Studia Iuridica Lublinensia vol. XXVIII, 2, 2019
DOI: 10.17951/sil.2019.28.2.193-203

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Gloss to the Judgement of the Supreme Administrative Court of 8 May 2018 (II OSK 1926/17)

Glosa do wyroku Naczelnego Sądu Administracyjnego z dnia 8 maja 2018 r. (II OSK 1926/17)

SUMMARY

By the judgement of 8 May 2018 (II OSK 1926/17), the Supreme Administrative Court dismissed the cassation appeal of the Lublin Provincial Heritage Conservation Officer against the judgement of the Voivodeship Administrative Court in Lublin of 6 April 2017 (II SA/Lu 1119/16), in which the Court found ineffective inclusion of a real estate monument record card (the area of the former Jewish cemetery in Biłgoraj at Maria Konopnicka Street) in the provincial record of historical monuments. The Supreme Administrative Court stressed that although the judgement under appeal was incorrectly reasoned, it was in accordance with the law since there were grounds for declaring the contested act ineffective. The aforementioned judgement deserves attention due to the fact that it expresses the position that it is impossible to apply the general principles of the Code of Administrative Procedure in the proceedings conducted by the provincial heritage conservation officer concerning the inclusion of the record card of a historical monument in the provincial record of monuments. The purpose of the gloss is to refer to this view.

Keywords: real estate monument; provincial record of historical monuments; provincial heritage conservation officer; record card of the historical monument; Code of Administrative Procedure; general principles of administrative procedure; principle of trust

Adjudicating Panel of the Supreme Administrative Court: Judge Zdzisław Kostka (President of the Panel, Rapporteur), Judge Barbara Adamiak, Judge Izabela Bąk-Marciniak.

On 4 August 2016, the Lublin Provincial Heritage Conservation Officer registered in the provincial record of historical monuments the property located in Biłgoraj, as the area of the former Jewish cemetery.

The aforementioned activity was appealed against the Voivodeship Administrative Court in Lublin by the company who is the perpetual usufructuary (long--term leaseholder) of a significant part of the real estate recognized as a historical monument. At that time, the company applied for a permit to build a commercial and service facility together with technical infrastructure on this property.

By the judgement of 6 April 2017 (II SA/Lu 1119/16), the Voivodeship Administrative Court in Lublin found the contested measure ineffective. First of all, the Court pointed out that although, as a rule, the provisions of the Code of Administrative Procedure[1] are not applied to the proceedings in which this action was taken, the general principles of this Code, including in particular the principle of trust (Article 8) and the principle of material truth (Article 7), apply to the assessment of the legality of any action taken by a body. In the Court's opinion, the authority violated these principles in a manner that may have a significant impact on the outcome of the case. In the opinion of the Voivodeship Administrative Court in Lublin, the authority did not clearly explain whether this property has characteristics of a historical monument within the meaning of Article 3 (1) and (2) of the Act of 23 July 2003 on the Protection and Care of Historical Monuments[2].

By the judgement of 8 May 2018 (II OSK 1926/17), the Supreme Administrative Court dismissed the cassation appeal of the body against the judgement of the court of the first instance. The Supreme Administrative Court stressed that although the judgement under appeal was incorrectly reasoned, it was in accordance with the law since there were grounds for declaring the contested act ineffective.

In support of this position, the Supreme Administrative Court put forward the following arguments.

Firstly, the Voivodeship Administrative Court incorrectly assumed that the general principles of the Code of Administrative Procedure, including the principles expressed in its Articles 6, 7 and 8, apply to the assessment of the legality of the contested act of a public administration body.

Secondly, it is inadmissible for the owner of a monument to challenge the legality of the activities of an administrative body related to the maintenance of the provincial record of historical monuments, including the incorporation of the

[1] Act of 14 June 1960 – Code of Administrative Procedure (Journal of Laws 2018, item 2096 as amended).

[2] Journal of Laws 2018, item 2067 as amended.

record card of the historical monument into these records – as part of proceedings in which such activities are undertaken. According to the Court, in the discussed proceedings "there is no place for any activities explaining whether a historical monument included in the provincial record of historical monuments is actually a historical monument within the meaning of the Act on the Protection and Care of Historical Monuments". It can be deduced from Article 22 (3) of the Act that since the inclusion of a real estate monument, which is not entered in the register of historical monuments, in the provincial record of historical monuments does not require the consent of its owner, then "in the case of a real estate monument, the authority is not hindered in any way by such action [underline – A.O., J.P.]". The assessment of whether a real estate monument included in the provincial record of historical monuments meets the features of such a monument within the meaning of Article 3 (1) and (2) of the Act on the Protection and Care of Historical Monuments is possible in other proceedings under the provisions of the Code of Administrative Procedure, where "one of the conditions is the fact that a given historical monument has been included in the records". An example of such a procedure is the procedure conducted pursuant to Article 106 of the Code of Administrative Procedure in conjunction with Article 39 (3) of the Construction Law[3]. Such an interpretation, as argued by the Supreme Administrative Court, allows for a proper balance between the need to protect historical monuments and the sometimes countervailing interests of owners and holders of historical monuments.

