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Commentaries

ADMINISTRATIVE LAW AND PROCEDURE

1 Judgment of the Provincial Administrative Court of 5 July 2004 in Case II SA/Wr 2838/03

Mateusz Hrynicky, Ph.D., lecturer at College of Public and Individual Security in Krakow

Inability to extend conditions limiting discretion to name children beyond the Law on Civil Status Records.

Summary:

In his commentary, the Author deals once again with the important issue of admissibility of naming children in the system of Polish law, with the use of the example of a foreign name "Jennifer". While the judgment is not one of the most recent, the commentary appears to be crucial with the view to continuously erroneous practice of registrar's offices which happen to show a tendency to expand the list of conditions limiting the discretion to name children beyond Article 50(1) of the Law on Civil Status Records in order to allegedly preserve Polish language against names without Polish origins and in the context of female names without the termination "a".

2. Judgment of the Supreme Administrative Court of 27 May 2010 in Case II FSK 2049/09

Bogumił Pahl, Ph.D., lecturer at University of Warmia and Mazury in Olsztyn

Taxation of telecommunication network.

Summary:

The judgment under consideration refers to the important issue arising at the stage of collecting real property tax, namely legal and fiscal classification of the telecommunication network. The Court is of the opinion that the network comes under the definition of a construction referred to in Article 1a(1)(2) of the Local Taxes and Charges Act. This standpoint is to be supported. The Court rightfully states that the "fiscal" definition of a construction refers to a technological and functional entity. Therefore, the basis for taxation is both the cable system and cables placed within. For the purposes of tax assessment, the value of each and every element should be taken into consideration.

3. Judgment of the Supreme Administrative Court of 11 January 2010 in Case I OPS 5/09

Mikołaj Pułło, Ph.D., lecturer at University of Gdansk

Decision on betterment levy.

Summary:

Administrative law provisions regularly provide for so-called time-limit with regard to the power, on the part of an administrative organ, to specify legal norms on case-to-case basis. Given the lack of codification of the general part of administrative law, such legal constructions are difficult to interpret particularly with reference to time-limits and means to keep them. In the judgment under consideration, the Court attempts to establish the rules governing the time-limit for calculation of the levy on the real property value increase resulting from its partition. The Court is of the opinion that the three-year time-limit for establishing the levy is fulfilled only when a final decision on the merits of the case is issued within this time.

4. Judgment of the Supreme Administrative Court of 7 April 2010 in Case I OSK 514/09

Robert Suwaj, Ph.D., lecturer at University in Bialystok

Payment of betterment levies by real property owners.

Summary:

The present commentary concerns the judgment in which the Court expresses the opinion that the obligation placed under Article 144(1) of the Real Property Management Act on the real property owner to participate in the cost of technical infrastructure facilities by payment of betterment levies for local government binds the property owner from the moment when it is possible for the real property to reach the access to particular facilities of the technical infrastructure. In my opinion the text of Article 144 in its present wording means that the owner is to be understood as the owner at the time of issuing the decision.

5. Judgment of the Supreme Administrative Court of 30 October 2008 in Case OSK 951/08

Michał Miłoś, Ph.D., teaching assistant at University of Gdansk

Right to public information and right to undertake activities with the purpose to produce information new in terms of quality.

Summary:

The commentary concerns the scope of the right to public information. The main question raised in the present case is whether the applicant's claim falls out of the material scope of the right to public information, while the outcome of the case determines if the information demanded by the applicant meet the requirements of processed information.

CIVIL LAW AND PROCEDURE, COMMERCIAL LAW

6. Order of the Supreme Court of 16 April 2010 in Case IV CSK 470/09

Anna Sylwestrzak, Ph.D., Lecturer at University of Gdansk

Partial incapacitation.

Summary:

The decision on partial incapacitation is justified then an individual suffering from mental disorder requires assistance with handling his or her affairs. Such affairs may come to light during the proceedings for incapacitation as well as they can be expected to take place in the future as long as their occurrence is highly probable. The curator of the partly incapacitated person is empowered to supervise legal acts undertaken by this person if the guardianship court has not vested him or her with more extensive power.

7. Resolution of the Supreme Court of 22 October 2009 in Case III CZP 63/09

Jarosław Turłukowski, Ph. D., lecturer at University of Warsaw

Shareholders as members of the management board in a limited-liability company.

Summary:

The commentary presents the analysis of the resolution of the Supreme Court of 22 October 2009 in Case III CZP 63/09 in which the Court states that the management board in a limited-liability company cannot act on behalf the company in the proceedings revoking the resolution of the meeting of shareholders lodged by a person acting both as a shareholder and as a member of the management board of the respondent company. The commentator disagrees with this view on the grounds that Article 253 of the Commercial Companies Code establishes in this context the general rule of representation of the respondent company by the management board regardless of whether the person bringing the claim to the court is a third party or a member of the management board. Moreover, Article 253 giving priority to the shareholders' will (with the view to the appointment of a representative) is to be regarded as *lex specialis* to Article 210(1) of the Commercial Companies Code.

