the AC was authorized to quash the unlawful administrative act in whole or in part or to amend it. Such power was subject of debates among the members of the legal community of Armenia, because it raised questions under the constitutional principle of separation of powers. In fact, this power granted the AC the legal power to replace the respondent administrative body and to "issue" any type of administrative act by way of amending it with a judgment. There are administrative jurisdictions in the Western legal systems that have substitutive powers, but these powers specify very limited circumstances where the court may amend the administrative act. In the CACP 2013 the legislator deleted the power of the AC to amend the administrative act. Under the current Action for Quashing individuals may only request that the AC partly or wholly quash the disputed administrative act. They cannot ask the AC to amend the disputed administrative act.

13. The second novelty of the Action for Quashing of the CACP 2013 is that now individuals may dispute the interfering provisions of the combining administrative acts[6]. Previously, the law clearly referred only to the interfering acts as objects of dispute before the AC, which excluded the combining administrative acts (although, in practice, the AC allowed judicial review of combining administrative acts).

14. The last amendment of the Action for Quashing concerns those cases where the individual used the administrative appeals system. Previously, under the CACP

[6] **Article 53. Definition and Types of Administrative Acts**
1. Administrative act is the decision, instruction, order or other individual legal act having external effect that administrative body adopted for the purpose of regulating a concrete case in the field of public law, and is directed to the prescription, amendment, elimination or recognition of rights and obligations for persons. Administrative act can also be directed to a group of persons classified according to a certain individual criteria.
2. According to the meaning of this law
   a) favorable administrative act is the administrative act through which administrative bodies grant rights to persons or create for them any other condition that improves the legal or factual situation of those persons,
   b) interfering administrative act is the administrative act through which administrative bodies refuse, interfere, up to restrict the enjoyment of the rights of persons, impose any obligation on them or in any other way worsen their legal or factual situation.
   c) combining administrative act is the administrative act in which both favorable and unfavorable provisions mentioned by administrative acts for person are combined.
   (Art. 53 amended by HO-10-N 13.012.14)

2007, there was a confusion among the advocates which act should be challenged before the AC, when there is the initial administrative act and the administrative act of the higher administrative body confirming the lower bodies' act. It was not clear whether these two acts must be challenged together or only the first or the second act. The CACP 2013 clarifies that the individual should challenge the initial administrative act. If the AC finds that it was unlawful, in addition to quashing this initial act, it will also quash the higher administrative bodies' administrative act.

15. Generally, this is the most frequently sought for legal action filed by individuals with the administrative jurisdictions. It should be concluded the AC of the RA has adequate quashing powers. Such legal regulation of the power of the court to quash unlawful action of the administrative authority corresponds to the international best practices found in the Western administrative justice systems.

Action for compelling	**CACP 2007, art. 66**	**The plaintiff may claim adoption of favorable administrative act, which was denied by the administrative body or which was not adopted by the latter by bringing an action for compelling**
	CACP 2013, art. 67	1. The plaintiff may claim adoption of the favorable administrative act, which was denied by the administrative body. 2. The action for compelling shall include the claim of quashing the administrative act mentioned in para. 1 of this Article.

16. The legislator also made significant changes in the Action for Compelling. Previously, the Action for Compelling could be initiated in two situations: (i) the administrative authority denied the adoption of a favorable administrative act by adopting an interfering administrative act (denial); (ii) the administrative authority failed to respond the application of an individual for a favorable administrative act (silence). The CACP 2013 allows initiation of this action only in the first situation. The "silence" of the administrative authority has been regulated under the next action, Action for Compelling (real acts).

17. Under the CACP 2007, when the individuals felt that merely quashing the unlawful administrative act would be insufficient and the law obliged the authority to issue favorable administrative act, they requested that the AC also compel the administrative authority to adopt a favorable administrative act that was denied or that was not adopted. In fact, in order to seek this remedy, the individual had to file two actions simultaneously, Action for Quashing and Action for Compelling. In case the individual failed to do so and filed only Action for Compelling, the AC would be unable to grant it, because the interfering administrative act of the administrative

authority denying the individual the favorable act would still remain in force. The last novelty of the Action for Compelling eliminated this obstacle. Now, individuals who wish to compel the administrative authority the adoption of a favorable administrative act, which the latter denied, includes the request of the individual to quash the denial of the authority.

18. The power of compelling the administration to perform certain actions makes administrative jurisdictions significantly more powerful. These powers are typical for the administrative jurisdictions in the continental Europe, while not very popular in the administrative justice systems of common law countries.[7] The provision on Action for Compelling in the CACP 2013 leads to the conclusion that the AC of the RA has adequate powers of compelling the administration to perform certain action, if it finds that the administration was under duty to act, but failed to do so.

Action for compelling (real acts)	**CACP 2007, art. 67**	**The plaintiff may request compelling of certain actions or refraining from such actions, which are not directed at the adoption of an administrative act by bringing an action for compelling or preventing real acts**
	CACP 2013, art. 68	1. The plaintiff may claim compelling of certain actions or refraining from such actions, which are not directed at the adoption of an administrative act by bringing an action for compelling or preventing real acts. 2. The plaintiff may bring an action for compelling or preventing real acts also to claim the document certifying the administrative act, if it was adopted as a result of non-adoption of the administrative act within the time-period prescribed by law.

19. The difference between the Action for Compelling and Action for Compelling real acts is that the first relates to written administrative acts only, while the latter

[7] Singh, M. P. *German Administrative Law in Common Law Perspective* (Springer, 2001), p. 121, ("[German administrative courts] can go into all question of legality whether apparent on the face of the record or hidden in or behind it and may also replace the administrative determination by their own in appropriate cases. Sometimes to avoid unnecessary delay and further harassment to the aggrieved party in the interest of justice the common law courts also provide the appropriate remedy in the judicial review proceedings. But they do so only exceptionally and not as a matter of rule"). These compelling/substituting powers of the German administrative jurisdictions are prescribed by Section 113 of the Code of Administrative Procedure. This clause grants the courts vast powers of compelling the authorities the adoption of favorable administrative acts. However, the rights of substitution is limited to very specific cases, e.g. when the disputed administrative act concerning an amount of money (e.g. social security payments) contains error that the court may without much difficulty correct. In all other cases the courts will rescind the unlawful administrative act, and, if required by law, compel the adoption of a favorable administrative act, letting the competent authority correct the mistakes in its new administrative act

refers to real acts of the administration, i.e. action or omission. Real acts of the administration are two separate types of administrative action[8]. Real acts do not change the legal situation of the individual, but create factual consequences for them.

20. The first part of this Action has not been changed in the CACP 2013, but part two has been added. The newly added second paragraph creates remedy for the individuals against the unlawful "silence" of the administration. "Silence" of the administration refers to the situation, where the individual filed a written request for a favorable administrative act, while the administration does not grant or deny it within the time period prescribed by law for the specific administrative procedure.[9] In such situations, the law considers that the "silence" of the administrative authority means it has granted the request of the individual, i.e. the requested favorable administrative act was adopted. However, on practical level, the individual still does not possess the official document, i.e. certificate, license, permission etc. confirming that the act has been obtained. This created technical obstacles for the individuals in their relationships with other administrative authorities. This remedy was created for the sole purpose of protecting the individuals who face such technical problems. Under this remedy, the individual only requests the AC to compel the administration to issue the official document, which certifies that the authority had already issued the favorable act by taking no action.

Action for recognition	**CACP 2007, art. 68**	**1. By launching an action for recognition the plaintiff may claim recognition of existence or absence of any legal relationship, if he/she cannot launch actions under Articles 65-67.** **2. By launching an action for recognition the plaintiff may claim that the administrative act be declared as being null and void.** **3. By launching an action for recognition the plaintiff may**

[8] "…activity of administrative bodies having external effect resulting in the issuance of administrative or normative act, as well as action or omission, which have actual consequences for persons".

[9] Article 48. Consequences of Failure to Issue an Administrative Act within the Time Period for the Administrative Proceeding

If the administrative body competent to adopt an administrative act fails to adopt such act within the time period prescribed by law with respect to an administrative proceeding commenced at a person's petition:

a) administrative act shall be considered to have been adopted and the applicant may take steps in the enjoyment of the right requested,
b) if petition requires provision of a document prescribed by law in regard to affirmation or recording of a fact (birth, death, absence of a person etc.), then the person that did not receive the relevant act pursuant to his petition or the persons that petitioned that act shall be exempted from such obligations or any liability prescribed by law for not having these documents.

	claim that the action or the interfering administrative act without legal effect be declared as unlawful, if the plaintiff has justified interest in the recognition of the action or the administrative act as unlawful, i.e.: **1) there is a danger that in similar situation similar interfering administrative act may be adopted or action may be taken again;** **2) plaintiff intends to claim compensation for pecuniary damage;** **3) plaintiff intends to recover his/her reputation, dignity or business reputation.**
CACP 2013, art. 69	1. The plaintiff may request recognition of existence or absence of any legal relationship by launching an action for recognition, if he/she cannot bring the actions under Articles 66-68. 2. The plaintiff may request that the administrative act be declared as being null and void by launching an action for recognition. 3. The plaintiff may request that the interfering administrative act without legal effect or the action or inaction that lost its legal effect because of implementation or other reasons be declared as unlawful by bringing the action for recognition, if the plaintiff has justified interest in the recognition of the action, inaction or the administrative act as unlawful, i.e.: 1) there is a danger that in similar situation similar interfering administrative act may be adopted or action may be taken again; 2) plaintiff intends to claim compensation for pecuniary damage; 3) plaintiff intends to recover his/her reputation, dignity or business reputation

21. Action for Recognition is a subsidiary action. Individuals may successfully file it, if they can prove that they could not file one or more of the other three remedies. One major amendment was made in paragraph 3 of article 69 (previously 68). According to this amendment, Action for Recognition can be submitted not only in relation to unlawful actions and written administrative acts of the administrative bodies, but also against the unlawful inaction of the authorities. Such amendment

was necessitated by the decision of the Constitutional Court.[10] As the text of the remedy and the above mentioned demonstrates, individuals will use this remedy rarely, when other remedies cannot be used.

ii. Investigative powers of the AC

22. One of the distinctive features of administrative proceedings in many countries of continental Europe is the inquisitorial nature of the proceedings. Administrative court judges are under duty to establish the circumstances of the administrative case *ex officio* without the motion of the parties. Administrative justice of the RA followed this tradition. Article 5 of the CACP 2013 prescribes the duty of the court to establish the facts of the case *ex officio*:

> 1. The court shall establish the facts of the case *ex officio*.
>
> 2. The court shall not be restrained by the evidence, motions, proposals, explanations and objections submitted by the parties to the proceedings, and shall, at his own initiative, take adequate measures in order to obtain possible and accessible information about the actual facts necessary for the resolution of the concrete case.
>
> 3. The court shall indicate to the formal errors in the lawsuit, propose clarification of unclear claims, replace incorrect lawsuit with the correct ones, distinguish main and subsidiary claims, complete insufficient factual circumstances, as well as demands the submission of all evidence necessary for the establishment and assessment of factual circumstances of the case.

