EDITORIAL:

ADMINISTRATIVE OFFENCES IN THE LIGHT OF HUMAN RIGHTS LAW

KEVIN AQUILINA

A recent area which has emerged in Human Rights Law is the regulation of administrative offences from a human rights perspective. Although human rights have developed considerably in so far as criminal procedure is concerned, the same cannot be said with regard to administrative sanctions. This is because whilst the human rights principles of criminal procedure such as the *nulla poena sine lege*, the *nullum crimen sine lege*, the *ne bis in idem*, the principle against retroactive application of the criminal law and others have been with us for several years if not centuries administrative punishments are of very recent origin.

An interesting document dealing with the human rights aspect of administrative offences is Recommendation No R (91)1E of the Committee of Ministers to Member States on Administrative Sanctions adopted by the Committee of Ministers on 13 February 1991.[1] It applies to any form of punitive administrative measure, be it pecuniary or otherwise. Outside the ambit of administrative sanctions contemplated by this Recommendation are 'measures which

[1] For the text of the Council of Europe's Recommendation see https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=34769&SecMode=1&Admin=0&DocId=392990.

administrative authorities are obliged to take as a result of criminal proceedings' and 'disciplinary sanctions'. The Recommendation lays down eight principles which can be summarised as follows:

Principle 1: Administrative sanctions have to be laid down by law. This principle is the administrative law counterpart to the *nullum crimen sine lege* principle in criminal procedure.

Principle 2: Administrative sanctions cannot be retroactive. This is equivalent to the *lex non habet ocolus retro* principle of criminal procedure. Principle 2 further provides that administrative sanctions cannot contemplate a more onerous sanction than the criminal offence which has been depenalised and administrative sanctions created following depenalisation should not burden the person on whom the administrative authority is considering imposing a sanction than s/he would have been burdened had the criminal offence not been depenalised.

Principle 3: No person may be penalised twice for the same act. Once again, the principle is reflecting the *ne bis in idem* principle of criminal procedure.

Principle 4: An action by an administrative authority has to be taken within a reasonable time and administrative proceedings have to be conducted with reasonable speed. This principle is based on Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms.

Principle 5: Any procedure capable of resulting in the imposition of an administrative sanction has to be terminated and cannot be left pending *ad infinitum*. Such principle ensures certainty of the law.

Principle 6: Persons faced with an administrative sanction

have to be informed of the charge against them; they are to be given sufficient time to prepare their case; their representative has to be informed of the nature of the evidence against them; they have the opportunity to be heard before any decision is taken. Once again, this principle is based on one of the principles of natural justice, the *audi et alteram partem* principle.

Moreover this principle further provides that an administrative act imposing a sanction has to contain the reasons on which it is based. The principles of natural justice contain also the duty to give reasons for decisions taken.

These principles – which are essentially mirroring Article 6(3) of the European Convention of Human Rights and Fundamental Freedoms – may be dispensed with, either in full or in part, in cases of minor importance only if the administrative sanction to be applied is a limited pecuniary penalty and the person charged consents thereto and such procedure is in accordance with the law.

Principle 7: The onus of proof shall be on the administrative authority. In other words, Principle 7 enshrines the maxim of *probatio incumbit ei qui dicit non ei qui negat.*

Principle 8: An administrative sanction shall be subject, as a minimum requirement, to control of legality by an independent and impartial court established by law. This is after all what the principle of legality is all about.

Although quite some time has passed since 1991 when the Recommendation under discussion was approved, there is no doubt that the Recommendation's guiding influence makes it more pertinent today than at the time of its adoption. This is because several states, including Malta, have developed a system of administrative offences parallel to a system of criminal justice. However, what seems to be missing are two things: in so far as state law is concerned, the adoption of

these human rights principles to administrative procedure and, in so far as international law is concerned, the adoption of an international convention which authoritatively lays down these principles within an international perspective. Perhaps the time has also come to add a new Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms dealing with the human rights aspects of administration offences very much on the lines of Recommendation No R (91)1E of the Committee of Ministers to Member States on Administrative Sanctions adopted by the Committee of Ministers on 13 February 1991.