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THE EXTENT OF ADMINISTRATIVE COURTS' REVIEW OF CASES BASED ON CHALLENGES TO CASSATION DECISIONS

Introduction

Provisions of the Act Amending the Code of Administrative Procedure and Certain Other Acts of 7 April 2017¹ introduced a new means to challenging 'cassation decisions' issued by appeal authorities to the Law on Proceedings Before Administrative Courts of 30 August 2002.² The remedy is called 'objection to a decision,' which is clearly implied by Article 64a PBAC, according to which a decision under Article 138, para. 2 of the Code of Administrative Procedure of 14 June 1960³ cannot be challenged, yet a party dissatisfied with a decision can file the so-called 'objection to a decision.'

The institution has replaced the earlier complaint against a cassation decision to become the sole means of challenging decisions issued by force of Article 138, para. 2 CAP. Accordingly, an appeal authority can repeal a decision in full and order its reconsideration by a first-instance authority if such decision is issued in breach of procedural rules and the scope of a case that needs clarification has a significant impact on its resolution. The authority should designate the circumstances to be addressed when re-considering the case.

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¹ Journal of Law of 2017, item 935.

² Journal of Law of 2022, item 329 [hereinafter: PBAC].

³ Journal of Law of 2021, item 735 [hereinafter: CAP].

The new way of challenging cassation decisions under Article 138, para. 2 CAP, supposedly fast and less complicated,⁴ gives rise to some doubts, however, and differences in administrative court rulings as to the extent of review of cassation decisions by administrative courts.

One view posits the extent of a review is restricted to the correctness of explanatory proceedings, whereas a review of interpretation of substantive law is premature at this stage. The other position holds a court noting errors in such an interpretation should review it as well.

The inconsistency of administrative courts in this matter produces uncertainty as to the rules of judging in cases instigated by means of objections and unequal treatment of those filing this means of challenging. The issue deserves some reflection, therefore.

The considerations were carried out on the basis of a legal dogmatic method and on the basis of a review of the presented views of the doctrine and jurisprudence.

1. The nature and types of cassation decisions

In line with the principle of two-tier administrative proceedings, an appeal authority is obliged to reconsider and resolve a case settled with a decision of a first-instance authority. A second-instance authority cannot limit itself to a review of a challenged decision, therefore. Its role is to conduct another procedure, including explanatory proceedings, and to issue a new resolution. Two decisions are insufficient for acknowledging that the principle of two-tier administrative proceedings is fulfilled. Such resolutions must follow a procedure that helps to attain its objectives [Borkowski 1998; Adamiak 1980, 144; Smarż 2018, 379-86].⁵

An appeal authority only has limited cassation competences by way of exception, as laid down in Article 138, para. 1, part 2 *in fine* and Article

⁴ Statement of reasons for the government draft Act Amending the Code of Administrative Procedure and Certain Other Acts, (Print No. 1183), p. 56-58, 61 <http://orka.sejm.gov.pl/Druki8ka.nsf/0/F3388D1AB00B1313C125809D004C3C8E/%24File/1183.pdf> [accessed: 09.07.2021].

⁵ Judgement of the Regional Administrative Court in Warsaw of 23 March 2015, I SA/Wa 3358/14, Legalis no. 1245144.

138, para. 2 CAP. These provisions distinguish two types of cassation decisions: typical cassation decisions, which end a case, and cassation decisions that cause a case to be reconsidered by a first-instance authority [Adamiak and Borkowski 2021].

Given the exceptional nature of these provisions, a broad interpretation is not acceptable in this case. This institution cannot be abused, therefore, without addressing the possibility of an appeal authority acting under Article 136 CAP.⁶ The need to examine evidence is within an appeal authority's competence to supplement explanatory proceedings, which excludes cassation of a decision.

These cassation resolutions have been treated differently by the legislator, however. In the first case, Article 138, para. 1, part 2 allows for an exception to the duty of resolving the essence of a case and lets an appeal authority limit itself to suppressing a first-instance authority's decision. The appeal authority is not free to opt for this method of closing appeal proceedings. This restriction stems from the criterion of discontinuance of the first-instance proceedings and thus only applies where the proceedings are unsubstantiated [Adamiak 2004, 549-603]. Where the condition of unsubstantiated proceedings in the first instance applies, an appeal authority is bound to resolve a case on its merits, unless there are grounds for the cassation of a decision and ordering the first-instance authority to consider the case again.