Thirdly, although the heritage conservation officer is not obliged to conduct an investigation to determine whether a historical monument included in the provincial record of historical monuments is actually a historical monument within the meaning of the Act on the Protection and Historical Care of Historical Monuments, it should "indicate the grounds for such an assessment in the proceedings before the administrative court".

In spite of this, the Supreme Administrative Court held that the judgement of the Voivodeship Administrative Court was in accordance with the law since it was correctly established that the contested act was ineffective as having been issued in violation of the law. The administrative body, contrary to §§ 9 and 10 of the regulation of the Minister of Culture and National Heritage of 26 May 2011 on keeping the register of historical monuments, the national, provincial and communal record of historical monuments and the national register of historic monuments stolen or exported abroad illegally[4], has established one registration card for both the Jewish cemetery previously entered into the register of historical monuments and the immovable historical monument not yet entered into such register.

[3] Act of 7 July 1994 – Construction Law (Journal of Laws 2019, item 1186).

[4] Journal of Laws No. 113, item 661.

The aforementioned judgement deserves attention due to the fact that it expresses the position that it is impossible to apply the general principles of the Code of Administrative Procedure in the proceedings conducted by the provincial heritage conservation officer concerning the inclusion of the record card of a historical monument in the provincial record of monuments. The purpose of the commentary is to refer to this view.

A real estate monument is a real estate, its part or complex, being a work of person or related to his activity and being a testimony of a past epoch or event, the preservation of which is in the interest of society due to its historical, artistic or scientific value (Article 3 (2) of the Act on the Protection and Care of Historical Monuments). Deciding whether a property has all these features is undoubtedly of key importance for the inclusion of a historical monument's record card in the provincial record of historical monuments. However, the statutory regulation in this respect is – which is of significant importance – even perfunctory, as it results only from the obligation to keep such records by the provincial heritage conservation officer – in the form of records of historical monuments located in the territory of the voivodeship (Article 22 (2) of the Act on the Protection and Care of Historical Monuments).

In our opinion, such a way of regulating the above issue leads to the conclusion that it is necessary to supplement this regulation in the process of its application with norms of general significance in the order of the state of law – the standards of "special axiological load". We are referring in particular to the rules containing the principles of objective truth, harmonisation of the public interest with individual interests, trust in public authorities and proportionality, as expressed in Articles 6, 7 and 8 of the Code of Administrative Procedure.

The following arguments demonstrate that the above principles apply to each sovereign action of a public administration body. Firstly, in the absence of codification of substantive administrative law and of a law containing general principles of that branch of law, the principles expressed in the Code of Administrative Procedure are the only normative set of principles existing within the scope of administrative law. Secondly, these principles are not purely procedural but have a substantive value[5]. "The general principles of the Code of Administrative Procedure should be given a directival meaning by virtue of the fact that they constitute a normative material which, in the interpretation of procedural as well as substantive law, plays an important role in determining the content of specific legal solutions"[6]. Their relationship with substantive law is at least that doubts concerning the content or scope of the

[5] J. Zimmermann, *Aksjomaty postępowania administracyjnego*, Warszawa 2017, pp. 41–42.

[6] W. Piątek, *Zasady ogólne Kodeksu postępowania administracyjnego jako podstawa skargi kasacyjnej w postępowaniu sądowoadministracyjnym*, [in:] *Kodyfikacja postępowania administracyjnego na 50-lecie K.P.A.*, red. J. Niczyporuk, Lublin 2010, p. 625.

substantive rules should be resolved on the basis of those principles[7]. Moreover, the principles of material truth, the balancing of values and goods, proportionality and trust in state bodies can be interpreted from constitutional principles, at the forefront of which is the rule of law. Admittedly, administrative bodies cannot make the basis for a decision on a constitutional norm only, but they can refer to it and rely on its norms (the so-called co-application of the Polish Constitution)[8]. Consequently, it must be assumed that the issuance of any decision of an administrative body on the rights or obligations of an individual must be preceded by an examination of the factual and legal basis for such a decision, in which the body properly balances the conflicting values and goods, inspiring confidence of citizens in its conduct.