23. Compared to the CACP of 2007, there has been significant clarification of the inquisitorial powers of the court in the CACP 2013. One noteworthy change is within the scope of the fact-finding duties of the court. The CACP 2007 imposed on the AC the duty to establish the facts *ex officio* without setting any limits to this duty. The AC was under duty to establish all missing and necessary facts in all cases until it was ready to dispose of the case. The CACP 2013 added scope and limits to the duty of the AC to establish the facts. The AC now has to seek the information that it deems to be possible to obtain and accessible for the court. It is for the judge presiding over the administrative case to determine whether or not the information is possible to obtain and whether or not it is accessible for the court. Such margin of appreciation is subject to appellate supervision. The legal contents and the exercise of this power will be discussed later below.

iii. Judicial acts of the AC on discretionary powers

[10] Decision of the ConC of 22 February 2011, SDV-942

24. Article 125(5) of the CACP prescribes the powers of the AC in cases involving judicial review of exercise of discretionary powers by administrative authorities:

> In cases, when the administrative body was competent to exercise discretionary powers, the Administrative court also checks whether the adoption or refusal to adopt the administrative act, action or inaction where lawful. If the administrative body was competent to exercise discretionary powers and the Administrative court concludes that the exercise of such powers by the administrative body was unlawful, then in the conclusive part of the judgment the Administrative court prescribes the duty of the administrative body to adopt the administrative act or to take the action or to refrain from the action taking into account the court's legal positions.

25. Article 125(5) does not prescribe a separate remedy for individuals, but it stresses the powers of the AC to instruct the administrative bodies to act in a certain way in case they exercised their discretionary powers unlawfully. It should be noted that this provision of the CACP does not authorize the AC to order the administration to act in a certain way, if the administration abused its discretion. This provision, rather, prescribes the power of the AC to impose a duty on the administration breaching its discretionary powers to take into account the AC's legal positions when reconsidering the case after the judgment of the AC. For instance, if the AC quashed the administrative act on the ground that the exercise of discretion was not adequately reasoned, the AC will not order the administration to adopt another administrative act with a definite content. Instead, the AC will instruct the administration to adequately reason its exercise of discretion during reconsideration of the case.

III. Analysis of the nature of the powers of administrative authorities

26. All powers of administrative authorities may be divided into two broad categories: discretionary powers and binding powers (or duties)[11]. The intensity of judicial review of administrative acts by the Administrative court usually differs depending on the structure and type of the powers of the administrative authority[12]. For this reason, in order to understand the nature and the scope of judicial review in a given system, it is necessary to divide the discussion into two parts. One should discuss the nature and the scope of judicial review of discretionary powers of the authorities, while the other the nature and the scope of judicial review of binding powers. For the purposes of this study, it is necessary to define and outline the structure of the rules granting legal powers to administrative authorities, in general, and find out whether the powers of the SMS with regard to decision-making on the status of refugee/asylum are discretionary or binding, in particular. The powers of the AC of the RA as they appear in the text of the law and in practice will be explored in light of the assessment of the nature of the powers of the SMS below.

A. Discretionary powers

27. Grant of a discretionary power by legislators to admin bodies is a legislative technique. Administrative discretion is not to be equaled with arbitrariness, unlawfulness, absolute and unrestrained power. Since discretionary power is a legislative drafting technique, grant of discretionary powers to administrative authorities is an intentional legislative process. Administrative authorities may not possess discretion, because the legislator produced defective text of a statute or created a gap in the law. In certain situations the legislative body decides it is better from policy and legal perspectives to design the power of administrative authorities in a discretionary, rather than in a binding manner. Other times the legislator does not have a choice but to grant discretions.

28. The discretionary power [of administrative authorities] is a legislative technique the application of which ensures a **higher level of justice in individual cases**. The administrative institution or the court may use its discretionary power only for

[11] Wade, W., Forsyth, C. *Administrative Law* (9th ed., Oxford University Press, 2004) p. 311

[12] See in Թովմասյան, Հ., Լուխթերհանդթ, Օ., Մուրադյան, Գ., Պողոսյան, Վ., Թայմեբս, Վ., Ռուբել, Ռ. (խմբ. Թայմեբս, Ռ. և Պողոսյան, Վ.) *ՀՀ քրգհանուր վարչական իրավունք: Ուսումնական ձեռնարկ* (Բավիղ, 2011), p. 206 (The structure and types of discretionary powers gain significance during judicial review of the lawfulness of exercise of such powers.)

this purpose[13]. The opposite of such legislation is the typified legislation where the legislator lists all typical situations and actions to be covered by the rule.[14] While at first sight conferring upon administrators only binding powers, instead of flexible discretions, may seem simpler and just, that is not the case in practice, as it is demonstrated by examples below.

29. According to Article 6(1) of the LFAAP, discretionary power is the right of the administrative body granted by statute to choose any solution among several available lawful solutions.[15] The central elements in this definition are (i) the availability of two or more lawful solutions in a particular situation and (ii) the right of the competent administrative body choose any of these solutions and apply to the relevant factual circumstances. Lack of available lawful options for action and the right of the authority to choose among them are solid indications that the authority lacks discretionary power and possesses a duty. In the latter case, if the authority takes any other action than the one prescribed by law, it must be qualified as unlawful administrative action on the ground of a breach of a statutory duty. In case of a breach of a duty by an administrative body, the administrative jurisdictions in many Western legal systems have competence to compel the breaching authority to comply with its statutory duty.

30. It is useful to understand the phenomenon of administrative discretion with reference to the general structure of the legal norms and rules of statutory construction. Almost every legal norm can be turned into a structure of "if - then" logical syllogism. In such a structure, if certain factual circumstances are established by proof, then certain legal consequences will (*may*) follow.[16] The "real" discretion of the administrative authority in its strict sense must be found in the "then" part of the legal norm, where, according to the definition of Article 6(1) of the LFAAP, "several available lawful solutions" are to be found. These are the legal consequences the legislator prescribed for the administrative authority to apply in relevant factual circumstances. A classical example of a discretionary power is prescribed in Article 169.1(2) of the Code of Administrative offences of the RA:

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[13] Levits, E. *General Clauses and Discretionary Powers of Administrative Institutions and Courts* (2004) Law and Justice 2, para. 25

[14] *Ibid*., paras. 11-14

[15] Committee of Minister of the Council of Europe, *Exercise of Discretionary Powers by Administrative Authorities* (Recommendation No. R (80)2, 11 March 1980), para. I.

[16] Levits, E., *General Clauses and Discretionary Powers of Administrative Institutions and Courts* (2004) Law and Justice 2, para. 19; Kunnecke, M., *Tradition and Change in Administrative Law: An Anglo-German Comparison* (Springer, 2007), p. 79 (The German concept of discretion has to be seen in the context of the German method of statutory construction. Statutes are seen to consist of two parts: a distinction is drawn between those elements, which constitute the facts (Tatbestand) and those parts, which deal with the legal consequence.); Թովմասյան, Հ., Լուխթերհանդթ, Օ., Մուրադյան, Գ., Պողոսյան, Վ., Թայմերս, Վ., Ռուբել, Ռ. (խմբ. Թայմերս, Ռ. և Պողոսյան, Վ.) *ՀՀ քրեդատաւոր վարչական իրավունքի: Ուսումնական ձեռնարկ* (Բավիղ, 2011), p. 202

> Failure to submit declaration or report or any other document prescribed by law… to tax authorities within the prescribed time-period… shall be punished by a fine of ten to twenty times of the minimum salary prescribed by law[17].

31. In this example, *if* the competent administrative authority has sufficient evidence to prove that a taxpayer was obliged, but failed to submit the required reports within the time prescribed by law, *then* it must impose a fine on the taxpayer. However, the legislator has not determined the exact amount of the fine for such offence. The latter only prescribed the lower and upper limits. Thus, within the meaning of the definition of discretionary power prescribed by Article 6(1) of the LFAAP, the tax authority has around ten thousand available lawful options to choose from in such situations. Therefore, the power of the tax authority under Article 169.1 of the Code of Administrative Offences is a discretionary power.

32. How such a flexible rule may ensure "greater justice in individual cases"? Wouldn't it be fairer to individuals and the society in general, if the rule prescribed only one amount of fine for all individuals in all circumstances, e.g. 20.000 AMD? Each situation is unique and different from all others. One taxpayer may violate the rule in Article 169.1(2) by inflicting significant harm to the state by, multiple times in a year, intentionally and using particularly dangerous methods. In such a case one might agree, that the fine of 20.000 AMD is just for such taxpayers. However, another taxpayer may breach the same rule for the first and only time due to negligence or technical reasons and cause no harm to the state budget (e.g. lack of any income for the reported period). It cannot be justly asserted that the fine of 20.000 AMD would also be fair towards this taxpayer, because circumstances differ significantly. However, due to lack of discretionary power, the tax authority would have no other lawful option, then treating the second taxpayer in the same way as the first one. Such situation may seem just and equal generally, but it will always be unjust for certain individuals, such as the second taxpayer. Thus, in order to ensure greater level of justice in individual cases, legislators intentionally grant discretions to administrative authorities.

B. Non-discretionary "flexible" powers

33. There are other techniques of "flexibilising"[18] legislative rules without granting discretionary powers to administrative authorities in its classic form (i.e. freedom

[17] For the purposes of this and analogous legislation, minimum salary has been fixed at 1000 AMD

[18] For the concept of "flexibilisation of the law" see in Levits, E., *General Clauses and Discretionary Powers of Administrative Institutions and Courts* (2004) Law and Justice 2, para. 19 (There are two legislative techniques, which, when correctly and appropriately incorporated in the law, may help flexibilise the law… in the conditional part of the norm such a technique consists in open legal concepts (general clauses), while under legal consequences this would be the discretionary power of an authority… Although these techniques decrease the benefit achieved by issuing a statutory legal act for regulating a typical situation – because finding a more correct (i.e. fairer) solution in an individual case is a more time-consuming process than adopting a standard decision – yet it is an acceptable compromise in order to

to choose legal consequences). Thus, another type of "flexible" official power often granted to administrative authorities is that, which include indefinite (open) legal concepts in the factual (or "if") part of the legal rule.[19] The indefinite legal concepts are abundant in the legislation. Example of such concepts are 'public welfare', 'public interest', 'need', 'public need', 'public safety', 'public order', 'reliability', 'urgency', 'unreasonable', 'morality' etc., which are quite commonly used in the statutes conferring powers on the administrative authorities.[20] Although these types of rules often contain significant level of flexibility, they are not discretionary powers in its strict sense. In addition to structural differences, the key difference between legal rules that contain discretionary powers and those that contain indefinite open legal concepts is the intensity of judicial review over the exercise of such powers by the authorities. Undefined open legal concepts can only be interpreted in a correct way. As a consequence, its application is fully reviewable by the courts.[21]

34. As cited from Levits in ft.13 above, inclusion of open legal concepts in the rules that confer legal powers to administrative authorities is another legislative technique, similar to, but different from, discretionary power, whose aim is to achieve greater level of fairness in individual cases. For instance, the law may prescribe that the competent authority on civil status shall grant the request of an individual for changing her name, if there are justified reasons for such a change.[22] This rule does not grant the authority the right to choose among several lawful possibilities the one it thinks more appropriate in the circumstances. Instead, the authority has to interpret in each individual case the concept of "justified reason". Such term makes the law more flexible, and, therefore, more just, if applied correctly by the authority. If the law contained exhaustive list of all reasons that justify change of a surname, the authority would not have any freedom of interpretation. However, no legislator can predict all reasons for which individuals justifiably may want to change their surnames. Thus, such law would result in injustice for those individuals who have serious reasons for changing their surnames, but they have not been predicted by the legislators and included in the text of the law.