The legislator stresses the exceptional nature of the cassation decisions of the other type by defining the condition of their issue in Article 138, para. 2 CAP, which may take place where 'such a decision has been issued in breach of procedural rules, while the extent of the case that must be clarified has a significant impact on its resolution.' Such a decision cannot be made, therefore, in circumstances other than explicitly laid down in Article 138, para. 2 CAP [Eadem 1996, 544-601; Dobkowska and Muzyczuk 2010, 119-27].⁷ No other defects of proceedings or of a decision in the first

⁶ Judgement of the Supreme Administrative Court of 15 August 2008, II GSK 57/08, Legalis no. 128235; judgement of the Regional Administrative Court in Gdańsk of 21 June 2006, II SA/Gd 654/05, Legalis no. 271697.

⁷ Judgement of the Supreme Administrative Court of 11 March 2020, II OSK 1187/18, Legalis no. 2391093.

instance do not allow an appeal authority to issue a cassation decision of this type. This kind of appeal authority's decision is admissible by way of exception to the rule of case resolution on its merits, thus, a broad interpretation is unacceptable.

The legislator speaks of the institution of objection to a decision, which will be analysed below, only with reference to cassation decisions of the second type.

2. The nature of the institution of objection to a decision

Objection to a cassation decision is a means of challenge separate from a complaint. The new legal solution introduces a mechanism of reviewing grounds for repealing decisions and ordering their reconsideration. The doctrine emphasises the institution fulfils two important functions: it helps streamline proceedings and has a preventive function as it helps to prevent appeal authorities from reckless reversals and encourage ruling on merits [Jagielski, Piecha, and Pietrasz 2017, 420-28]. The functions serve the overarching objective of upholding a party's right to have their case resolved in reasonable time, implied by Article 45, sect. 1 of the Constitution of the Republic of Poland,⁸ which refers to administrative proceedings, too, although not explicitly.

This results from the draft amendments to CAP, which state the institution of 'the objection to a decision' and the remaining provisions of Chapter 3a, i.e., Articles 64a-64e, are intended to improve efficiency and effectiveness of case handling by public administration authorities.⁹

The Supreme Administrative Court has also affirmed the legislator intended the introduction of the special remedy of the objection to a cassation decision to mobilise appeal authorities to discharge their statutory function and duty of considering a case twice on its merits, not merely of reviewing it.¹⁰

⁸ Constitution of the Republic of Poland of 2 April 1997, Journal of Law No. 78, item 483 as amended.

⁹ Cf. reasons for the bill of amendments, the Parliament Print no. 1183, p. 61ff.

¹⁰ Judgements of the Supreme Administrative Court of 21 November 2018, II OSK 3069/18, Legalis no. 1851402, and of 7 December 2017, II OSK 3011/17, Legalis no. 1697467.

The statement of reasons for the amendments implies another intention of the legislator is to allow administrative courts to conduct reviews limited to reasons for reversing a decision by an appeal authority and ordering a case to be reconsidered. The objection was to become a means of challenge a party could use to initiate a kind of incidental proceedings whose object would be restricted to formal questions.¹¹ The objection has therefore been created not as a means of challenge (appeal) but a stand-alone legal remedy initiating new administrative court proceedings in a case that the provisions of Article 3, para. 2a PBAC, have made a separate and stand-alone type of administrative court case.

3. Differences between a complaint and an objection

It has already been noted the objection to a decision is a means of challenge separate from a complaint, which is clearly corroborated by Article 64a PBAC. The legislator distinguishes both the institutions of challenging administrative decisions there. This is implied by the words “a decision contemplated by Article 138, para. 2 [...] cannot be challenged, yet a party dissatisfied with such a decision can file an objection.” This distinction is additionally supported by the fact the objection is governed by a separate Chapter 3a of Division III of PBAC, just like the complaint [Hauser and Wierzbowski 2021].

