



Media relations
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Press Release

regarding judgment F-2182/2021 of 6 June 2024

Approval procedure subject to review

The Federal Administrative Court has reviewed the approval procedure applied by the State Secretariat for Migration with regard to a residence permit granted by order of a cantonal court. The Court finds that the current practice violates the constitutional principle of the separation of powers and the fundamental procedural guarantees.

In 2015, a Portuguese worker who was incapacitated for work by illness applied for a residence permit relying on the right to stay contemplated in the Agreement on the Free Movement of Persons. The relevant cantonal authority, the Service de la Population du canton de Vaud (SPOP), refused to grant him a permit and ordered his removal from Switzerland in 2017. In 2019, the Cantonal Court of Vaud upheld his appeal. This cantonal judgment was not disputed before the Federal Supreme Court. The SPOP subsequently referred the file to the State Secretariat for Migration (SEM) for approval. Deeming that the requirements for recognition of the right to stay were not satisfied, the SEM refused to approve the granting of a residence permit. The applicant lodged an appeal with the Federal Administrative Court (FAC).

Separation of powers

The approval procedure is intended to enable the SEM to exercise federal oversight throughout Switzerland. In June 2019, an amendment to Article 99 of the Federal Act on Foreigners and Integration (FNIA) came into force. Under this amendment, the SEM is expressly empowered to refuse its approval even if the granting or extension of a permit was ordered by a cantonal appellate authority.

In the case at hand, the SEM refused its approval although the granting of the requested permit had been accepted by a cantonal judicial authority of the last instance. The FAC points out that this practice is contrary to the separation of powers and to the fundamental procedural guarantees enshrined in the Constitution and the European Convention on Human Rights. If the SEM deems that the granting or extension of a permit is not justified, it must, where the remedy of appeal is available, refer the matter to the Federal Supreme Court which is the only body empowered to overturn the decision of a cantonal court in such circumstances.

The FAC grants the appeal in this case and, in so doing, reverses the SEM decision. Considering the specific requirements for the right to stay as well, the

FAC approves the granting of a residence permit to the appellant.

This Judgment is subject to appeal, and the State Secretariat for Migration may therefore bring the matter before the Federal Supreme Court.

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About the Federal Administrative Court

Located in St. Gallen, the Federal Administrative Court (FAC) was established in 2007. With its staff of 375 employees (314.7 FTE) and its 73 judges (65 FTE) it is the largest federal court in Switzerland. The Federal Administrative Court has jurisdiction to hear appeals against decisions rendered by Swiss federal administrative authorities. In specific matters, the FAC may grant review on decisions rendered by cantonal authorities. Recourse actions are also reviewed by the Court. The FAC is composed of six divisions. It renders an average of 6,500 judgments every year.