35. Both discretionary powers in strict sense and indefinite legal concepts contain elements of decision-making freedom of administrative authorities. However, the

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prevent excessive tension between strictly defined regulation and justice in an individual case, which might lead to admitting that the regulation of the law is unfair and, hence, void…)

[19] Singh, M. P. *German Administrative Law in Common Law Perspective* (Springer, 2001), pp. 176-181. See also in Levits, E., *General Clauses and Discretionary Powers of Administrative Institutions and Courts* (2004) Law and Justice 2, para. 20; Kunnecke, M., *Tradition and Change in Administrative Law: An Anglo-German Comparison* (Springer, 2007), p. 79

[20] Singh, M. P. *German Administrative Law in Common Law Perspective* (Springer, 2001), p. 176

[21] Kunnecke, M., *Tradition and Change in Administrative Law: An Anglo-German Comparison* (Springer, 2007), p. 79

[22] See the decision of the German Supreme Administrative Court of 29 September 1972 BVerwG 40, 353 (the summary of this decision can be found in Russian in Richter, I., Schuppert, G. F. *Casebook Verwaltungsrecht* (C.H. Beck'sche Verlagsbuchhandlung, 1995), p. 40

differences of these two types of powers are sufficiently significant to justify judicial review of different intensity. The review powers of the AC of the RA in relation to both discretionary and non-discretionary "flexible" powers of administrative authorities will be discussed in Section III. and IV. below.

C. Non-discretionary binding powers

36. Powers of administrative authorities that do not contain discretions or otherwise flexible concepts are the duties of the administrative authorities. The only option for lawful action mentioned in such rules is binding the administrative authority. In some statutes the legislator clearly prescribes that the administrative body is obliged to take certain action or refrain from it, in others such obligation flows from the text. For instance, Article 16(2) of the LRA of the RA prescribed the duty of the competent authorities to inform the asylum –seekers and refugees about their right to apply to the UNHCR at any time at the moment of receiving the asylum request. This rule does not contain open legal concepts or several lawful options for choice by the authorities. Instead, it explicitly prescribes the duty of the authority, which is the only lawful action. According to Article 55(3)(1) of the LRA of the RA, the SMS terminates the asylum procedure, if the asylum-seeker requests the SMS to do so in writing. This rule obliges the SMS to take only one action, in the presence of the relevant request by the asylum-seeker. Therefore, even without being so written explicitly, it is clear that with this rule the legislator prescribed an obligation for the administrative authority.

37. Thus, obligations of administrative authorities are the opposite of discretionary powers and different from open legal concepts. In practice, it is advisable to always distinguish discretions, open legal concepts and duties and treat them accordingly by all participants of the administrative law relationships, i.e. authorities, individuals and, later, by the reviewing judges of the administrative jurisdictions.

D. The nature of the powers of the SMS

38. The brief outline of the main typology of official powers of administrative authorities in the preceding part of the study makes it obvious that the powers of the SMS to make decision on the status of refugee and grant of asylum are not discretionary. Instead, these powers contain indefinite (open) legal concepts, which make these powers flexible to a certain extent. As such, the legality and correctness of application of the mentioned flexibility by the SMS is subject to full judicial control by the AC of the RA.

39. Article 6(1)(1) of the LRA defines the notion of refugee. Such definition reflects the definition prescribed by the Refugee Convention of 1951 and its Protocol of 1967. Accordingly, refugee is the person, who

> owing to well- founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is out- side the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

40. However, the Armenian legislator went beyond this definition and, in line with international standards and best practice, prescribed another ground for the grant of the status of refugee.[23] Accordingly, Article 6(1)(2) of the LRA of the RA prescribes, that refugee is

> a foreign citizen, who has been compelled to leave his/her citizenship, or, in case of stateless person, his/her former residence due to generalized violence, foreign aggression, internal conflicts, massive violation of human rights, or other serious events, which have disturbed public order.

41. In order to determine who qualifies as refugee under the definition of Article 6 of the LRA, the SMS has to conduct the administrative procedures of refugee status determination resulting in a final decision. Article 34(1)(2) of the LRA prescribes that the power to make decisions on asylum shall rest exclusively with the SMS. This provision confirms that other administrative authorities may not make final decisions on asylum request, but may provide, upon the request of the SMS, consultative opinions and conclusions. It is clear from the LRA that the power of the SMS to make determination on the status of refugee and grant of asylum is not discretionary. The SMS is not authorized to choose among various lawful options as legal consequences for asylum-seekers, since such options do not exist. In any individual situation, the person is either refugee or is not a refugee. If the person meets the requirements of refugee, it would be unlawful to deny recognition of this status and grant of asylum. If the person meets the definition of refugee, the SMS is under legal duty to recognize this status. If the person does not meet the definition of refugee, the SMS is under statutory duty to deny recognition of the status and grant of asylum. Moreover, the grounds of exclusion from refugee status and denial of asylum are exhaustively listed in Article 11 of the Law on Refugees and Asylum.

42. The conclusion on SMS powers in the field of granting refugee status and asylum being non-discretionary is supported also by a well-accepted general principle of international refugee law. According to that principle, granting of refugee status has only declaratory nature: a person is a refugee within the meaning of the 1951 Convention as soon as he fulfills the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally

[23] This part of Article 6 of the LRA of the RA has been inspired by Article 1(2) of the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa of

determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.[24]

43. However, the SMS is authorized to lawfully and correctly interpret the undefined legal concepts in the definition of refugee and apply it in each individual case. Such an application involves determination of the contents of the indefinite open legal concepts found in the definition of refugee, such as "well-founded fear", "persecution", "particular social group" etc.[25] It is clear from such definition that it would be practically impossible by the national and international legislator to list all situations where the person would qualify as refugee and deserve grant of asylum. For this reason the international legislator and, later, the Armenian legislator, drafted this rule in a more "flexible" way in order to ensure greater fairness in each individual situation. The administrative jurisdictions have full control over the interpretations of the applicable legal rules of the SMS. This means the judiciary has the right of final word on whether the person is or is not a refugee. The contrary would entail in a situation where some interpretations of the law are non-reviewable by the AC. Such a situation would be incompatible with Article 19 of the Constitution of the RA, which guarantees the right to a fair trial, including access to justice.

44. The SMS has other powers under the LRA of the RA, which contain undefined open legal concepts. One of such powers can be found in Article 10(3) of the LRA, according to which the asylum provided to the refugee in the Republic of Armenia shall be terminated, if, on the ground of serious reasons, he/she poses threat to the national security of the RA. The concepts of "serious reasons" and "threat to national security" are indefinite legal concepts, which the SMS has to interpret and apply correctly in each situation. The SMS has not been granted discretion with regard to termination of asylum. Nor it can decide which situation constitutes threat to national security arbitrarily. Whether or not there exist serious reasons, as well as whether the person poses threat to national security are factual findings made by the SMS on the basis of evidence and lawful assumptions.[26] Such factual

[24] See UNHCR Handbook, paragraph 28.
[25] UNHCR, in the exercise of its mandate, as contained in the Statute of the Office of the United Nations High Commissioner for Refugees, and Article 35 of the 1951 Convention relating to the Status of Refugees, regularly issues legal interpretative guidance in the area of refugee law, including on interpretation and application of the concepts of the refugee definition. See, for example, UN High Commissioner for Refugees (UNHCR), Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, December 2011, HCR/1P/4/ENG/REV. 3, available at: http://www.refworld.org/docid/4f33c8d92.html. See also study commissioned by UNHCR Armenia aimed at exploring legal avenues for introducing UNHCR opinion/position in the domestic courts of Armenia.
[26] "The insufficiency of evidence shall not be ground for the authorized body to deny making decision or for making a negative decision. Suspicions arising from events that took place outside the territory of the Republic of Armenia shall favor the asylum-seeker." Article 52(4), LRA of the RA

findings and legal determinations, too, are subject to full judicial review by the AC, as demonstrated below.

E. The nature of judicial review

45. The AC of the RA is authorized to conduct review of points of facts underlying the disputed administrative action, if the disputed action was taken in the exercise of binding powers. If the authority adopted the decision X in the exercise of its binding powers, while during judicial review the AC finds that the law required the adoption of Y decision, the AC will have to compel the authority to adopt the decision Y (and quash the decision X as unlawful). Such view derives from the law, case-law and scholarship.

46. The authors of the first textbook of Armenian administrative law assert that in judicial review of the exercise of discretionary powers of administrative authorities, the administrative jurisdiction may review the legality of the disputed action, but not the appropriateness of such action:

> In contrast to binding administrative action, in discretionary administrative action the law grants administrative bodies the possibility to choose any one of the several legitimate solutions. This way, the administrative body gains the authority to decide the appropriateness of one or the other solution. The question is what are the limits within which the administrative court is authorized to review such administrative act. If the administrative court was authorized to conduct full judicial review, including the appropriateness of the act, then it will inevitably face a situation where the necessary legal criteria for solution of the case are absent. Such interference would largely cast a shadow on the principle of division of powers in the relationship between the executive and the judicial powers.[27]

47. For instance, where the authority has discretion to choose the amount of the fine within the prescribed range, e.g. 10-20.000 AMD and the AC finds that the fine of 20.000 in a particular case was unlawful, it lacks further authority to "remind" the authority what would be the lawful amount of fine. In the following two cases on the limits of judicial review of administrative acts adopted pursuant to discretionary powers of administrative authorities, the CoC made the following precedential rulings:

> …the Court, which is a body exercising judicial power, lacks competence to decide the period of leasing a land [by the Mayor of Yerevan]. In this case such a decision by the court would be lawful only if the administrative authority possessed binding powers that excluded discretion. Prescription of a specific period of lease interferes with the discretionary power of the administrative authority. Such interference is

[27] Թովմասյան, Հ., Լուխթերհանդը, Օ., Մուրադյան, Գ., Պողոսյան, Վ., Ռայմերս, Վ., Ռուբել, Ռ. (խմբ. Ռայմերս, Ռ. և Պողոսյան, Վ.) *ՀՀ ընդհանուր վարչական իրավունք: Ուսումնական ձեռնարկ* (Բավիղ, 2011), pp. 394-5

> permissible only within the limits of checking the legality of the exercise of such discretion.[28]
>
> …in cases, when the Court finds that the administrative authority exercised its discretionary power in breach of the law, the Court lacks competence to prescribe maximum, minimum or specific amount of fine. In other words, the Court interfered with the discretionary power of the administrative authority, which is permissible only within the limits of checking the legality of the exercise of such discretion.[29]

48. Thus, both the scholars and the case-law support the view that the review of discretionary powers has certain limits, i.e. it excludes the review of appropriateness of the decision, which is left to the competent authority's discretion. Such limitation on judicial review applies only if the administrative authority adopted the disputed act using its discretionary powers. In the absence of discretionary power, when the authority exercised binding powers, the AC conducts full review. Full review means the court is authorized to review all factual and legal matters in the case.

This is the case in Germany where administrative courts are both courts of fact and law:

> …like any court of initial and conclusive jurisdiction, not only the administrative courts can go into all questions of law and facts, but can also record all the evidence necessary for a proper disposal of the dispute.[30]

49. Armenian legislator follows the latter tradition and created a court of both law and fact in all public law matters, except constitutional issues.

50. Once the analytical process produces the conclusion that the concerned power of an administrative authority is binding, i.e. the latter is authorized by law to take only action X, it may be safely asserted that the AC of the RA is authorized to: (i) inquire into all aspects of fact and law of the case; (ii) disagree with the authority, in case the latter took action Y, instead of action X; (iii) compel the authority to take the action X. It has already been established that under the LRA the SMS is vested with a binding "flexible" power of granting/refusing recognition of refugee status. Thus, the AC may look into all factual and legal questions within the administrative case against the SMS. In case it finds that the facts of the case leads to the conclusion that the individual meets the definition of refugee and the SMS refused to recognize the person as refugee, the AC is authorized (obliged) to compel the SMS to recognize the person as refugee. On the contrary, the law did not authorize the AC to limits its reviewing and compelling powers by reference to the discretionary powers of the SMS, since the latter powers are not discretionary.