That provision of Article 64 PBAC, clearly states that if a second-instance authority issues a cassation decision by force of Article 138, para. 2 CAP, a party cannot file a complaint with an administrative court, which had been the case before. It should be remembered, though, the option of challenging a cassation decision in an administrative court had not been an obvious question. Once solutions were in place to allow the Supreme Administrative Court to verify the legality of administrative decisions under Article 198 CAP prevailing at the time, the admissibility of a complaint against an authority’s decision was conditional on the exhaustion of remedies in administrative proceedings. Due to the above, seven judges

¹¹ Judgement of the Regional Administrative Court in Gdańsk of 25 February 2019, II SA/Gd 15/19, Legalis no. 1881735.

of the Supreme Court in their resolution of 19 January 1983¹² declared the essence of a cassation decision consists first of all in the fact a second-instance authority's decision does not resolve a case on its merits. A cassation decision of a public administration authority closes appeal proceedings while maintaining a case in progress, since administrative proceedings still continue. Hence, it is a purely court, 'inter-instance' decision, as it fails to settle the essence of a case. As a consequence, the Supreme Court found these unique characteristics of a cassation decision provide grounds for concluding such a decision cannot be challenged in a complaint to the Supreme Administrative Court. The Supreme Court upheld this position in a resolution of all members of its Civil and Administrative Chamber of 15 December 1984.¹³ The admissibility of a complaint against a cassation decision ordering reconsideration of a case by the Supreme Administrative Court was finally decided by Article 16, sect. 1, part 1 of the Supreme Administrative Court Act of 11 May 1995,¹⁴ which stipulated the court rules on complaints against administrative decisions without differentiating their contents [Sobieralski 2000, 48-57].

Under the current legal order, there is no doubt an objection to a decision is distinct from a complaint and the sole means of challenging cassation decisions. This difference from proceedings based on complaints against a cassation decision is expressed in several aspects. First, the objection can only concern a cassation decision by force of Article 138, para. 2 CAP. The designation of the legal format of an act that can be reviewed in objection proceedings and specific legal grounds of such an act have far-reaching consequences, since an objection can only be raised to a decision issued as part of general administrative proceedings. Thus, cassation decisions by force of Article 138, para. 2 CAP can be objected to and other cassation decisions are subject to complaints at present [Gut 2018, 47-62].

Therefore, an objection can relate exclusively to a decision contemplated by Article 138, para. 2 CAP, namely, issued by a second-instance authority in breach of procedural rules, where the part of the case requiring clarification has a significant impact on its resolution.

¹² III AZP 7/82, OSNCP 1983, No. 9, item 127.

¹³ III AZP 1/84, OSNCP 1985, No. 10, item 144.

¹⁴ Journal of Law item 368. The act was binding till 31 December 2003.

The literature points out application of a cassation resolution by an appeal authority should be an exception to the principle of judging cases on their merits [Adamiak 2016, 569-634; Glibowski 2017, 877-963; Dobkowska and Muzyczuk 2010, 119-27]. Similar positions are present in rulings of administrative courts.¹⁵ In addition, the doctrine stresses the avoidance of judging cases on their merits by appeal authorities is an abuse of Article 138, para. 2 CAP to the detriment of the principle of quick proceedings in two tiers, depriving a party of the option of having their case judged on its merits by higher-instance authorities [Adamiak 2020, 342-44]. In the context of decisions issued pursuant to Article 138, para. 2 CAP, it is highlighted the protection of the rule of two-tier administrative proceedings cannot be prioritised at the expense of other court values, including the requirements of quick and simple proceedings. It should not be addressed in abstraction from the mechanism of the protection of party interests, that is, of decision reviews by courts, either [Kmieciak 2014, 282-348].

The second difference between a complaint and an objection lies in the fact proceedings instigated by an objection are restricted solely to a verification of conditions for issue of a cassation decision under Article 138, para. 2 CAP (Article 64e PBAC). The principle expressed by Article 134, para. 1 PBAC, which stipulates an administrative court resolves a given case without being bound by charges and petitions of a complaint or any legal grounds cited, has been limited in this way. In effect, Article 135 PBAC will not apply either, according to which a court applies statutory means to remedying breaches of law with reference to acts or actions issued or undertaken in any proceedings in the case the complaint relates to. In the circumstances, the court judges exclusively whether conditions obtain for the issuance of a decision specified by Article 138, para. 2 CAP, without going beyond this narrow scope. The court isn't bound by charges and petitions of an objection and proceeds to examine all conditions that led to the issue of a decision by force of Article 138, para. 2 CAP,

¹⁵ Cf. e.g. judgements of the Supreme Administrative Court of 20 October 2016, II OSK 65/15, *Legalis* no. 1554068; of 24 August 2016, II OSK 2958/14, *Legalis* no. 1533915; of 13 May 2015, II GSK 859/14, *Legalis* no. 1722453; judgement of the Regional Administrative Court in Gdańsk of 14 September 2016, II SA/Gd 733/15, *Legalis* no. 1540816.

and should therefore assess reasons for rejecting a petition contemplated by Article 136, para. 2 CAP.

