File No. II OSK 3218/17

09.02.2018

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DECISION

23 January 2018

The Supreme Administrative Court composed of:

Judge of the Supreme Administrative Court Jerzy Stelmasiak

After having examined on 23 January 2018
at a closed session at the General Administrative Chamber
the cassation complaints of the Foundation ClientEarth Prawnicy dla Ziemi
having its seat in Warsaw
and Zdzisław Kuczma
against the decision of the Provincial Administrative Court in Gliwice
of 27 October 2017, File No. II SA/GI 639/17,
to reject the complaint of Zdzisław Kuczma
against the resolution of the Assembly of Śląskie Voivodship
concerning the air protection programme

decides:

to reject the cassation complaints

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Marcin Sikorski

Senior Court Inspector

JUSTIFICATION

With its decision of 15 September 2017, the Provincial Administrative Court in Gliwice rejected the complaint of Zdzisław Kuczma (hereinafter referred to as the "Complainant") against the resolution of the Assembly of Śląskie Voivodship of 17 November 2014 concerning the air protection programme.

In its justification the Court of First Instance pointed out that with the challenged resolution the Assembly of Śląskie Vovodship adopted the Air Protection Programme for the area of Śląskie Voivodship aimed at achieving the limit levels of substances in ambient air and the exposure concentration obligation. Article 91(3) and Article 92(1c) of the Act of 27 April 2001 on Environmental Protection Law (Official Journal of the Laws of 2013, Item 1232, as amended – hereinafter referred to as the "EPLA") were indicated as the basis for the adoption of the resolution.

With his letter of 13 April 2017, the Complainant called on the Assembly of Śląskie Voivodship to cease to violate the law by repealing the abovementioned resolution and adopting an act which would establish a programme making it possible to achieve the limit and target values of certain substances in ambient air as soon as possible. The Complainant pointed out that the challenged resolution was detrimental to his interest, which should not be conceived restrictively, since this would be inconsistent with EU law. At the same time, the resolution was a flagrant breach of the law; in particular, Article 91(9a), in conjunction with Article 91(1)-(5) of the EPLA and in conjunction with Articles 12 and 13 of Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe (OJ 2008 L 152/1, as amended, hereinafter referred to as the "CAFE Directive").

With its decision of 15 September 2017, the Provincial Administrative Court allowed the Foundation ClientEarth Prawnicy dla Ziemi having its seat in Warsaw (hereinafter referred to as the "Foundation") to participate in the proceeding.

Rejecting the complaint the Court of First Instance pointed out that the challenged resolution was addressed only to the administration authorities which were obliged to implement the programme which had been adopted. The challenged act imposed no obligations on the Complainant as a resident of Śląskie Voivodship (Rybnik). A legal interest may not be based on the deficiency of the resolution itself, which in the Complainant's view did not introduce effective measures to ensure that the air quality complied with the law, thus

posing a threat for the residents' health, causing mental discomfort and restricting the freedom of using one's flat in light of odour annoyances. The Complainant also referred to the fact that communications from public authorities recommended staying at home and buying an air cleaner in order to protect oneself against the adverse effects of air quality. In the Complainant's opinion, the right to respect for one's private and family life and one's home resulted from the Convention for the Protection of Human Rights and Fundamental Freedoms done at Rome on 4 November 1950, amended with Protocols Nos. 3, 5 and 8 and supplemented with Protocol No.2 (Official Journal of the Laws of 1993, No. 61, Item 284, as amended). Moreover, health as a personal good was subject to protection pursuant to Article 23, in conjunction with Articles 24 and 448 of the Civil Code. In the opinion of the Court of First Instance, the constraints indicated by the Complainant as affecting the use of his flat and his functioning in his surroundings only caused a factual interest.

The Court of First Instance also pointed out even if the position enabling a legal interest to be based on the right to life in a clean environment were admitted, it could not recognise that the Complainant had demonstrated that the challenged resolution was detrimental to his legal interest conceived in this way. In the opinion of the Court of First Instance, the adoption of mechanisms of air protection which the Complainant found insufficient could not represent a violation of his legal interest. Indeed, this did not mean that the Complainant's specific (real) rights were restricted or that he was deprived of them. The Complainant's situation relative to the environment, shaped by the provisions of the air protection programme which in his opinion would fully implement the mechanisms of environmental protection drawn from European Union law and international law, had only a hypothetical dimension. The Complainant's arguments could not be accepted on the basis of the principle, which he had cited, that national law should be interpreted in line with the Community law. This interpretation of national law in favour of the EU must not lead to the assumption that an individual was (always) able to successfully initiate a review of the content of an administrative act by an administrative court, also in the situation where the individual did not meet the statutory conditions for the capacity to bring legal action in court. In the view of the Court of First Instance, the adoption of the Complainant's position on the application of Article 90(1) of the Act on the Voivodship Self-Government would represent an interpretation *contra legem*.