[28] 2 March 2007, 295 (□□)
[29] 26 December 2008, □□/1492/05/08
[30] Singh, M. P. *German Administrative Law in Common Law Perspective* (Springer, 2001), p. 134

IV. Outline and assessment of domestic case-law

51. For the purposes of this study, the case-law of administrative jurisdictions of the RA, consisting of the AC, ACA and the CoC, on refugee status and asylum can be divided into two groups. In the first group, the administrative jurisdictions refused to conduct full judicial review on the ground that the SMS exercised discretionary powers, in which case the CACP, allowed only limited review. In these cases the administrative jurisdictions also referred to the rules of burden of proof in administrative procedure under the LFAAP. In the second group, the administrative jurisdictions dismissed the actions by refugees and asylum seekers with reference to the consultative opinions obtained from the NSS reasoning that these opinions are binding on all administrative bodies, including the SMS and the Police, and not subject to substantive review by the court. In some of the cases this was among other grounds for dismissal. Each of the groups of case-law is summarized and evaluated below.

A. Judicial review of discretions and non-discretions

52. Both the SMS and the AC of the RA generally treated the powers of the SMS on refugee status determination as discretionary powers. In a case concerning the citizen of Georgia, who asked the AC to review the decision of the SMS denying her the status of refugee, the SMS asserted before the AC that its powers of refugee status determination are discretionary. With reference to the constitutional provision on separation of powers, the SMS asserted that the AC lacks constitutional powers of compelling the SMS to recognize the person as refugee, because the legislator granted the SMS discretionary power by law.[31] The AC refused to annul the decision of the SMS on the ground that the latter conducted complete, comprehensive and objective examination of facts and found that the person did not qualify under the definition of refugee. The AC did not address the assertion of the SMS that its powers were discretionary. The CoC refused to admit the complainants cassation complaint.[32] The SMS made the same assertion regarding the nature of its powers before the AC in many subsequent cases.[33] With several exceptions, the AC did not address these assertions.

53. The nature of the powers of the administrative authority whose decision is under review is a significant matter for the reviewing court. It is so significant that the intensity of review by the court depends on the very nature of the powers of the

[31] Judgment of the AC of the RA of 2 June 2010, ՎԴ/4749/05/09, p. 6
[32] Decision of the CoC of the RA of 28 July 2010
[33] Judgment of the AC of the RA of 17 December 2012, ՎԴ/6630/05/11, p. 7

authority. When in judicial review proceedings the authority whose decision is under review asserts that it made the decision at its own discretion, the AC is compelled to address such assertion, even if there are other grounds of review. Leaving unaddressed the assertion of the authority on possession of discretionary powers, which are in fact binding powers, may result in repetitious incorrect exercise of its powers by the same authority, which results in new judicial review cases in the AC. Binding powers cannot be exercised as if they were discretionary. When such practice is brought to the attention of the AC, it ought to address it and clarify for the asylum-seekers, refugees, the SMS and the public whether or not the authority has been vested with discretion. Silence of the AC in these situations may be perceived as approval of the assertion of the SMS, as the practice of the latter demonstrates.

54. In an earlier case in 2009 the AC made an explicit legal finding that the powers of the SMS on recognition of refugee status and grant of asylum are discretionary powers on the ground that with regard to requests for asylum the SMS had been authorized to choose any of the several lawful options.[34] The AC made a general declaration that such discretionary power was conferred on the SMS by the LRA, but did not mention nor cited in its judgment any specific provision(s) of the LRA that granted discretionary powers to the SMS with regard to refugee status and asylum.

55. The AC found that the powers of the SMS were discretionary in a number of other cases, using the following reasoning:

> In a situation where the individual failed to produce any evidence proving the existence of factual circumstances favorable to him, it is the conviction of the court that the disputed decision of the administrative body is lawful, its contents is in conformity with the requirements of the law on the Fundamentals of administration and administrative procedure, because it contains reasoning on all significant factual and legal circumstances, which enabled the administrative body to adopt this decision while exercising its discretionary powers.[35]

56. Firstly, the first part of this reasoning shifts the burden of proof to the asylum-seeker. Secondly, this reasoning does not make it clear how failure of the plaintiff to produce evidence on favorable circumstances (even supposing one is under such a duty) is connected with the possession and exercise of discretion by the SMS. What is clear from this paragraph frequently found in judicial acts on refugee status/asylum cases, is that the administrative jurisdictions declare that the SMS possessed and exercised discretionary powers in taking its administrative act. There is no reference to any legal rule prescribing such

[34] Judgment of the AC of the RA of 4 September 2009, ՎԴ/1693/05/08, p. 9

[35] Judgment of the AC of the RA of 9 September 2014, ՎԴ/5706/05/12; judgment of the AC of the RA of 21 November 2014, ՎԴ/12642/05/13, which was affirmed by the decision of the ACA on 7 May 2015; judgment of the AC of the RA of 25 September 2014, ՎԴ/5119/05/14

discretionary power of the SMS. As has been demonstrated above, administrative bodies are vested with discretionary powers by the legislators for a number of reasons, all of them unconnected from the rules of burden of proof. It has also been conclusively demonstrated that the powers of the SMS are not discretionary, irrespective of who bears the burden of proving certain circumstances. In any situation before the SMS, the person is either a refugee or is not a refugee, which is a factual determination on the basis of evidence and is not subject to discretionary decision. If the person who bears the burden of proving certain circumstances fails to do so, and the SMS, in the exercise of its duty to *ex officio* conduct a full, objective and comprehensive examination of the factual circumstances of the case, including of those favourable for the applicant,[36] does not reveal evidence supporting the refugee claim, then the SMS might hold the person is not a refugee on the basis of lack of evidence that the person is refugee, but not on the basis of its discretion. The holding above has been recently affirmed by the ACA.[37] Shortly after the decision of the ACA confirming the discretionary nature of the powers of the SMS, the AC made a judgment[38], which follows the decision of the ACA about the nature of the powers of the SMS.

57. After finding that the powers of the SMS were of discretionary nature, the AC found that it has limited powers of review when the administrative authority was authorized by law to exercise discretionary powers:

> …the administrative court finds that the court's act cannot replace the administrative authority and implement the authority's discretion. If the authority is competent to choose among several lawful options, then the court cannot realize this discretion and decide, instead of the authority, which option must be chosen. If the court was able to do this, it would violate the principle of separation of powers prescribed by Article 5 of the Constitution of the Republic of Armenia.[39]

58. Such finding by the AC on the limits of judicial review of discretionary powers of the administrative authority is generally correct. It is in line with the constitutional principle of separation of powers, as well as the case-law of the CoC on the limits of judicial review by the AC over the exercise of discretionary powers by administrative authorities.[40] However, such finding maybe made only in case the administrative authority is vested with discretionary powers. In case the authority, which is the SMS in this case, lacks discretion as regards the legal

[36] See Article 37 of the Law on Fundamentals of Administrative Action and Administrative Proceedings. For further guidance on burden of proof and establishing the facts in refugee status determination procedures in general, see UNHCR Handbook, paragraphs 195-204; UNHCR Note on Burden and Standard of Proof in Refugee Claims. See also A. Zrvandyan, 2013, Ապացույցները և ապացուցումը փախստականի կարգավիճակի գնահատման վարչական վարույթում

[37] Decision of the ACA of the RA of 7 May 2015, ՎԴ/12642/05/13

[38] Judgment of the AC of the RA of 4 June 2015, ՎԴ/5119/05/141

[39] Judgment of the AC of the RA of 4 September 2009, ՎԴ/1693/05/08, p. 10

[40] See the decisions of the CoC in footnotes 27 and 28

consequences, such judicial finding on the limits of the reviewing powers of the AC entails incorrect interpretation and application of law. As a result of the perception of administrative jurisdictions of the powers of the SMS as discretionary, individuals seeking administrative justice from these jurisdictions in fact obtained limited judicial review, while they were entitled to full judicial review because of the binding nature of the powers of the SMS. The nature of the powers of the SMS may be easily clarified by making amendment(s) in the LRA.

B. The scope of fact-finding powers of the AC

59. In the earliest judgment[41] examined for the purposes of this study, the AC quashed the decision of the SMS and compelled the latter to recognize the refugee status of the plaintiff in the RA. This is the only known case where the AC compelled the SMS to recognize the refugee status of the claimant. In subsequent cases the administrative jurisdictions either dismissed the plaintiff's lawsuit(s) or granted only the lawsuit for quashing. The AC reasoned its decision with the following grounds, among others:

    (i) the asylum-seeker provided sufficient evidence, while the SMS was under duty to clarify the unclear aspects of the case;

    (ii) the asylum-seeker did not bear burden of proof in this case, while under the principle of presumption of credibility of the data provided by individuals, the data provided by the asylum-seeker had to be considered as credible by the force of law, unless the SMS proved otherwise;

    (iii) the opinion of the NSS submitted to the SMS was in breach of the provisions of the LRA.

60. The CoC reversed this judgment on the ground that the asylum-seeker bore the burden of proof under Article 43 of the LFAAP, but failed to prove the circumstances that were favorable for him.[42] The decision particularly implied that an applicant may not be recognized as a refugee based solely on the principle of presumption of reliability without the case being actually proven (this is not the exact wording of the Court though). The Cassation Court did refer to the duty of the lower instance court to examine the facts and the duty of the applicant to substantiate his claim and noted that there is no evidence in the case proving the applicant's statements and returned the case to the Administrative Court for a re-hearing. This is generally in line with the approach that assessment of a refugee claim implies a forward-looking risk assessment which is the duty of the competent authority/court. The applicant bears the initial burden to prove circumstances favourable for him/her, and oral testimony is to be considered as

[41] Judgment of the AC of the RA of 28 November 2008, ՎԴ/1693/05/08
[42] Decision of the CoC of 27 May 2009

valid evidence.[43] The duty to ascertain, verify and assess the evidence submitted including to assess credibility of the applicant's statements lies with the respective authority. In the case in question, the case was rejected by SMS without any reasoning provided and the first instance court granted the claim (obliged SMS to grant refugee status) without making the necessary assessment instead just basing its arguments on the principle of the presumption of reliability. Subsequent judicial acts referred to this position of the CoC and rigorously applied it in similar cases with somewhat selective reference to the statements in the Court of Cassation decision relating to the duty of the applicant to prove circumstances favorable for him/her, thus using it to shift the burden of proof on the applicant with complete disregard of the duty of the competent authority to conduct a full, objective and comprehensive examination of the factual circumstances.

61. On 17 December 2012 the AC made a judgment invalidating the administrative act of the SMS on the ground that it failed to comply with its duty under the LFAAP and the LRA of proper establishment of facts.[44] The AC listed the circumstances that the SMS had had to establish, but failed to do so. However, the AC refused to satisfy the action for compelling the adoption of an administrative act on the ground of insufficient fact-finding by the SMS:

> Concerning the claim of the plaintiff on compelling the adoption of administrative act, the court finds that in cases when the respondent failed to conduct adequate administration and failed to discover all necessary circumstances significant for the case, the court may not have sufficient ground for compelling the respondent the adoption of a favorable administrative act. In such circumstances the plaintiff's claim is subject to dismissal.[45]

62. Thus, the AC quashed the administrative act of the SMS on the ground that it was adopted in breach of the law, i.e. the SMS's legal duty of adequate fact-finding. But it dismissed the action for compelling administrative act, because it considered that the discovery of the facts of the administrative case before the SMS was the task of the SMS, not of the AC. This judicial holding, which is the main approach of all administrative jurisdictions of the RA, requires closer scrutiny. In particular, on the basis of this holding, this part of the study will test whether or not the following hypothesis can be supported: **in case the SMS conducted inadequate fact-finding during the administrative procedure of asylum/refugee status, during judicial review proceedings the AC is under duty to conduct adequate fact-finding at its own initiative and, in case it finds the person meets the definition of refugee, shall compel the SMS to grant the respective status**.