Another difference concerns the kind of resolutions the court may issue. Objection proceedings, apart from decisions to discontinue the proceedings or reject an objection, can only end with repealing a decision in full if an objection is accepted, i.e., if the court finds a violation of Article 138, para. 2 CAP, or rejecting an objection if no breach of Article 138 § 2 is determined (Article 151a, para. 1 PBAC). In these proceedings, the court cannot find a cassation decision invalid, which is a major and unreasonable restriction compared to the complaint. What is more, when accepting an objection, the court may, *ex officio* or at a party's request, decide to fine an authority against which a complaint can be submitted (Article 151a, para. 3 PBAC) as set out in Article 154, para. 6 PBAC.

Importantly for parties, means of challenge are unavailable to a ruling to accept an objection and repeal a decision in full (Article 151a, para. 3 PBAC). Such a ruling cannot be challenged by either public administration authorities or other parties to administrative court proceedings that haven't filed an objection, therefore. It can be stated proceedings based on objections fail to realise the principle of two-tier court administrative proceedings in full.

Deadlines other than for complaints apply to objections. An objection is filed within fourteen days of decision delivery to a complainant. The fourteen-day term is met if a party submits an objection to a decision directly to an administrative court within this period. In the event, the court promptly calls on the authority that has issued the decision in question to provide full and orderly files of the case within fourteen days. If the authority fails to discharge the duty of supplying the files to the court, the latter, if requested by the complainant, may decide to fine the authority as set out in Article 154, para. 6 PBAC [Sadkowski 2017]. Thus, the times for submitting an objection and providing the case files to the court, as well as the deadline for self-review, that is, fourteen days, too, have been reduced (Article 64c, para. 4 PBAC).

What is also noteworthy, the legislator has not provided for separate (preferential) dates for objections by prosecutors, the Commissioner

for Civil Rights Protection or the Ombudsman for Children, which is the case for complaints [Gołaszewski 2017, 969-73].

Like complaints, on the other hand, objections are submitted via the authorities whose decisions are challenged. Should an authority fail to transfer such an objection, even if fined, the court considers the case based on a copy of the objection supplied by the complainant (Article 64c, para. 7 PBAC). Other than in the case of a complaint, a decision based on a copy of an objection is independent from the complainant's petition and is obligatory, not dispositive like in proceedings concerning complaints. Since courts normally do not elect to consider cases based on copies of challenge remedies, cases derived from objections can be expected to be heard, if authorities are slow, in order to avoid their obligatory consideration based on copies [Woś and Firlus 2017, 82-98].

In spite of these differences, complaint regulations apply to objections pursuant to Article 64b, para. 1 PBAC, unless the Act stipulates otherwise. This reference does not allow for unequivocal determination of a scope of provisions to apply to proceedings based on the objection, however. It's not clear whether it refers only to Chapter 2, Division III PBAC, entitled 'The Complaint,' or to all provisions of the Act that relate to complaints. Such a solution is dubious from the perspective of the principle of the definiteness of law [Jagielski, Piecha, and Pietrasz 2017, 420-28] and consequently produces its uncertainty.

4. Jurisprudential lines concerning the extent of review as part of objections

Despite the literal wording of Article 64e PBAC, and the legislator's intention expressed in the statement of reasons for draft amendments to CAP that the objection to a decision is intended to allow administrative courts to undertake reviews to a limited extent including only reasons for repealing a decision by an appeal authority and ordering a reconsideration of a case, administrative court jurisprudence contains decisions that undermine this assumption. These decisions point out a court, beside assessing the correctness of explanatory proceedings, should review the interpretation of substantive law. These divergences cannot be ignored.