The term "real estate monument" is an undefined concept, because it refers to values of an evaluative nature. This does not mean, however, that the classification of a property as a historical monument and, consequently, the establishment of a record card for it and its inclusion in the provincial record of historical monuments, can take place without an analysis of the reasons justifying the performance of the above-mentioned activities, as well as documenting them in a proper manner. The inclusion in the regional record of monuments must result from the authority's statement that the item is characterised by features which – due to the undoubted circumstances of the case – justify granting it special protection. Therefore, only such a real estate, which meets the definition of a historical monument, can be included in the provincial record of historical monuments[9].

In other words, conducting proceedings for the inclusion of a real estate monument record card in the provincial record of historical monuments requires an unambiguous assessment of the character of this real estate. After all, it does not raise any objections that in the event where it is found that a given building or land property or parts thereof meet the characteristics of a historical monument, the heritage conservation officer is obliged to take steps to ensure that it is covered by the required protection, including the entry of the card of this monument in the provincial record of monuments, in order to protect its substance for future generations. The principles of administrative actions reflected in the Code should be used for the proper drafting of a card for a monument, although the drafting of the card is done outside the jurisdictional process[10].

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[7] J. Zimmermann, *op. cit*., pp. 43–44.

[8] *Ibidem*, s. 45. See also M. Wyrzykowski, M. Ziółkowski, *Konstytucyjne zasady prawa i ich znaczenie dla interpretacji zasad ogólnych prawa i postępowania administracyjnego*, [in:] *System Prawa Administracyjnego*, t. 2: *Konstytucyjne podstawy funkcjonowania administracji publicznej*, red. R. Hauser, Z. Niewiadomski, A. Wróbel, Warszawa 2012, pp. 23–25.

[9] Judgement of the Supreme Administrative Court of 9 November 2016, II OSK 254/15, LEX No. 2199312.

[10] Cf. judgement of the Voivodeship Administrative Court in Kraków of 8 February 2018, II SA/Kr 1570/17, CBOSA.

Undoubtedly, decisions (activities) of heritage conservation authorities are not discretionary, and the legal effect of granting protection to a heritage item, which results from the fact that a record card has been prepared for it and that it has been added to the records, is a consequence of the statement that a given item meets the statutory requirements for recognition as a historical monument. For this reason, the inclusion of successive groups of cultural heritage items in the provincial record of historical monuments is usually a consequence of expanding knowledge about a specific, previously unrecorded historical object or access to previously unknown archival sources[11].

These undisputed issues should be properly taken into account in the context of the efficiency and general accuracy of the assessment of the historic character of the property, in relation to which the authority is considering the above-described form of protection.

The jurisprudence rightly points to the quite obvious fact that the inclusion of a monument in the communal (provincial) record of historical monuments is a sovereign decision ("official statement") that this item is characterised by features justifying its coverage by a special form of protection[12]. At the same time, an opinion was expressed that the owner of a real estate monument may, in a complaint to the administrative court, question the legitimacy of including the address card of the monument in the record of historical monuments by the authority. On the basis of this assumption, it was pointed out that in such proceedings it is essential to assess whether, in view of the requirements for the protection of the public interest, i.e. the historical, artistic and scientific value of the item, it is necessary to limit the rights of the owner to dispose of and use the item freely[13].

This leads to the conclusion that contrary to the Supreme Administrative Court's judgement, in the proceedings on the building permit (permission for demolition) concerning a historical monument or in the related approval procedure before the provincial heritage conservation officer, it is not possible to effectively question the legitimacy of including a monument in the communal (provincial) record of historical monuments. Such allegations, which seem logical, may be raised only in appropriate proceedings aimed at changing the communal (provincial) record of historical monuments in the scope of removing a property, which should not be included in it any longer in the light of the regulations on the protection and care of

[11] See also judgement of the Voivodeship Administrative Court in Gdańsk of 1 October 2014, II SA/Gd 396/14, LEX No. 1534126.

[12] See judgement of the Supreme Administrative Court of 21 January 2015, II OSK 2189/13, LEX No. 1753478; judgement of the Supreme Administrative Court of 18 April 2018, II OSK 1446/16, LEX No. 2494134.