[43] See Article 42
[44] Judgment of the AC of the RA of 17 December 2012, ՎԴ/6630/05/11, p. 12
[45] Judgment of the AC of the RA of 17 December 2012, ՎԴ/6630/05/11, p. 13

63. This question leads to examination of the nature and the scope of the inquisitorial powers of the AC. **The question is whether the duty of the AC to establish the facts of the case at its own initiative has limits, and, if yes, what are those limits**.

64. In contrast to mostly adversarial nature of civil law proceedings, where various private interests compete with each other before an impartial judicial authority, public interests involved in public law proceedings necessitates complete establishment of the objective truth, even beyond what the parties wanted or were able to disclose to the court:

> In judicial review proceedings of administrative decisions the inquisitorial procedure applies… Similar to criminal proceedings or in proceedings in the finance or social courts and others the public interest in a correct decision requires an objectively correct and complete establishment of facts, which underlie the decision. … The main emphasis of the inquisitorial process is completeness, openness and neutrality of the establishment of the facts.[46]

65. It has been established above that the AC of the RA possesses inquisitorial powers with regard to the establishment of the circumstances of the case under Article 5 of the CACP. Did the legislator design these powers in order to substitute the inadequate investigation of administrative authority? When and to what extent he AC establishes the facts of the case *ex officio* and when it refuses to do so and quashes the administrative act on the ground that the authority failed to do adequate fact-finding.

66. On 9 September 2014 the AC of the RA dismissed the action of an asylum-seeker against the decision of the SMS denying the grant of asylum in the RA.[47] In line with the judicial policy set by the decision of the CoC of 27 May 2009, the AC reasoned that the plaintiff claimed the existence of various circumstances in justification of the well-founded fear of persecution in the country of origin, but failed to prove them. On 10 June 2015 the ACA of the RA reversed this judgment and remitted the case in the AC for new consideration. The appellants submitted to the ACA the copy and the translation of a judgment of a criminal court of the county of origin convicting him to 15 years in prison for political crimes, as well as the copy of the email to which this judgment was attached. Such submission was decisive for the outcome of the case. Finding that the holding in the ECtHR in the case of *M.A. v Switzerland*[48] was applicable in this case, as well as with reference to the inquisitorial powers of the AC under Article 5 of the CACP, the ACA held:

[46] Kunnecke, M., *Tradition and Change in Administrative Law: An Anglo-German Comparison* (Springer, 2007), p. 46

[47] Judgment of 9 September 2014 of the AC of the RA, ՎԴ/5706/05/12

[48] M.A. v. Switzerland, Application no. 52589/13, Council of Europe: European Court of Human Rights, 18 November 2014, available at: http://www.refworld.org/docid/5475f05a4.html

> …in this case it is necessary to verify the credibility of the copy of the judgment of […] submitted by the … [Plaintiff]. In this regard, through the Ministry of Foreign Affairs of the RA and/or the Embassy of Iran in the RA and through other competent bodies, it is necessary to check the veracity of the judgment of the Iranian court no. 89099071177-66, to take reasonable measures in acquiring the original of the judgment submitted in copy, and to assess the acquired evidence in accordance with the law.

67. As a result, the AC has been tasked with (i) checking the veracity of the judgment and (ii) assessing this evidence, (iii) making a fresh judgment on the basis of assessing new evidence. Considering that the AC is able to acquire the original of the judgment, it may convince the AC that the plaintiff's fear of persecution was well-founded. As a result, the AC may compel the SMS to grant asylum to the plaintiff, because no other fact need to be established.

68. However, this case does not answer the main question of this section of the study. Firstly, our hypothesis refers to incomplete or no investigation by the administrative authority whose decision has been challenged before the AC. In the case above, in contrast, neither the SMS nor the AC had a chance to assess the judgment convicting the asylum-seeker for religious related crimes in the country of origin. The contrary situation might have lead the SMS and/or the AC to grant/compel granting the status of refugee in the RA. Secondly, the evidence involved in this case, i.e. the criminal judgment, is unique and does not represent majority of asylum cases. Only the existence of such judgment may be determinative for the outcome of the case at the SMS or in the AC. When checking the veracity of the judgment the copy of which has been submitted to the AC, the AC is not replacing the SMS. It is discharging its judicial powers of (i) ascertaining of the credibility of evidence, (ii) *ex officio* establishment of facts.

69. Under the CACP 2013, the AC is not obliged to replace the SMS in all cases when the SMS failed to conduct proper fact-finding. The AC is under duty to obtain information about the facts necessary for the resolution of the case that are *possible* and *accessible*. These two qualities set the limits to the fact-finding duty of the AC. If the AC finds it impossible to obtain a piece of information, it will not waste its judicial resources. In the absence of these limits, the AC would have been required by law to replace all administrative bodies in all cases of inadequate fact-finding. Such a court would be inefficient, inaccessible for the individuals and often breaching the fair trial principle of trial within a reasonable time.

70. Under the CACP 2013, the Armenian legislator set limits of "reasonableness" on the duty of the AC to establish the facts at its own initiative. Such a limitation is common in other similar jurisdictions too:

> The participants [SMS and the asylum-seeker in this case] have to contribute to the fact-finding process, in particular in questions of fact to which they have easy access, because they lie within their sphere. The procedure is flawed if the court does not comply with its duty to investigate the facts properly. ... Forms of evidence, which can be taken by the court, are documents, witnesses, experts and even direct evidence taken at the location... The court has to use all these methods of taking evidence fully. However, limits to the use of evidence are set by the principle of proportionality. It is, for instance, not necessary to call an official from abroad as witness in a trial concerning the granting of asylum.[49]

71. The terms "possible" and "accessible" are undefined open legal concepts for the AC to interpret in each particular administrative case. The legislator would be unable to draft an exhaustive list of what material and when it is accessible for the AC. Such interpretation by the AC is subject to review by the ACA. If the latter finds that the material required for the solution of the case was possible and accessible for the AC, but it incorrectly found it was not, the ACA will quash the judgment of the AC on the ground of failure to establish the possible and accessible facts. Thus, the interpretation of the open legal concepts of "possible and accessible" is fully reviewable and the AC does not have discretion – only limited margin of appreciation subject to control by higher court. It is for the ACA and, more importantly, under its mandate of ensuring uniform application of the law, for the CoC, to guide the AC in its exercise of this margin of appreciation correctly. It should be noted that in the context of asylum, information from the country of origin of the asylum-seeker is often not accessible since the principle of confidentiality bars making any contacts or making any enquiries with the authorities/any actors in the country of origin not to endanger the safety of the applicant and/or of family members.

72. The following policy considerations must be taken into account when considering the question of the scope of the fact-finding powers of the AC:

    - If the AC was under duty to replace the inadequate fact-finding of the administrative body with its own fact-finding in *all* cases, the administrative authority would have little or no incentive to conduct adequate fact-finding, while having the designated resources, powers and the legal duty to do so. This setting would encourage the authority not to conduct proper discovery of facts resulting in unlawful, erroneous or otherwise defective decisions. Moreover, the existence of an administrative body whose fact-finding tasks are also conducted by the AC, would be meaningless. On the other hand, where –as is the case in some jurisdictions - there may be a concern of decision-making at the first instance being unduly influenced by broader policy considerations, the role of the judiciary in providing an independent

[49] Kunnecke, M., *Tradition and Change in Administrative Law: An Anglo-German Comparison* (Springer, 2007), p. 46 (for the latter view on the limitation of the fact-finding powers of the courts in an asylum case, the author refers to the case tried by the German Supreme administrative court, i.e. BVerwG, NJW, 1989, 678)

and thorough review, and thus ensuring access to an effective remedy, is key, and the finding of facts would be an essential element of the independent review.

- The administrative agencies possess and accumulate expertise in the particular area of regulation. In contrast, courts try cases in different areas and do not possess the specialized knowledge and skills of the administrators. Administrators stand nearer to the facts. The courts are better suited to supervise the work of the administrators, and, where relevant, compel them to act lawfully, rather then replacing them whenever they fail to use their expertise in discharge of their statutory powers. Nonetheless, proper supervision of an Administrative Body may only be possible in some cases if the AC would also look at the facts. Examples from other jurisdictions where the judicial body makes a finding of fact may be drawn upon to demonstrate the important role that the judicial body has in providing appropriate checks and balances.

- It is a common knowledge that agencies have more flexible and informal procedures, while courts have more complex and formal procedures. It is natural that the length of the judicial proceedings is usually longer than the length of most administrative procedures in the same case. Administrative procedure is usually cheaper for the individuals, if any, while proper judicial representation may cost substantial amount of money for the individuals[50] (). If the courts were bound to conduct the discovery of all facts in all cases, which the administrators failed to do, it should be expected that the length of judicial proceedings would increase, double or triple, which would necessarily entail an increase of judicial costs for the individual participants. In addition, this could potentially create issues with the right to a trial within a reasonable time prescribed by fair trial standards under international human rights law. Thus, the role of the advocate would be even more crucial and the importance of competent, well-trained, knowledgeable and experienced lawyers in the judicial proceedings should be underlined.

- The assumption that if the judiciary had the power of substituting the administrative authority in all cases, it would necessarily adopt a more liberal stance and grant more rights than would the competent administrative authority is a groundless assumption. In fact, because of the lack of expert knowledge, length of proceedings and overload of cases, the courts may potentially take more restrictive approach. The policy of the CoC

[50] Although this may be less relevant in the asylum context given the availability of free legal aid funded by UNHCR, the revision of the Law on Refugees and Asylum, which now provides for free legal aid to asylum-seekers, as well as the proposal to amend the Law on Attorneyship to include asylum-seekers as a category benefitting from free legal aid

in asylum/refugee status cases demonstrates that the administrative jurisdictions expressed certain conservative positions in refugee/asylum cases. Changing the scope of fact-finding powers of these jurisdictions might not lead to liberalization of this judicial policy.

- Finally, administrative agencies are usually more flexible and "accessible" for technical cooperation with international organizations than the judiciary. This fact is understandable, because the judiciary is under the obligation of refraining from all actions that jeopardize its independence/impartiality or even create such an impression.

73. It may be concluded that the AC has wide compelling powers under the CACP. The AC holds the power to compel the SMS the recognition of the status of refugee/grant of asylum, if it finds that the facts of the case demonstrate to the AC that the SMS erred in denying such status. If the facts are insufficient to make such determination, the AC is under legal duty (with no request from the parties) to conduct fact-finding until it is ready to make a conclusion. Such fact-finding duty of the AC is limited by two qualities, i.e. possibility and accessibility. The legal contents of these open legal concepts is not clear under Armenian law. The CoC is thus well-positioned to rule on the contents of these two concepts with a view of ensuring uniform application of law by the AC.

C. Review of decisive matters of fact by the AC

74. Sometimes the totality of the powers of an administrative authority is not sufficient for completely autonomous decision-making. Often, the administrative decision of an administrative body is the result of the efforts of several administrative organs' cooperation and mutual assistance. As has been mentioned in the outline of national legislation above, the LRA authorizes the SMS to seek and receive the support of a number of other administrative organs (in particular the police, the NSS, and Ministry of Foreign Affairs etc.) in order to be able to make a final decision on an asylum request. Thus, according to Article 34(1)(3) of the LRA, when conducting the administrative procedure of asylum, SMS is authorized to request the NSS an opinion about potential threat of the asylum-seeker to the national security of the RA. The power of the NSS to provide such opinion to the SMS is prescribed by Article 35(1) of the LRA. The SMS has used this procedural opportunity in a number of cases. The study of judicial acts in the area of asylum/refugee status demonstrates that the opinions of the NSS addressed to the SMS are often decisive for the outcome of the asylum procedure at the SMS and, surprisingly, for the outcome of judicial review proceedings at the AC.