4.1. Assessing the correctness of explanatory proceedings

The first group of decisions assumes, in line with the legislator's intention, that in cases based on objections to cassation decisions, the court only reviews the correctness of explanatory proceedings. This stance is presented, *inter alia*, in the Regional Administrative Court of Łódź judgement.¹⁶ The court determined the role of an administrative court reviewing cassation decisions is limited to analysing the reasons for which an appeal authority found it necessary to exercise the option provided for by Article 138, para. 2 CAP.¹⁷ The judges explain in their statement of reasons the provisions of Article 138, para. 2 CAP, define two conditions of an appeal authority's decision to repeal a challenged decision in full and order its reconsideration to a first-instance authority, namely: 1) the appeal authority finding a challenged decision to be issued in violation of procedural rules, i.e., provisions of CAP and/or procedural regulations in specific laws, and 2) the appeal authority finding the extent of a case to be clarified has a significant impact on its resolution.

Use of the connective 'and' is noteworthy here as it means the determination of a violation of procedural rules alone, though pre-requisite to the repealing of a challenged decision, is not the sole and sufficient condition [Ziółkowska 2017, 313-32]. It is additionally necessary to demonstrate 'the extent of a case to be clarified has a significant impact on its resolution.' The words 'the extent of a case to be clarified' signify a first-instance authority has not conducted explanatory proceedings in full or in a substantial part, which prevents an appeal authority from resolving the case in compliance with the principle of two-tier administrative proceedings.¹⁸

The adjudication panel was correct in stressing in their decision the regulation of Article 138 § 2 CAP, is an exception to the principle of two-tier

¹⁶ Judgement of the Regional Administrative Court in Łódź of 29 November 2017, SA/Łd 654/17, Legalis no. 1699888.

¹⁷ Judgement of the Regional Administrative Court in Poznań of 7 May 2014, III SA/Po 1332/13, Legalis no. 978511; judgement of the Regional Administrative Court in Gliwice of 10 October 2013, IV SA/Gl 18/13, Legalis no. 864314.

¹⁸ Judgement of the Regional Administrative Court in Warsaw of 16 September 2020, VII SA/Wa 1473/20, Legalis no. 2498895.

administrative proceedings governed by Article 15 CAP, according to which an administrative case heard and resolved with a first-instance authority's decision, which is then appealed against by an authorised entity, is again considered and resolved by a second-instance authority. This means, therefore, that where there are no obstacles to reconsidering an administrative case and ending it with a second-instance resolution based on the merits of the case, the making of a cassation decision that repeals a first-instance authority's decision and orders a reconsideration of the case by the same authority is unacceptable as it goes against the principle of two-tier administrative proceedings.

It should be also kept in mind a cassation decision may be made if a second-instance authority's doubts as to the facts of the case cannot be dispelled under Article 136 CAP, according to which an appeal authority, if required by a party or *ex officio*, can undertake additional proceedings to gather more evidence and materials in the case or instruct the authority which has issued the given decision to conduct such proceedings [Smarż 2021, 81-94]. The need to gather limited additional evidence is undoubtedly within the competence of an appeal authority and excludes issue of a cassation decision.

Other regional administrative courts rule in similar ways¹⁹ as they recognise only the occurrence of the condition specified in Article 138, para. 2 CAP, can be reviewed in cases stemming from objections. The application of substantive law provisions cannot thus be reviewed at this stage. By defining the questions to be examined by administrative courts in case of objections and amending CAP and PBAC, the legislator determines that only the occurrence of the condition specified in Article 138, para. 2

¹⁹ Judgement of the Regional Administrative Court in Poznań of 12 December 2017, IV SA/Po 1180/17, Legalis no. 1700114; judgement of the Regional Administrative Court of Cracow of 4 November 2020, III SA/Kr 1186/19, Legalis no. 2507843; judgement of the Regional Administrative Court in Rzeszów of 31 August 2020, II SA/Rz 873/20, Legalis no. 2451823; judgement of the Regional Administrative Court of Cracow of 11 August 2020, III SA/Kr 1250/19, Legalis no. 2500024; judgement of the Regional Administrative Court in Warsaw of 29 July 2020, VII SA/Wa 1035/20, Legalis no. 2512019; judgement of the Regional Administrative Court in Cracow of 10 July 2020, III SA/Kr 1402/19, Legalis no. 2485059; judgement of the Regional Administrative Court in Warsaw of 8 April 2020, VI SA/Wa 2502/19, Legalis no. 2358184.

CAP (Articles 64e and 151a, para. 1) is subject to review. Appealing from the contrary, the option of evaluating the application of substantive law is thus excluded, as regulated in the now separate Article 138, para. 2a CAP. This solution corresponds to the rule that if a court admits a complaint, its judgement cannot be challenged (Article 151a, para. 3 PBAC).