8. Order of the Supreme Court of 3 December 2009 in Case II CSK 273/09

Małgorzata Dumkiewicz, Ph.D., lecturer at Maria Curie-Skłodowska University in Lublin

Acquisition of shares by one of the spouses.

Summary:

The decision under consideration refers to the issue, relevant in the context of circulation practice, of consequences of acquiring limited-liability company shares by one of the spouses with the use of resources coming from common assets of both spouses. The Court is of the opinion that, just like securities, shares acquired by one of the spouses with the use of resources coming from common assets are to be included in such assets, while only the spouse who is the party to the transaction resulting with shares acquisition becomes the shareholder. Thus the Court has determined two issues relevant in this context, i.e. the issue of ownership of the shares acquired in the above-mentioned manner and their attribution to one of the estates (common assets of the spouses or personal assets of the spouse acquiring the shares) as well as the issue of personal scope of participation in a limited-liability company in such a situation (i.e. common participation of both spouses or separate participation of the spouse acquiring the assets). The standpoint of the Court in the present case is to be supported.

9. Judgment of the Appeal Court in Wrocław of 18 June 2009 in Case I ACa 459/09

Monika Nowikowska, doctoral student at University of Białystok

Criterion of acting in public interest as a condition excluding unlawfulness of interference in personal rights.

Summary:

The commentary supports the judgment of the Appeal Court in Wrocław (Case I ACa 459/09). The Author analyses the conclusion reached in the judgment that the public interest as the condition excluding unlawfulness is of an overriding nature when the public have the access to information on deplorable malpractices in public domain which are reflected in factual circumstances. The Author states that the Court rightly dismisses certain automatism when approving acting in justified interests as a condition to exclude unlawfulness of the interference in personal rights in media.

FINANCIAL LAW

10. Judgment of the Supreme Administrative Court of 16 December 2009 in Case II FSK 667/09

Paweł Borszowski, Ph. D., lecturer at University of Wrocław

Real property tax rates for facilities or their parts used for the purposes of conducting business activities in the area of health care provision.

Summary:

The legal framework of real property tax rates allows for tax reduction in the case of facilities or their parts used for the purposes of conducting business activities in the area of health care provision. Given the lack of a precise definition of this legal term, it is of the utmost importance for fiscal practice to determine its precise scope. It is crucial for the taxpayers because of the reduction of tax burdens. The problem seems even more important with the view to the fact that the legislator has introduced legal definition of land, buildings, and constructions connected with business activity in which this term is worded in a very broad manner. The present commentary attempts to determine the scope of legal terms used, taking into account in the first place the conduct of the entity in the context of its attitude to business activity in the area of health care provision, which also requires considering the economic liberty principle and the competence of the decision-making body.

11. Judgment of the Provincial Administrative Court of 22 July 2009 in Case I SA/Sz 276/09

Maciej Wojciechowski, Ph.D., lecturer at University of Gdansk

Educational allowance.

Summary:

The commentary deals with the decision of the Provincial Administrative Court of 22 July 2009 in Case I SA/Sz 276/09 on so-called educational allowance. The commentary is of critical character mainly due to the insufficient quality of the reasoning provided in the judgment which makes no genuine attempt to deal with arguments raised by the applicant. Instead, the reasoning resembles the reasoning provided for in the established case-law and thus may give the appearance of mechanical multiplication of conclusions drawn previously. It is to be criticized as the standpoint of the court might have been supported by different arguments which have not been taken into account by the trial court.

CRIMINAL LAW AND PROCEDURE

12. Resolution of the Supreme Court (the Chamber of seven judges) of 30 October 2008 in Case I KZP 22/08

Ryszard Skarbek, Ph.D., lecturer at University of Gdansk

Term "interruption in serving the sentence of prison"

Summary:

In the decision under consideration the Supreme Court determined the issue (a doubt) on the part of the Ombudsman whether Article 155(1) of the Criminal Executive Code refers to the offender deprived of liberty in the preliminary proceeding as well as to the person sentenced to deprivation of liberty. The Supreme Court states that the term "interruption" in deprivation of liberty does not concern the interruption in the deprivation of liberty in the preliminary proceedings as this instrument (deprivation of liberty in the preliminary proceedings) is not an instrument of penal policy. However, this term also refers to the interruption in the deprivation of liberty following the stay of executive proceedings as long as the stay was based on conditions provided in Article 153 of the Criminal Executive Code which coincide with the text of Article 15(2) of the Code in this matter.

13. Order of the Supreme Court of 24 February 2010 in Case I KZP 33/09

Wojciech Zalewski, Ph.D., lecturer at University of Gdansk

Legal lacuna – lack of sanction for violation of so-called pitch ban.

Summary

The Act on Security of Mass Events entered into force on 1 August 2009. Under the aforementioned Act, a new penal instrument was introduced to the Criminal Code, namely the ban on entry to mass events. However, the amendment has not provided for a sanction in the case of a violation of the ban. The commentary to the order of the Supreme Court presents a line of reasoning against the extensive interpretation of Article 244 of the Criminal Code, therefore supporting the conclusion that there is a legal lacuna in this matter.