75. On 12 July 2013 the SMS made a decision to terminate the asylum it had previously provided to the refugee. In the reasoning, the SMS referred to Article 10(3) of the LRA and stated that the NSS provided a letter, which stated that the person posed potential threat to the national security of the RA. The person affected by the administrative act of the SMS challenged the decision before the AC. While dismissing the lawsuit of the plaintiff and upholding the challenged administrative act, the AC reasoned:

> …the respondent legitimately considered the fact that the Plaintiff posed threat to the national security of the RA, and, considering that the latter fact is a ground for termination of the asylum, made the decision no. Դ-17/13-Ա.
>
> The Court finds that the respondent acted in accordance with the above-mentioned rules, and, after examination of the letter of the NSS, made a correct conclusion. [51]

76. It should be noted that the text of the discussed decision of the SMS stated that the NSS informed the SMS that the refugee posed only *potential* threat to the national security of the RA, while in its holding the AC referred to actual threat. The judgment of the AC does not contain description of the efforts of the AC to clarify the level of threat the plaintiff posed to the national security of the RA. Therefore, it may be safely concluded that the AC based its conclusions solely on the findings of the SMS and record of the administrative case as compiled by the SMS. In such a case, the AC went beyond the record and added the actual nature of the threat of the plaintiff posed to the national security of the RA, because the decision of the SMS clearly states that the person posed only potential threat. It should also be noted that the LRA implicitly stresses that the threat to national security must be actual, grounded on serious reasons and it lacks the adjective "potential". It results, that in case the NSS finds that the person poses only potential threat to the national security of the RA, the SMS will be lawfully unable to terminate the asylum of the refugee on the basis of Article 10(3) of the LRA. It becomes evident that the AC based its judgment on a fact that had not been established by the SMS during the administrative procedure of termination nor such fact has been found as a result of judicial review proceedings.

77. Another controversial aspect in this holding is its conciseness, generality and abstract statement. The AC did not inquire into the facts on the basis of which the NSS concluded that the person posed potential or real threat to the national security of the RA. It is not clear whether or not the circumstances underlying the letter of the NSS were disclosed to the AC, but withheld from the parties. In case they have not been disclosed at all, it is not clear how the AC checked whether or not the conclusions in the letter were correct and reliable. It is noted that the task of the AC in this case was not the review of the lawfulness of the letter of the NSS, but the lawfulness of the decision of the SMS. The letter of the NSS does not

[51] Decision of the AC of the RA of 14 March 2014, ՎԴ/7373/05/13

satisfy the requirements of the definition of administrative act.[52] It does not have external effect and does not change the legal status of the individual. It is an internal communication between two administrative bodies within the public administration. The NSS letter was only evidence the SMS considered (and felt bound by) during the administrative procedure of termination. The AC also treated it as relevant and sufficient evidence to confirm the legality of the decision of the SMS. However, none of these two bodies checked the lawfulness, credibility, justification and reasoning of this letter, but it was the only decisive factor for the outcome of both the administrative case and the judicial case. It seems that the both the SMS and the AC felt incompetent to question and review the decisive conclusions contained in the letter of the NSS. While the SMS may claim lack of power of checking the lawfulness of the letters of the NSS (except that it can find it unpersuasive, unclear, arbitrary, unjustified, and deny considering it as adequate evidence) the competence of the AC includes review of all actions of all state bodies under public law, including all decisive evidence before it. The independence of the AC requires that it conduct independent review of all materials of the administrative case before it. If the AC excludes certain materials from substantive review, especially if it was decisive for the administrative procedure and is decisive for the judicial proceedings, such review is insufficient and may amount to denial of justice – a state that is incompatible with the absolute right of access to court and to a fair trial under Article 19 of the Armenian Constitution.

78. On 8 July 2014 the ACA affirmed the lawfulness of the judgment of the AC of 12 July 2013. The ACA referred to the letter of the NSS as containing conclusion on the potential, not actual threat of the plaintiff to the national security of the RA. The ACA, in particular, made the following findings:

> The appeals court affirms that the national security service is the authorized body, which ensures the security of the individuals, the society and the state, and, on the basis of the law, is competent to clarify the identify of the asylum-seeker and provide conclusion on the potential threat the person may pose to the national security of the RA. In the opinion of the Appeals court, the information provided by the national security service was sufficient ground for termination of the asylum.

79. Apparently, the decision of the ACA has the same qualities as the judgment of the AC – both arrived at a decisive conclusion without revealing how they arrived to such a conclusion. On 27 August 2015 the CoC returned the cassation complaint reasoning that it did not raise issues required by law for admitting cassation complaint.

80. The same approach was taken by the Administrative Court with respect to appeal of the applicant against the refusal of the Police to grant a residence permit

[52] See in footnote 6 above

because of the NSS negative opinion.[53] The Court particularly stated that 'the Police is confined by the negative conclusions and by the presumption of lawfulness of such conclusions by the NSS, the existence of such conclusion excludes the possibility for the Police to grant the request of an individual on residency status.'

81. Thus in both judgments by the AC analyzed above and in Annex I, the Court expressed the position that the SMS and the Police, respectively, are bound by the findings of the NSS and their decisions were lawful, because these bodies could not check the correctness, legality of the conclusions of the NSS nor they could override the conclusions of the NSS. None of the administrative jurisdictions reviewed the relevant (and decisive) facts, which constituted the basis of the administrative acts of the SMS and the Police. No court inquired whether the letters of the NSS are lawful, justified and based on correct factual grounds. In fact, the administrative jurisdictions declined to exercise full judicial review in these cases. The terms of the LRA "threat to national security" are open legal concepts, which must be applied correctly by the authority. Even if this rule is applied by the NSS, the AC has the power of evaluating the opinion of the NSS as evidence and disagreeing with it, if it is not persuasive. Alternatively, the AC is reviewing the decision of the SMS and the Police. If these decisions are not supported by factual grounds, the AC must quash them as unlawful. When the Police or the SMS make a decision on the basis of the letter by the NSS unsupported by factual grounds, their decisions can be said to lack any factual grounds required by law. In the contrary situation, it appears that not only the SMS and the Police, but also the AC is bound by the conclusion of the NSS and no court has the authority to check the lawfulness and reasoning of the opinions of the NSS within the administrative procedure. Such a situation would be incompatible with two of the cornerstones of the principle of rule of law, i.e. the right to court and access to court.

82. Thus, the asylum-seekers and refugees find themselves in a complex legal situation. On the one hand, the AC always considers that the SMS and the Police exercised lawful administration, if their decision is exclusively based on the letters of the NSS irrespective of the contents of these letters. It appears from the case-law produced by administrative jurisdictions that even if these letters contain only one word, i.e. "deny", the courts will consider the SMS and the Police must deny the asylum and residency status respectively. On the other hand, the letters of the NSS are addressed to the SMS and to the Police, not to the individuals. These letters do not change the legal status of the individuals. As such, the individuals, whose case is de facto decided by the NSS, cannot challenge the lawfulness of the letters of the NSS before the AC, because they are not administrative acts nor they are independent real acts. They can only challenge the final decision of the SMS or the Police, but they are always lawful when based

[53] □□/6239/05/14 of 10 April 2015

on the conclusions of the NSS. Such situation apparently creates issues with the right to court, the right of access to court, for which the existence of a court with full jurisdiction is a precondition, the right to a fair trial and the right to an affective legal remedy. The ECtHR produced ample case-law on each of these heads, some of which are presented below and persuasive guidelines.

D. The case-law of the ECtHR

83. The three judgments of the ECtHR below demonstrate the positions of the ECtHR on the reviewing powers of administrative jurisdictions in light of the "right to court" under Article 6(1) of the ECHR[54]:

i. I.D. v. Bulgaria[55]

84. On paper, the applicant was employed as a dormitory supervisor, facilities and social events coordinator by the Bulgarian Communist Party. However, in fact she was employed as a typist – a position that did not appear in the staff table. The applicant felt pain and numbness in her arms and fingers, especially after some period of time of typing. The Diagnostic Expert Commission (DEC) examined the applicant and concluded that she was suffering from vegetative polyneuropathy of the upper limbs, and, later, from *osteohondrosis cervicalis,* which were included in the Table of Occupational Diseases. However, on the basis of the applicant's job description as it appeared on paper, the DEC concluded that the diseases were non-occupational. The applicant appealed the conclusion before the Central Diagnostic Expert Commission (CDEC) and submitted that her actual job was a typist and requested admission of evidence proving her submission. The CDEC refused to admit evidence and witnesses on the applicant's behalf in order to establish the actual duties of the applicant and endorsed the conclusion by DEC. The applicant sued her employer claiming that her diseases developed as a result of her work. The court heard the applicant's witnesses and independent experts who concluded that her diseases could have been the result of her work as a typist. The court dismissed the applicant's action reasoning that it was an

[54] It is noted that Article 6 of the ECHR does not apply in cases involving determination of refugee status, asylum or residency, because such determination does not involve civil rights and obligations nor it concerns a criminal charge (see, in particular, the judgment of the ECtHR in the case of *Maaouia v. France* (app. no. 39652/98), 5 October 2000). However, the rights to court and to a fair trial, including the right to equality of arms and adversarial proceedings, are also guaranteed by Article 19 of the Constitution of the RA, as well as by Article 14 of the ICCPR. It may be claimed that the contents of these provisions are identical or similar to the contents of Article 6(1) of the ECHR. The positions of the ECtHR on administrative justice expressed in other cases than determination of refugee status must at least be admitted as authoritative guiding principles and best practices for the policy-makers and the AC, the ACA and the CoC

[55] Judgment of the ECtHR of 28 April 2005, app. no 43578/98

absolute condition for employer liability to obtain the relevant conclusion on occupational diseases from the specialised administrative bodies established for that purpose, i.e. DEC and CDEC. The appellate instance and the Supreme Court endorsed the trial judgment.

85. The applicant complained before the Court that none of the domestic judicial instances heard her case on its merits, because they accepted the findings of the administrative commissions as binding and refused to admit new evidence. As a result, she complained, her "right to a court with full jurisdiction" under Article 6(1) was breached.

86. The Court firstly recalled its previous case-law in similar cases, ***Obermeier***[56] and ***Terra Voningen B.V.***[57], in which it held that where the national courts are bound by the decisions of the administrative authorities who do not themselves meet the requirements of a "tribunal" under Article 6(1), it was in breach of the same provision. Thus, the Court reiterated its established case-law, according to which Article 6(1) requires that either the administrative authorities determining civil rights or obligations must meet the requirements of Article 6(1), or the applicants should have access to a judicial authority with full jurisdiction to try both issues of law and fact. The national courts in this case showed great deference to administrative authorities' findings of fact and declined to review the facts decisive for the resolution of the case:

> …the domestic courts examining the applicant's action did not themselves assess a fact which was crucial for the determination of the case and instead chose to defer to the findings of an administrative body... They thus deprived themselves of jurisdiction to examine all questions of fact and law relevant to the dispute before them, as required by Article 6 § 1[58].

87. While the 'judicial' tribunals declined to exercise full jurisdiction, the administrative authorities (DEC and CDEC) themselves fall short of the Convention requirements of a "tribunal" since they do not enjoy the independence of the executive, impartiality, security of tenure, and other guarantees expected of judicial authorities under Article 6(1). The Court reminded that the remedies must be effective and accessible to individuals and reasoned that the authorities failed to demonstrate any effective remedy for the applicant to challenge the decisions of the DEC and CDEC under Bulgarian law at the material time.

[56] Judgment of the ECtHR of 28 June 1990, app. no. 11761/85
[57] Judgment of the ECtHR of 17 December 1996, app. no. 20641/92
[58] *I.D.*, para. 50

ii. Fazliyski v. Bulgaria[59]

88. The applicant was dismissed from his job in the Ministry of Internal Affairs on the ground of a psychological assessment report conducted by an institute subordinate to the Ministry. The applicant sought judicial review of the dismissal in administrative jurisdictions. In particular, the applicant's counsel challenged the credibility of the psychological assessment statement. The Supreme Administrative Court dismissed the applicant's claims and refused to review the psychological assessment report on the ground that such assessments are non-reviewable. No reasoning was provided for such position. The appeal on points of law was also rejected.