[13] See judgement of the Supreme Administrative Court of 18 April 2018, II OSK 1446/16, LEX No. 2494134.

historical monuments. This results from the fact that the establishment of grounds for allocating a specific property with historic values:

> […] constitutes the factual element of the matter of designating a property to be included in the communal record of historical monuments, which is an administrative matter (matters of public administration) characterised by the subjective and material separation from the matter concerning the building permit (demolition), in which the specific construction project is subject only to agreement by the conservation authority[14].

A different position, adopted by the Supreme Administrative Court in the commented judgement, does not contain arguments indicating what particularly important values justify a refusal to grant legal protection to a real estate owner. This is not understandable given the importance of the issue to be resolved regarding the assessment of the proportionality of the violation of constitutionally protected property rights. Such reasoning would lead to a conclusion, which was not noticed by the Supreme Administrative Court, that the role of the administrative court hearing a complaint against the activity in question would be reduced to a kind of mechanical approval of the solution adopted by the authority only after a formal assessment of the proceedings conducted by it. In a democratic state governed by the rule of law, there is no place for such an extremely formalistic approach to the administration of justice. This also applies to the administrative courts, which carry out this task through the review of the activity of public administration.

The irrationality of this position is revealed by the arguments adopted in the judgement of the Voivodeship Administrative Court in Szczecin of 31 May 2017[15]. The Court pointed out that since neither the provisions of the Act on the Protection and Care of Historical Monuments nor the provisions of the secondary legislation to the Act do not specify what is to be the basis and what form is to be taken in order to verify the legitimacy of including the card of a monument in the communal record of historical monuments, if the card contains elements required by law, and the authority having expert knowledge admitted that it subjected the data contained in the address card to verification, as a result the court can only conclude that the card has been checked correctly. In other words, in the Court's opinion, in a situation where the regulations do not specify the manner of checking the record cards of a monument or the manner of documenting this activity, any manifestation of the authority's activity in this respect should be considered correct, including the statement of the heritage conservation officer confirming that the activity of checking has been carried out.

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[14] This position has been expressed in the judgement of the Supreme Administrative Court of 18 August 2016, II OSK 2909/14, LEX No. 2142398 and judgement of the Supreme Administrative Court of 18 April 2018, II OSK 1446/16, LEX No. 2494134.

[15] II SA/Sz 158/17, LEX No. 2314427.

As indicated above, such a position is not acceptable in a state governed by the rule of law. All the more so as the owner of a real estate may learn about its recognition as a historical monument, and consequently about the restriction of its ownership right, only after that fact. The provisions of the Act lead to a kind of "confidentiality" of the proceedings on the inclusion of the historic monument's card in the relevant records, because they do not even introduce the obligation to notify the owner of the ongoing proceedings or of the final activities to include the monument in the communal (provincial) record.

Similar doubts were raised by the Supreme Administrative Court when it examined a cassation appeal against the aforementioned judgement of the Voivodeship Administrative Court in Szczecin. In the decision of 13 June 2018[16], the Supreme Administrative Court requested that the Constitutional Tribunal examine the compliance of the provision of Article 22 (5) (3) of the Act on the Protection and Care of Historical Monuments with the constitutional principles of property protection and proportionality provided for in the Convention for the Protection of Human Rights and Fundamental Freedoms of 20 March 1952[17]. The Court pointed out that this provision may be understood in such a way that it allows the property to be included as a real estate monument in the communal record of historical monuments, without providing the owner with a guarantee of legal protection against such limitation. The proceedings initiated by this question in the Constitutional Tribunal under No. P 12/18 have not yet been completed.

The commented judgement ignores all these arguments, which are crucial for assessing the legality of the reasoning adopted by the Court. The Court failed to assess whether its interpretation of substantive and procedural law is in a reasonable proportion to the restriction of the right to property. This is because the inclusion of the monument's record card in the provincial record of monuments leads to such an effect. At the same time, the Supreme Administrative Court failed to notice that this activity, which by its very nature has a strictly formal and documentary character, exerts far-reaching expropriatory effects. Including the property in this way in the system of protection imposes on its owner many additional administrative restrictions hindering or even preventing its free development. Harmonising the public interest and the legitimate interest of the citizen, pursuant to Article 7 of the Code of Administrative Procedure, is the duty of an administrative authority in every case in which it decides on the rights and obligations of an individual. There is no doubt that such cases include the case in which the judgement in question was delivered. In the judicature, there is a settled view that the above provision is not only a rule concerning the manner of conducting proceedings but also, to an equal

[16] II OSK 2781/17, LEX No. 2536740.