This means the extent of a review of legality by an administrative court in a case initiated with an objection to a cassation decision is restricted to an analysis of reasons for an appeal authority to find it necessary to resort to the option provided for by Article 138, para. 2 CAP. In effect, a court is authorised to accept an objection only if a reversal of a first-instance authority's decision and ordering the latter to recognise the case arises from the conditions under Article 138, para. 2 CAP. The jurisprudence indicates an objection to a cassation decision is only raised against a reversal of a first-instance decision and ordering another hearing of a case. Such an objection initiates special proceedings where a court is only expected to decide whether an appeal authority had reasons not to issue a resolution on the merits of a case and whether it should not, like in complaint cases, decide within such a case without being bound by charges or petitions of a complaint and the legal grounds it cites. Such a review, therefore, cannot include a substantive law assessment of the point of the case, since drawing any conclusions in this respect would be inadmissible and premature.²⁰

This view is also supported with linguistic, logical, intent, and systemic interpretations. It should be accepted, therefore, a ruling on an objection only serves proceedings without creating any consequences for the scope of rights and duties of parties interested in a specific resolution.

The Regional Administrative Court of Warsaw decided likewise²¹ by acknowledging a review of a challenged decision as part of hearing

²⁰ Judgement of the Supreme Administrative Court of 13 October 2020, I OSK 1734/20, Legalis no. 2510122; judgement of the Regional Administrative Court in Poznań of 8 August 2017, IV SA/Po 649/17, Legalis no. 1653716; judgement of the Regional Administrative Court in Gorzów Wielkopolski of 17 October 2017, II SA/Go 838/17, Legalis no. 1675455; judgement of the Regional Administrative Court in Łódź of 29 November 2017, II SA/Łd 654/17, Legalis no. 1699888.

²¹ Judgement of the Regional Administrative Court in Warsaw of 18 December 2017, VII SA/Wa 2725/17, Legalis no. 1729629.

an objection means it becomes necessary to assess if, in the given case, a second-instance authority was reasonable in exercising the option of issuing a cassation decision or whether it avoided settling the point of the case for no reason. A fundamental duty of an administrative court considering an objection to a cassation decision will therefore be to determine whether conditions were in place for the application of Article 138, para. 2 CAP, i.e., for the abandoning of the general rule of another hearing of a case on its merits or closing it otherwise. When reviewing a resolution issued by force of Article 138, para. 2 CAP, on the other hand, the court is not authorised to refer to the merits of a case with a view to resolving it, since the case is returned to the first-instance authority whose decision is repealed.

A similar ruling was handed down by the Regional Administrative Court of Białystok,²² which found a review of the legality of a decision subject to an objection means it is necessary for a court to assess whether, in the circumstances of a given case, an appeal authority has reason to exercise the option of issuing a cassation decision or whether it avoided settling the point of the case for no reason. The court is not authorised, on the other hand, to examine other possible breaches of the law in the case, particularly violations of substantive law.

The Supreme Administrative Court shared the same position, finding the purpose of administrative court proceedings based on objections to a cassation decision is not a full assessment of a challenged decision, only an examination whether conditions obtain for the issuance of a cassation decision. Guided by this objective, the legislator has simplified court proceedings initiated by an objection and stipulated, for example, Article 33 PBAC, is not applicable to these proceedings. Parties to proceedings in administrative courts are therefore not the same as the remaining parties to administrative proceedings who have a legal interest in having a given case resolved. A binding resolution regarding substantive law in proceedings based on an objection would undoubtedly lead to a violation of rights of those entities.²³

²² Judgement of the Regional Administrative Court in Białystok of 26 September 2018, II SA/Bk 447/18, Legalis no. 1830137.

²³ Judgement of the Supreme Administrative Court of 11 May 2021, III OSK 3627/21, Legalis no. 2572278.

This view clearly corresponds to the contents of administrative and court administrative procedure, therefore, it can be expected to gain broad support that will contribute to its general acceptance.