89. The Court first examined the scope of competence of the Supreme Administrative Court in light of the requirements of Article 6(1) on "tribunals". The Supreme Administrative Court not only relied on the psychological assessment test conducted by the institute, it also felt bound by it and refused to exercise its jurisdiction of review of substantive and procedural aspects of the assessment.

> …in its exclusive reliance on that assessment in the applicant's case the Supreme Administrative Court refused independently to scrutinize a point which was crucial for the determination of the case, and thus deprived itself of jurisdiction to examine the dispute before it[60].

90. The second question the Court had to answer was whether the institute that conducted the assessment itself satisfied the requirements of a "tribunal" under Article 6(1). The Court's finding on this question was also negative since the institute was subordinate to the Ministry of Internal Affairs, it did not possess the judicial functions characteristic of judicial bodies nor was it independent of the executive. The last and decisive question was whether the psychological assessment test was directly amenable to judicial review under the domestic law and practice. The Court found that there was no such possibility under domestic law:

> No justification has been offered for this situation. It is true that the applicant held the rank of major at the National Security Directorate of the Ministry of Internal Affairs and that his duties related to the gathering and processing of intelligence ... It is also true that this Court has, albeit in different contexts, held that legitimate national security considerations may justify limitations on the rights enshrined in Article 6 § 1 of the Convention... However, neither the Supreme Administrative Court in its reasoning nor the Government in their observations sought to justify this denial of access to a court with adequate jurisdiction in terms of either the legitimacy of the aim pursued or its proportionality. It is noteworthy in this

[59] Judgment of the ECtHR of 16 April 2013, app. no. 40908/05
[60] *Fazliyski*, para. 59

> connection that in other cases the Supreme Administrative Court held that an assessment of mental fitness for work which prompts the dismissal of an officer employed by the Ministry of Internal Affairs should be amenable to judicial scrutiny even if it touches upon national security, and that in May 2006 the law was changed to provide for direct judicial review of the mental fitness assessments of all members of the Ministry's staff[61].

91. The Court noted the similarities of this case with the ***I.D.*** case. In both cases the domestic courts first felt bound by the findings of facts by the administrative authorities that may not be considered as tribunals themselves and secondly refused to review the substance of the decisions of these administrative authorities (assessment of psychological fitness to work and assessment of occupational disease). In both cases the same domestic courts, i.e. the Constitutional and the Administrative Court, demonstrated highly deferential approaches to administrative decision-making. In such a situation, the Court found that the applicants were deprived of access to justice and an effective remedy. Such an approach deprived these courts of the status of a "tribunal" vested with 'full jurisdiction' for the purposes of Article 6(1).

92. It is easy to draw parallels between the two cases above and the positions of the AC and ACA with regard to the letters of the NSS discussed above. In both situations, there were documents issued by administrative authorities containing assessment of facts and conclusions. These assessments and conclusions were deemed to be binding upon administrative authorities. Similar to the domestic courts in the two ECtHR cases, the AC of the RA also demonstrated highly deferential approach to the conclusions of the NSS. The Court has also considered the approach taken in Armenia by an Administrative Body towards the NSS in respect of a case concerning freedom of peaceful assembly.

(i) Helsinki Committee of Armenia v. Armenia

93. The applicant organisation, a human rights NGO based in Yerevan, applied to the Mayor Yerevan notifying its intention to hold a mourning march on the first anniversary of the death of a L.G., a witness in a murder investigation who died while at a police station. According to the official version, L.G. died in an attempt to escape by jumping out of a second-floor window of the police station. It appears that this event provoked an outcry among Armenian human rights groups and civil society. On 19 February 2008 a presidential election was held in Armenia, which was followed by mass post-election rallies and protests and an intense standoff between the authorities and the supporters of the opposition, resulting in clashes and at least ten persons being killed. On 1 March 2008 a state of emergency was declared by the President of Armenia for a period of 20 days, during which all public assemblies were banned. On 6 May 2008 the applicant organisation applied to the Mayor of Yerevan, notifying its intention to hold a

[61] *Fazliyski*, para.62

mourning march on the first anniversary of L.G.'s death. The march was to take place on 12 May from 8 p.m. to 9.30 p.m. It was to start at Republic Square and continue through Nalbandyan Street in the direction of the police station. On 8 May 2008 the Mayor decided to ban the planned event, with reference to Sections 9 § 4 (3) and 13 § 1 (3) of the Assemblies, Rallies, Marches and Demonstrations Act ("the Act"), finding:

94. "According to the official opinion of the Police ... of 8 May 2008 ..., the mass public event held on 1 March 2008 turned into mass disorder resulting in human casualties and not all the circumstances of the crime and offenders have been disclosed, and not all weapons and ammunition used [at that event], whose circulation may pose danger to the lives and health of citizens, have been found in the course of the investigation into the criminal case instituted in connection with that fact by the Special Investigative Service of Armenia[. H]ence, it will be impossible to prevent new crimes, if the mass public event [in question] is held.

95. According to the official opinion of the National Security Service ... of 7 May 2008 ..., the National Security Service of Armenia has credible and verified data which show that the mass public event in question, if allowed, will result in undermining national security, public order, and the health and morality of society, in encroachments on constitutional rights and freedoms and in disorder and [new] crimes."

96. A letter dated 12 May 2008 notifying of this decision was posted to the applicant organisation. On the same date the police, who had apparently been informed of the decision of 8 May 2008, prevented the organisers from holding the planned event. On 13 May 2008 the applicant organisation received the letter of 12 May 2008.

97. On the question of whether the interference with the exercise of the freedom of peaceful assembly was justified, the Court noted that:

> [t]he Mayor's reference to the official opinion of the National Security Service alleging that the march posed a danger is couched in general terms (see paragraph 10 above). It is not even clear whether the "credible and verified data" referred to were ever presented to the Mayor or what such data were or whether such data even existed. The Mayor's finding in this respect therefore appears not to be supported by any concrete, clear and convincing evidence.

98. The positions of administrative jurisdictions with regard to the letters of the NSS also raise issues under the fair trial principles of equality of arms and adversarial trial. The letter of the NSS is considered as evidence in the administrative case, while the facts on which it is based are never disclosed to the plaintiff, and, by assumption, also to the courts. So, although the courts base their conclusions on the existence of letter by the NSS, in which case the respondent administrative authority (SMS, Police) gains procedural advantage over the plaintiff, the plaintiff is simply unable to evaluate and challenge the credibility, admissibility and

reasoning of these letters. Thus, the respondent administrative authorities gain advantage over the plaintiffs, because their evidence determines the outcome of the case in the administrative jurisdiction, while the individuals are unable to challenge such evidence. The two judgments of the ECtHR in almost identical situations below demonstrate the positions of the ECtHR in such situations:

iv. Uzukauskas v. Lithuania[62]

99. The applicant was informed that his firearms license was revoked on the ground that he was included in the "operational records file" of the police. The applicant challenged the inclusion of his data in the list before the Kaunas Regional Administrative Court. The Administrative Court dismissed the appeal and found that the entry of his name to the operational list was lawful. The basis of the decision was the classified information submitted by the police to the Administrative Court, which was not disclosed to the applicant. The applicant appealed to the Supreme Court arguing that he had no access to the police materials submitted to the court. The Supreme Court upheld the findings of the Administrative Court reasoning that the police submissions constituted state secrets that could not have been disclosed to the applicant.

100. The Court decided to analyse the domestic decision-making process as a whole to find out whether the process guaranteed equality of arms and an adversarial trial. The Court first noted that in accordance with domestic law and judicial practice, classified state secrets couldn't be used against individuals as evidence until they are declassified. Even after declassification, such evidence could not be the sole evidence forming the basis of a judgment. However, it appeared that in this case the only evidence of the applicant's alleged danger to society was the operational records file:

> In order to conclude whether or not the applicant had indeed been implicated in any kind of criminal activity, it was necessary for the judges to examine a number of factors, including the reason for the police operational activities and the nature and extent of the applicant's suspected participation in alleged crime. Had the defence been able to persuade the judges that the police had acted without good reason, the applicant's name would, in effect, have had to have been removed from the operational records file. The data in this file was, therefore, of decisive importance to the applicant's case[63].

101. Secondly, there was a dispute between the police and the applicant about a fact, i.e. the reasons justifying the inclusion of his name in the list. Examination of these reasons by the Administrative Court would be decisive for the applicant's

[62] Judgment of 6 July 2010, app. no. 16965/04
[63] *Uzukauskas*, para. 49

case because the applicant would have an opportunity to persuade the domestic courts that the inclusion of his name in the list was not necessary. However, the applicant was not afforded such opportunity in the case.

102. Along with deciding the ***Uzukauskas*** case, the Court decided the case of ***Pocius***[64] on the same day. Both contained almost identical facts, while some differences existed. In addition to revoking his firearms license, as in ***Uzukauskas***, ***Pocius*** was also charged with theft as a member of an organized group, covering up others' criminal activities, which were later discontinued on the ground of statutory time limitations. Unlike ***Uzukauskas***, the applicant in this case also submitted detailed reasons why he needed the firearm license. In particular, he was an inspector of nature protection and was frequently attacked by poachers, he was transferring large sums of money from office safe to bank and, lastly, he needed to protect his family living in a remote rural area. Similar to ***Uzukauskas***, the applicant was also included in the operational records file and the domestic judiciary relied on the police submissions containing state secrets without ever disclosing them to the applicant for adversarial argument. The Court found a breach of the applicant's rights to equality of arms and adversarial trial. Thus, the fact that there were criminal charges against ***Pocius*** did not justify the use and reliance by the domestic courts of the secret evidence regarding the reasons for including his name in the operational records files without disclosing it to him with a view of adversarial proceedings.

[64] Judgment of 6 July 2010, app. no. 35601/04

V. Conclusions

This study revealed a number of aspects of the judicial review exercised by the AC in cases on refugee status/asylum that may be further improved and developed. These points of concern may be divided into two broad categories: systemic issues and issues of application.

1. *Standard of proof in refugee status/asylum cases*

Absence of special standard of proof in administrative procedure of asylum at the SMS and in judicial review procedure at the AC is among the systemic issues identified during the research, because standards of proof are generally not defined in the Armenian law. Asylum-seekers and their representatives do not know to what extent and through what kinds of evidence they have to prove the circumstances required by law in order to obtain the requested asylum. The SMS enjoys freedom of evaluation of the evidence, while no law guides this freedom by providing criteria of evaluation of evidence, other than that the evaluation must be comprehensive, complete and objective. The introduction of such special rules of standards of proof in asylum/refugee status cases in accordance with international standards and available guidance on standard and proof and evidence assessment would make the outcome of administrative and judicial review procedures more predictable for the asylum-seekers, the SMS, lawyers and judges.

2. *Non-discretionary nature of the powers of the SMS to grant refugee status/asylum*

The study concludes that the confusion about the nature of the powers of the SMS, on which the scope and method of judicial review depends, belongs to the second group of issues, i.e. application of law. The study concluded that the power of the SMS to make determination on the status of refugee and grant of asylum is not discretionary. The SMS is not authorized to choose among various lawful options as legal consequences for asylum-seekers, since such options do not exist. Granting of refugee status has only declaratory nature: a person is a refugee within the meaning of the 1951 Convention as soon as he fulfills the criteria contained in the definition. Distinguishing discretionary and binding powers of the administration is a key element in administrative procedure and judicial review procedure of any administrative justice system. In Armenia this can be achieved through cooperation and working on the relevant training agenda. However, the LRA may also clarify the nature of the powers of the SMS by amendment, which will reduce points of controversies in the AC.