[17] Journal of Laws 1995, No. 36, item 175 as amended.

extent, an interpretation of substantive law, which results from the fact that the provision obliges the body "to settle the matter" in accordance with this principle[18].

The fact that the Supreme Administrative Court's adjudicating panel avoids the pro-constitutional interpretation of the provisions of the Act on the Protection and Care of Historical Monuments may indicate the loss of the fundamental value that moral sensitivity to law should be for a judge[19]. The judge should implement the idea of justice, seeing the axiology of law even where the legislator did not want or could not see it. Therefore, whenever the rule of law violates the principle of justice, the judge should be the guarantor of the inalienable rights of the individual[20].

The Polish Constitution undoubtedly recognizes juridical elements, especially by indicating the fundamental value for this act, which is the inherent and inalienable dignity of the human being[21]. This leads to the conclusion that there are constitutional values that are not rooted in the state or even in the sovereignty of the nation. These values, which are truth, justice, goodness and human dignity, exist independently of the fact of being enshrined in the Polish Constitution. They are merely recognised by the legislature and, as such, constitute the criteria (determinants) of equitable law[22]. Therefore, the actions of the administrative authority, and consequently the review of these actions by the administrative court, should be directed towards the good of fairness. This means that the human being and his goodness, read in conjunction with the common good, must be the goal of the administration. The value of the common good can be seen when a separate value of the human being is seen. It is person who constitutes the meaning of the law. The law is therefore good only if it executes and serves this purpose[23]. This perspective was missing from the commented judgement of the Supreme Administrative Court.

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[18] Judgement of the Supreme Administrative Court of 4 June 1982, I SA 258/82, ONSA 1982, No. 1, item 54.

[19] As J. Zimmermann (*op. cit.*, p. 46) wrote, "the administrative court should at least see the existence of the provisions of the Constitution and treat them as points of reference when making decisions. It should invoke constitutional norms whenever possible and treat them as an element of the legal basis for its decision".

[20] A. Gomułowicz, *Sędzia sądu administracyjnego a idea autorytetu*, [in:] *Aspekt prawotwórczy sądownictwa administracyjnego*, Warszawa 2008, pp. 78–79 with the literature cited therein.

[21] See M. Zdyb, *Konstytucyjne podstawy administracyjnoprawnych ograniczeń prawa własności jako podstawowego prawa rzeczowego (i ograniczonych praw rzeczowych)*, [in:] *System Prawa Administracyjnego*, t. 7: *Prawo administracyjne materialne*, red. R. Hauser, A. Wróbel, Z. Niewiadomski, Warszawa 2017, p. 595 with the literature cited therein.

[22] W. Dziedziak, *O prawie słusznym (perspektywa prawa stanowionego)*, Lublin 2015, pp. 115–117.

[23] *Idem*, *Some Remarks on Good Law and Good Administration*, [in:] *Discretionary Power of Public Administration. Its Scope and Control*, eds. L. Leszczyński, A. Szot, Frankfurt am Main 2017, p. 224, 234.

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STRESZCZENIE

Wyrokiem z dnia 8 maja 2018 r. (II OSK 1926/17) Naczelny Sąd Administracyjny oddalił skargę kasacyjną Lubelskiego Wojewódzkiego Konserwatora Zabytków od wyroku Wojewódzkiego Sądu Administracyjnego w Lublinie z dnia 6 kwietnia 2017 r. (II SA/Lu 1119/16) stwierdzającego bezskuteczność czynności polegającej na włączeniu do wojewódzkiej ewidencji zabytków nieruchomości położonej w Biłgoraju przy ul. Marii Konopnickiej jako obszaru byłego cmentarza żydowskiego. NSA podkreślił, że choć zaskarżony wyrok został wadliwie uzasadniony, to odpowiada prawu, gdyż istniały podstawy do stwierdzenia bezskuteczności zaskarżonej czynności. Wyrok NSA zasługuje na uwagę, ponieważ wyraża stanowisko o braku możliwości stosowania przepisów ogólnych Kodeksu postępowania administracyjnego w postępowaniu prowadzonym przez wojewódzkiego konserwatora zabytków w przedmiocie włączenia karty ewidencyjnej zabytku do wojewódzkiej ewidencji zabytków. Celem glosy jest rewizja tego poglądu.

Słowa kluczowe: zabytek nieruchomy; wojewódzka ewidencja zabytków; wojewódzki konserwator zabytków; karta ewidencyjna zabytku nieruchomego; Kodeks postępowania administracyjnego; zasady postępowania administracyjnego; zasada zaufania