4.2. The court also reviews the interpretation of substantive law

The other group of less common decisions of administrative courts tend to accept Article 138, para. 2a CAP, obliges an appeal authority that repeals a decision and orders a case to be reconsidered to set guidelines on an interpretation of regulations wrongly interpreted by a first-instance authority in the latter's decision, including the provisions of substantive law.²⁴

For instance, the Regional Administrative Court of Gdańsk²⁵ accepts determining in practice whether a cassation decision has been issued in breach of procedural law may require an evaluation addressing the contents of substantive law the decision concerns. In the event, a norm of substantive law will be one of the criteria for the assessment of procedural conditions (Article 138, para. 2 CAP), not an object for the administrative court to consider.

Comparable positions have been taken by the Regional Administrative Courts of Lublin, Kraków, and Białystok,²⁶ which found that, although a review by an administrative court whose extent is defined by Article 64e PBAC, is limited to an assessment of conditions for the issue of a decision under Article 138, para. 2 CAP, and thus cannot, as a matter of principle, concern the essence of a case, the determination whether the extent of a case to be clarified has a significant impact on its resolution occasionally requires an analysis of substantive law concerning a given matter, in particular, those of its provisions which determine the scope and type

²⁴ Judgement of the Supreme Administrative Court of 9 November 2017, I OSK 24/16, *Legalis* no. 1860747.

²⁵ Judgement of the Regional Administrative Court in Gdańsk of 11 June 2018, II SA/Gd 228/18, *Legalis* no. 1801133.

²⁶ Judgement of the Regional Administrative Court in Lublin of 26 March 2019, II SA/Lu 105/19, *Legalis* no. 1952280; judgement of the Regional Administrative Court in Cracow of 26 October 2020, II SA/Kr 911/20, *Legalis* no. 2548487; judgement of the Regional Administrative Court in Białystok of 7 February 2019, II SA/Bk 804/18, *Legalis* no. 1880992; judgement of the Regional Administrative Court in Białystok of 16 September 2019, II SA/Bk 600/19, *Legalis* no. 2231520.

of factual findings necessary to settle the case. In other words, establishing whether a cassation decision has been issued in violation of procedural regulations may in practice require an assessment addressing the contents of substantive law the decision relates to. In the event, however, a substantive norm will be a criterion of the evaluation of procedural conditions [Kabat 2018, 268-77].

A similar stance is adopted by the Regional Administrative Court of Łódź, which determined an examination of conditions for the issuance of a decision under Article 138, para. 2 CAP, as authorised by Article 64e PBAC, comprises a substantive law assessment that conditions a conclusion the extent of a case having impact on a resolution must be clarified. This is the case where a procedural breach constituting a first condition prevents clarification of some important circumstances of a case. This interrelation of both the conditions corroborates the definition of the extent of a case which must be clarified. In other words, questions of substantive law cannot be ignored by an administrative court, since the conditions of application of CAP provisions can only be assessed from the viewpoint of a substantive law provision being applied.²⁷

This position is indefensible when compared to the provisions of CAP and PBAC, yet it adapts them to the reality of administrative cases, where an application of procedural regulations is inextricably linked with an interpretation of substantive law.

This line of jurisprudence has been recently upheld by the decisions of the Supreme Administrative Court, which assume that in the light of Article 138, para. 2 CAP, the extent of a case having a significant impact on a resolution should be assessed from the perspective of substantive law applicable to a given case. If the scope of explanatory proceedings is determined by regulations on which a resolution concerning the merits of a case is based, substantive law issues cannot be ignored by the administrative court at all. Otherwise the institution of the objection, intended to accelerate the entire proceedings, becomes meaningless. This means Article 64e PBAC, should be construed in such a way that an administrative court considering conditions for an objection to a decision only

²⁷ Judgement of the Regional Administrative Court in Łódź of 22 February 2021, II SA/Łd 403/20, Legalis no. 2534170.

assesses existence of conditions for the issue of a decision under Article 138, para. 2 CAP, yet does it in the light of substantive law provisions that may be applicable to a given case. In the opinion of the Supreme Administrative Court, it is correct to say an administrative court reviewing legality of a cassation decision cannot treat such a review as fiction. This is precisely the case, meanwhile, if the administrative court ‘escapes’ legal regulation that may apply to a given case. Such an action cannot be seen as reviewing the legality of a decision, but as the evasion of determining the legal compliance of a decision challenged in the administrative court. The Supreme Administrative Court also points out Article 64e PBAC, does not preclude the application of Article 134, para. 1 CAP. When examining an objection to a decision, a court cannot assess whether conditions for an authority’s issuance of a positive or negative decision are met, but must determine if all circumstances essential to resolution of a case were clarified.²⁸

Conclusion

The introduction of the objection to a cassation decision has considerably modified the system of challenging public administration authorities’ decisions. Before, two legal instruments to instigate proceedings before an administrative court had been in place, i.e., the petition and the complaint.