The Foundation and the Complainant (hereinafter referred to as the ”Cassation Complainants”) lodged cassation complains with the same content against the above judgment.

The Cassation Complainants charged that Article 58(1)(5a), in conjunction with Article 3(2)(5), of the Act of 30 August 2002 on the Law of Proceedings Before Administrative Courts (Official Journal of the Laws of 2017, Item 1369 – hereinafter referred to as the “PBAC”), in conjunction with Article 90(1) of the Act of 5 June 1998 on the Voivodship Self-Government (Official Journal of the Laws of 2016, Item 486, as amended) and in conjunction with Article 23(1) of the CAFE Directive, were violated. In the opinion of the Cassation Complainants, the Court of First Instance should have assessed the Complainant’s capacity to bring legal action in court, taking into account the provisions of EU law laid down in the CAFE Directive and, in particular, Article 23(1) of that Directive.

The Cassation Complainants applied for the challenged decision to be repealed in its entirety and for the case to be reconsidered by the Court of First Instance.

Moreover, the Cassation Complainants applied for the proceeding to be suspended and for a question of law to be submitted to the Court of Justice of the European Union as to whether Article 23(1) second paragraph of the CAFE Directive should be interpreted to mean that a natural person who lives in area for which an air protection programme has been adopted in view of exceedance of limit values whose attainment deadline has already expired has the right to ask the national court for a review of this air protection programme, in particular as to whether it contains appropriate measures so that the period when limit values are exceeded can be as short as possible, even if this plan is only addressed to the administration authorities which are obliged to implement the adopted plan and the plan itself does not impose any obligations on this natural person or confer any rights thereto.

The Court considered the following:

The cassation complaints did not deserve to be accepted.

In accordance with Article 90(1) of the Act on the Voivodship Self-Government, everybody whose legal interest or right has been violated by an act of local law issued within the scope of public administration may challenge the provision before an administrative court.

Firstly, the essence of the capacity to bring legal action in court as defined in Article 90(1) of the Act on the Voivodship Self-Government is the right to demand a review of a specific act or activity in order to bring them to a condition which is consistent with the law,

i.e. with an objective legal order. This is a measure which serves to protect other entities against the effects of an exceedance by a territorial self-governmental unit of the limits of its independence laid down by the provisions of the law, with a detriment to the rights of another unit within the sphere of public administration. This institution is sometimes also called a general complaint (*actio popularis*) which, however, is incorrect insomuch as the capacity to lodge a complaint depends on whether the Complainant can demonstrate that the challenged local act violates his legal interest or right. It is with this meaning that Article 90(1) of the Act on the Voivodship Self-Government is a *lex specialis* in relation to Article 50(1) of the PBAC which makes the capacity to lodge a complaint only dependent on the possession of a legal interest, at the same time, without requiring the demonstration of its violation. In the case where a complaint is lodged against this type of an act of local law, the consequence of failure to demonstrate a violation of a legal interest is the rejection of the complaint (Article 58(1)(5a) of the PBAC).

Secondly, in this case it is undisputed that the condition for successfully lodging a complaint against an act of local law of the Voivodship self-government authority is the demonstration of a violation of a legal interest. The Complainant did question this in his complaint, nor is it questioned by the Cassation Complainants in their cassation complaints. In contrast, both the Complainant and the Foundation demand the application of the interpretation of Article 90(1) of the Act on the Voivodship Self-Government in favour of the EU by allowing the possibility of challenging a resolution of this type, although the air protection plan does not impose any obligations on the Complainant, nor does it confer any rights and it is addressed to the administration authorities. The Foundation (and the Complainant) believe that Article 23(1) of the CAFE Directive makes it possible to apply this type of interpretation. However, in the opinion of the Supreme Administrative Court, the proposed interpretation would be an interpretation *contra legem* which cannot be reconciled with the principle of a democratic state governed by the rule of law and the related principle of equality before the law. Indeed, such an interpretation would lead to the unacceptable situation where, depending on the type of a challenged act of local law, specific entities would be obliged to demonstrate a violation of a legal interest whereas others would not.