3. *Jurisdiction to review/question NSS opinions*

Among the issues of application, the study revealed judicial tendency to feel bound by the letters of the NSS without studying their contents. An independent court with full jurisdiction is authorized to assess the contents of all evidence and documents submitted by all state organs without exception. In case these materials contain confidential information proper mechanisms should be available to provide fair trial, on the one hand, while preserving the public interests contained in the confidential information, on the other. Refusal to study the contents of decisive evidence or creating presumptions of their credibility cast shadow on the authority of independent court. This practice may be further developed through cooperation and trainings.

4. *Experience exchange/capacity development*

Finally, the study concluded that most of the issues of application may be improved by establishing long term and effective cooperation with relevant actors, with a view to exchanging ideas, skills and substantive knowledge of administrative law and refugee law. Most of the time these issues of application are the result of lack of experience in the relevant area, which may be compensated by cooperation and training.

Recommendations

- Suggest amendment in the CACP in the form of a new chapter on special procedural rules for cases involving disputes related to the status of refugee and statelessness. In this chapter the CACP may prescribe the more specific fact-finding and other specific powers of the court, as well as specific rules on burden of proof at the AC considering the nature of such cases, in line with international standards, best practices and relevant UNHCR guidance.

- Suggest amendment in the LRA containing special rules of burden of proof, in line with international standards as contained in relevant UNHCR guidance in particular, applicable in all administrative procedures conducted by the SMS, since the general rules of burden of proof prescribed by Article 43 of the LFAAP are not suitable for refugee status determination/asylum procedures. The law of administrative procedure of the RA should not put the same burden on both large and wealthy corporations and the vulnerable asylum-seekers.

- Suggest amendment in the LRA containing special rules on standard of proof in line with international standards as contained in relevant UNHCR guidance in particular. With these rules the SMS, the AC, the litigating lawyers and finally the asylum seekers and refugees will have clear understanding of the extent to which the relevant circumstances required by law must be proven. These rules will make administrative procedure and justice more predictable.

- Suggest amendments to the LRA the wording of which would make easily discernible which of the exhaustively listed powers of the SMS is discretionary, which contain flexible concepts and which are binding.

- Establish effective cooperation with the GiZ and Academy of Justice with a view to exchangingideas and communication on the (i) controversial aspects of administrative procedure/proceedings legislation as it relates to the mandate areas of the UNHCR and (ii) ways for remedying the situation, including joint round-table discussions, trainings, as well as discussion of potential amendments to the relevant legislation. Presumably, such cooperation will result in changes in the regular training agenda for the AC judges, as well as, where evidence indicates to such a need, in legislative changes.

- On the basis of cooperation established with the GiZ, prepare and deliver training sessions on (i) the methodology of distinguishing discretionary powers from non-discretionary powers, (ii) the significance of such

discretion for the scope of judicial review, as well as (iii) on substantive thematic issues in the field of international refugee law, (iv) the powers of reviewing court to examine the substance of all materials of the case, including the opinions of the NSS, (v) the scope and limits of the *ex officio* power of the AC to establish the possible and accessible information on the facts of the case.

- A manual for judges addressing the main issues identified from international and refugee law as well as national administrative law perspective should be developed. A checklist for reviewing an administrative act on refusing a refugee claim shall be attached to the manual.

- On the basis of existing cooperation with the School of Advocates of the RA, include in the training agenda for the advocates/candidates the concept of the "right to court with full jurisdiction" in light of the Constitution and the ICCPR, with a view that with the efforts of the advocates the law in this area will develop in the RA.

Annex I

On 10 April 2015 the AC decided a case on the decision of the Police of the RA denying the grant of temporary residence to the plaintiff, who was the same plaintiff as in the ՎԴ/7373/05/13 case presented in section IV.C above. According to the facts, during the administrative procedure of determination of the residence status of the plaintiff, the visa department of the Police asked the NSS an opinion on the appropriateness of granting residence status to the plaintiff. The NSS provided a letter to the Police, in which it stated that it was convenient to deny the grant of residency status to the plaintiff on the ground of Article 19(e) of the law on Foreigners. According to the latter provision, the grant of residency status to a foreigner may be denied, if there exist serious and justified risks by the person to the national security or public order of the RA. On the basis this letter, the Policy denied the plaintiff the grant of residency status in the RA.

The AC defined the two main legal questions posed by this case as follows:

i. Whether the Police authorized to grant a person temporary residence in the RA in a situation where the NSS expressed a negative conclusion in this regard;

ii. Whether the existence of a negative conclusion by the NSS, disagreement by the NSS on the grant of residence status, excludes the possibility to grant temporary residence status to an individual.

The AC stated that these questions must be answered in light of the laws on national security organs, citizenship, legal status of foreigners in the RA, foreigners, as well as Government decrees and the charter of the NSS adopted by the Government of the RA. The AC concluded that the Police was not authorized to check the lawfulness of the letters of the NSS or to replace the NSS on questions of national security. This is a correct conclusion, since horizontally aligned administrative bodies are usually not competent to exercise control on the lawfulness of each other's work. Full control is exercised by the vertically aligned higher authority, if such exist, and by the administrative jurisdictions, such as the AC. On the basis of this, the AC made the following conclusions:

… due to the particularities of the functions of the NSS, as well as the distinction of the functions of the Police and the NSS, the Police is confined by the negative conclusions and by the presumption of lawfulness of such conclusions by the NSS, the existence of such conclusion excludes the possibility for the Police to grant the request of an individual on residency status. In a contrary situation, the requirement of the decision of the Government of 7 February 2008 that the Police shall agree the questions on residency status with the NSS, would be meaningless, the functions of the NSS specified in the charter of the NSS would become devoid of meaning.

On the basis of the above analysis and conclusions, the court finds that the argument of the plaintiff's representative on the violation of the requirements of Article 6 of the LFAAP is unjustified, because in this situation there have not been several legitimate solutions. Under the existence of a negative conclusion by the NSS, the only lawful action was the denying of granting residency status – the contrary would be unlawful action.

As referred to above, Article 19(e) of the law on Foreigners prescribes that the grant of residency status to a foreigner may be denied, if there exist serious and justified risks by the person to the national security or public order of the RA. The AC concluded that this power of the Police was not a discretionary even if the legislator has used the word "may" instead of "shall" with regard to denying the residency status.

It must be assumed that each word in the legal rule has a meaning and that the legislator acted rationally and did not intend to create meaningless rules. However, the interpretation of the AC of the powers of the Police makes these powers meaningless and superficial. If the Police was bound by the negative conclusion of the NSS on granting residency status in the RA to a foreigner, (i) the legislator would draft Article 19(e) of the law on Foreigners in a way that would bind the Police with the opinion of the NSS, instead of current text that prescribes that the Police may (or may not) decide so, (ii) it would be meaningless to grant this power to the Police, if in fact the final decision is made by the NSS. Thus, the facts that the Police may deny residency status to a foreigner in case of negative opinion by the NSS and the fact that this power is conferred upon the Police, not the NSS, lead to the conclusion that the Police may independently decide the question of residency status taking into account all relevant evidence before it. This understanding of the law gives meaning to the law, which should have been the intention of the National Assembly of the RA.

There are several instances in which the Police may grant the residency status to a foreign citizen, when the NSS provided negative opinion.

Firstly, under Article 19 of the Law on Foreigners, the "existence of serious and justified risks" is a factual matter for the Police to determine in order to arrive at the final decision on residency status. This factual matter is within the competence of the Police. This fact either exists or it does not exist. In order to determine whether or not this fact exists, the Police has to ask the NSS to provide an opinion. On the basis of the fact that the Armenian legislator vested the competence of granting or denying residency status in the RA with the Police, it should be concluded that the Police may find that the opinion provided by the NSS is insufficient to prove the fact required by the law for the Police to make a final decision. Such opinion may lack factual grounds, contain contradictions, inconsistencies and suffer from other defects that do not allow the reasonable decision-maker to arrive at any useful conclusion. There is no law in the RA requiring that the Police be bound by the

presumption of lawfulness of otherwise defective letter. Such law would make the powers of the Police in the field of residency meaningless.

Secondly, the principle of proportionality under Article 8 of the LFAAP states:

Administrative action shall pursue the aims set by the Constitution and laws of the Republic of Armenia, and the means for achieving these aims shall be useful, necessary and moderate.

Under the last requirement of this principle, i.e. the moderate nature of the means of achieving the legitimate aims, the Police may grant the person residency status in the RA, even if it is beyond any doubt that the applicant foreign citizen poses threat. The principle of "moderation" of the means is also referred to as the "principle of proportionality in a narrow sense" . Under this principle, the decision-maker should compare and weigh against each other the harms caused to the public interests and to the individual. If the harm to individual in case of negative decision is greater than would be the harm to the public interest in case of positive decision, this principle requires that the authority adopt positive decision. The case decided by the German Federal Administrative Court on 26 February 1980 was about the principle of "moderation" (Verhältnismäßigkeit in German) with regard to cases on expulsion of foreign citizens. The Federal Court, in particular, held:

The principle of Verhältnismäßigkeit, which substantially restricts the discretion in the matter of expulsion, must be observed. After considering the facts and circumstances of each case, the harm associated with the expulsion must not be disproportionate to the aimed result, which includes that between the concrete facts of the case, particularly in terms of kind and severity, and the consequences, i.e. between the ends and the means, there must exist no disproportionality.

It follows that even in cases when the person committed an offence and poses threat to public order, the authority shall have the power to grant the residency status on the ground of the principle of proportionality. If the immigration authority did not have such a power and was bound by an unreasoned, defective decision of another authority, the immigration authority would have no other option than act unlawfully and breach the principle of proportionality. If the person committed serious crimes or poses serious and real threat to the national security, which must be proved by evidence and cannot be based on assumptions or legal presumptions and subject to full judicial review by an administrative jurisdiction, the authority may decide to expel this person without breaching the principle of proportionality, because the harm to public interests would be greater if the person remains on the territory of the state. However, the latter decision would only be lawful, if there was no plausible claim that the person would be subjected to treatment contrary to Article 3 of the ECHR. The ECtHR has been very clear that even national security considerations cannot justify such treatment resulting from expulsion.

Annex II

List of cases

Administrative court

ՎԴ/5706/05/12, 10 June 2015
ՎԴ/7368/05/14, 9 June 2015
ՎԴ/5119/05/14, 4 June 2015
ՎԴ/12642/05/13, 21 November 2014
ՎԴ/6239/05/14, 10 April 2015
ՎԴ/5706/05/12, 9 September 2014
ՎԴ/9742/05/13, 25 July 2014
ՎԴ/7373/05/13, 14 March 2014
ՎԴ/3048/05/12, 9 July 2013
ՎԴ/4475/05/12, 21 May 2013
ՎԴ/5882/05/12, 12 March 2013
ՎԴ/6630/05/11, 17 December 2012
ՎԴ/0081/05/10, 27 August 2010
ՎԴ/4749/05/09, 2 July 2010
ՎԴ/1693/05/08, 4 September 2009
ՎԴ/1693/05/08, 24 November 2008

Administrative court of appeals

ՎԴ/12642/05/13, 7 May 2015
ՎԴ/8891/05/13, 26 November 2014
ՎԴ/1082/05/13. 17 September 2014
ՎԴ/3048/05/12, 23 January 2014
ՎԴ/7373/05/13, 8 July 2014
ՎԴ/5882/05/12, 2 October 2013
ՎԴ/2317/05/11, 3 April 2012

Court of cassation

ՎԴ/7373/05/13, 25 September 2014
ՎԴ/7373/05/13, 27 August 2014
ՎԴ/1693/05/08, 27 May 2009