Sharing the view of the draft legislators who amend the law to more effectively counteract the low incidence of the cassations of appeal proceedings by providing the option of challenging a cassation decision by filing a complaint with an administrative court, I believe the way chosen to prevent that may prove ineffective. What is more, the design of administrative court proceedings based on the objection includes too far-reaching restrictions to the rights of parties to administrative court proceedings that do not seem reasonable in this case. Limiting the proceedings instigated by the objection to decisions issued by force of Article 138, para. 2 CAP, is a breach of the constitutional principle of equality. This is also confirmed

²⁸ Decisions of the Supreme Administrative Court of: 23 March 2021, II OSK 512/21, *Legalis* no. 2561213; 13 February 2019, II OSK 132/19, *Legalis* no. 2237388; 26 November 2019, II OSK 3311/19, *Legalis* no. 2254524; 19 February 2021, II OSK 286/21, *Legalis* no. 2540540.

by the fact that the legislator treated cassation decisions differently, referring the institution of objection to the decision only to cassation decisions issued under Article 138, para. 2 CAP, and disregarding such a possibility to cassation decisions issued under Article 138, para. 1, point 2 CAP.

In effect, reasons for a cassation decision are beyond the court's competence and the option of finding such a decision invalid by an appeal authority is ruled out. Added to all that, narrowing the scope of case consideration to conditions for the issue of a decision under Article 138, para. 2 CAP, doesn't mean parties will await final decisions for shorter times.

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The Extent of Administrative Courts' Review of Cases Based on Challenges to Cassation Decisions

Abstract

The paper analyses a new means of challenging cassation decisions by appeal authorities by force of Article 138, para. 2 CAP, that is, objection to a decision. Particular attention is paid to the extent of reviews by administrative courts in cases concerning objections to cassation decisions, since that extent gives rise to grave doubts in practice, which is reflected in two different trends of rulings by administrative courts.

The literal wording of Article 64e PBAC and the legislator's intention expressed in the draft amendments to CAP imply the objection to a decision is intended to allow administrative courts to undertake reviews limited to reasons for repealing a decision by an appeals authority and submission of a case to reconsideration. Administrative court rulings comprise decisions, though, which assume courts should not only assess explanatory proceedings, but also review the interpretations of substantive law.

Keywords: objection to a cassation decision, cassation decision, proceedings before administrative courts, means of challenging a decision

Zakres kontroli dokonywanej przez sądy administracyjne w sprawach ze sprzeciwu od decyzji kasacyjnej

Abstrakt

Celem artykułu jest analiza nowego środka zaskarżenia decyzji kasacyjnych wydanych przez organ odwoławczy w trybie art. 138 § 2 k.p.a., jakim jest sprzeciw od decyzji. Szczególną uwagę zawrócono na przedmiotowe uregulowanie pod kątem zakresu kontroli dokonywanej przez sądy administracyjne w postępowaniu prowadzonym w sprawach ze sprzeciwu od decyzji kasacyjnej. Zakres ten budzi bowiem istotne wątpliwości w praktyce, co znajduje odzwierciedlenie w orzecznictwie sądów administracyjnych, w którym zarysowały się dwa różne kierunki orzecznicze.

Jak wynika z literalnego brzmienia art. 64e p.p.s.a. oraz intencji ustawodawcy wynikającej z uzasadnienia do projektu zmian k.p.a., celem instytucji sprzeciwu

od decyzji było umożliwienie wykonywania przez sądy administracyjne kontroli w ograniczonym zakresie obejmującym jedynie zasadność uchylecia przez organ odwoławczy decyzji oraz przekazania sprawy do ponownego rozpatrzenia. W orzecznictwie sądowo-administracyjnym pojawiają się jednak orzeczenia, które przyjmują, że oprócz oceny prawidłowości przeprowadzenia postępowania wyjaśniającego, sąd powinien dokonać także kontroli wykładni prawa materialnego.

Słowa kluczowe: sprzeciw od decyzji kasacyjnej, decyzja kasacyjna, postępowanie przed sądami administracyjnymi, środki zaskarżenia decyzji

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