Both the Complainant and the Foundation refer to the case-law of the Court of Justice of the European Union, which, however, may not provide the basis for interpreting *contra legem* Article 90(1) of the Act on the Voivodship Self-Government. The Polish legal system admits the possibility of challenging a resolution of a Voivodship assembly concerning the air protection programme; however, the effective lodging of a complaint in a case of this type

depends on the demonstration of a violation of a legal interest, which did not happen in this case. In turn, it does not follow from the content of the CAFE Directive that a Member State is obliged to ensure that each resident of the zone covered by the programme may challenge the air protection programmes. The ECJEU indirectly indicated the desirability of such a solution in the case-law cited in the cassation complaint; however, as was already pointed out, this may not provide the ground for an unacceptable expansion of the application scope of Article 90(1) of the Act on the Voivodship Self-Government.

Thirdly, in accordance with Article 23(1) of the CAFE Directive, where, in given zones or agglomerations, the levels of pollutants in ambient air exceed any limit value or target value, plus any relevant margin of tolerance in each case, Member States shall ensure that air quality plans are established for those zones and agglomerations in order to achieve the related limit value or target value specified in Annexes XI and XIV. In the event of exceedances of those limit values for which the attainment deadline is already expired, the air quality plans shall set out appropriate measures, so that the exceedance period can be kept as short as possible. The air quality plans may additionally include specific measures aiming at the protection of sensitive population groups, including children. Those air quality plans shall incorporate at least the information listed in Section A of Annex XV and may include measures pursuant to Article 24. Those plans shall be communicated to the Commission without delay, but no later than two years after the end of the year the first exceedance was observed. Where air quality plans must be prepared or implemented in respect of several pollutants, Member States shall, where appropriate, prepare and implement integrated air quality plans covering all pollutants concerned.

There is no doubt that this provision is addressed the Member States and imposes specific obligations on them. However, it does not follow from it that the air protection programmes adopted at the Voivodship level must impose specific obligations or confer rights to the residents of a zone covered by the plan. It is by no means possible to assume on the basis of an analysis of the cited provision that it may be the source of a legal interest of the Complainant in this case and, even more, that this interest has been violated. However, in such a case there may be a factual interest, but it is insufficient for the capacity to lodge a complaint to be conferred to the Complainant in this case. The factual interest of this type is also demonstrated by other circumstances raised in the complaint (e.g. concerning the purchase of an air cleaner). In contrast, a violation of a legal interest may not be based on the general non-compliance of a given act of local law with the law, which follows directly from Article 90(1) of the Act on the Voivodship Self-Government.

Fourthly, for these reasons the charges of the cassation complaints did not deserve to be accepted. Despite the charges of the cassation complaints, the Court of First Instance evaluated a violation of the legal interest of the Complainant within the limits of the provisions which he had cited. This also concerned the evaluation of a violation of a legal interest based on Article 23(1) of the CAFE Directive.

Fifthly, for these reasons the Supreme Administrative Court did not find it necessary to submit a prejudicial question to the Court of Justice of the European Union. Indeed, there is no basis for such an interpretation of Article 23(1) of the CAFE Directive that would lead to an interpretation *contra legem* of Article 90(1) of the Act on the Voivodship Self-Government. Indeed, the interpretation of this provision proposed by the Cassation Complainants would mean that it would be possible for a complaint against a resolution concerning an air protection programme to be solely based on a factual interest, which is unacceptable not only under the special provision which is Article 90(1) of the Act on the Voivodship Self-Government, but also under the general rules of proceedings before administrative courts.

Sixthly, it can be mentioned only in passing that already after the cassation complaint had been lodged the Assembly of Śląskie Voivodship adopted the resolution No. V/47/5/2017 of 18 December 2017 to adopt an air protection programme for the area of Śląskie Voivodship aimed at achieving the limit levels of substances and the exposure concentration obligation (Official Journal of Śląskie Voivodship of 2017, Item 7339) which repealed the challenged resolution No. IV/57/3/2014 of 17 November 2014. The entry into force of this resolution has no consequence in terms of legal action for the decision in this case, but may possibly be important from the point of view of the factual interest of the Complainant.

For these reasons and pursuant to Article 184 of the PBAC, the Supreme Administrative Court ruled as in the conclusion of the judgment.

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Marcin Sikorski

Senior Court Inspector