14. Order of the Supreme Court of 16 December 2009 in Case IV KK 168/09

Mikołaj Małecki, doctoral student at Jagiellonian University

Identity of the offence and *ne bis in idem* principle in the context of the number of parties aggrieved by the offence of mistreatment (Article 207(1) of the Criminal Code).

Summary:

The Supreme Court was faced the task to determine the identity of the offence in the case of a multi-act offence committed to detriment of several parties in the context of the *ne bis in idem* principle. The Court states that "one historical event" can make at least two "punishable acts". In the approving commentary the reasoning of the Supreme Court was supplemented on the basis of the construction of continuous offence (Article 12 of the Criminal Code). In the conclusion it was accepted that the identity of the aggrieved party is the condition for recognizing as one offence a number of acts qualified collectively as a multi-act offence consisting an assault on personal rights of the aggrieved party.

15. Order of the Supreme Court of 23 September 2008 in Case I KZP 18/08

Marek Skwarcow, judge at the Regional Court in Gdansk.

Ruling against the accused and limitation of appeal.

Summary:

The commentary deals with the issue of limitation of appeal and the influence of the nature of appeal (for or against the accused) on the availability of the appeal court ruling against the accused. It also refers to the *reformationis in peius* principle which protects the interests of the accused pending the appeal proceedings as well as its consequences. The Author also mentions the issue of criminal liability of a professional, both acting as a representative in the proceedings and giving evidence.

LABOUR LAW

16. Judgment of the Supreme Court of 2 September 2009 in Case II PK 206/08

Monika Lewandowicz-Machnikowska, Ph. D., lecturer at University of Wrocław

Exhausting the cause for non-competition clause, informing the employee about this fact and the right of termination the contract.

Summary:

Article 101²(2) of the Labour Code is a mandatory provision not allowing for any contractual alteration of the effects of exhaustion of the causes for the non-competition clause. A contractual provision stating that in the case of exhausting the causes for the non-competition clause the contract expires violates the law and is null and void. A written statement of the employer informing the employee that the causes for the non-competition clause have ceased to exist is an act of knowledge, not an act of will given for the purposes of executing the right to terminate the contract.

17. Judgment of the Supreme Court of 14 December 2009 in Case I PK 108/09

Anna Musiała, Ph.D., lecturer at Adam Mickiewicz University in Poznan

Voluntary work agreement.

Summary:

The judgment under consideration refers to a relative novelty in Polish law, namely the legal institution of voluntary work. The Supreme Court states that as a rule trade unions can benefit from voluntary work of their members also with regard to their subsidiary activities. However, there can be serious doubts as to the correctness of the Supreme Court's standpoint. Moreover, the novelty of the issue, in particular in the light of the impression that the judgment is erroneous, urges to take a position on the matter.

18. Resolution of the Supreme Court of 7 April 2009 in Case I UZP 2/09
Wioletta Witoszko, Ph.D., lecturer at University in Bialystok

Date of ruling on bodily injury in decision dismissing the claim for a lump-sum compensation.

Summary:

The commentary under consideration analyses the view expressed by the Supreme Court in the resolution of 7 April 2009 in Case I UZP 2/09 that in the case of dismissal of the claim for a lump-sum compensation for injury resulting from an accident at work it is the decision of the pension authority to dismiss the claim for a lump-sum compensation that serves as the ruling on the injury as such. The date of issue of the decision is conclusive as to relevant rates of lump-sum compensation applicable to percentages of bodily injury in the given case.

19. Judgment of the Supreme Court of 11 April 2001 in Case I PKN 350/00
Jarosław Jankowiak, judge of the District Court for Grunwald and Jeżyce in Poznan

"Managing" workplaces in different locations.

Summary:

With the resolution of the Supreme Court of 19 November 2008 in Case II PZP 11/08, the issue of so-called location of the workplace has rapidly become one of the important issues dealt with and developed in the case-law of the Court. Nevertheless, in the period before the said decision such issues existed mainly in the background or even at the margin of the Court's case-law, in particular case-law considering so-called business travel. The judgment of 11 April 2001 under consideration here is one of very few decisions given by the Supreme Court in the period before the aforementioned resolution, while it still preserves its substantial value for both legal practice and research dealing with workplaces with assigned locations. The commentary focuses on the analysis of the elements discussed in the ruling which consider the key aspects of creation, in the case of a particular employment agreement, of the location model of workplaces.

20. Judgment of the Appeal Court in Katowice of 12 April 2007 in Case III Aua 53/06
Piotr Lechosław Kamiński, doctoral student at University of Gdansk

Period of retraining in the light of acquiring the right to FUS training benefit.

Summary:

The judgment under consideration states that computer and cash register training, lasting several weeks and taken in the period of receiving the FUS training benefit, is not a sufficient condition for the beneficiary retraining. It is to be agreed that the effective time of professional retraining has not been exhausted. However, the reasoning provided with the judgment does not allow for any more detailed conclusions as to the period of professional retraining. Therefore, an attempt is made to establish presumed timeframes for retraining the recipients of the FUS training benefit.

21. Resolution of the Supreme Court (the Chamber of seven judges) of 21 April 2010 in Case II UZP 1/10
Maciej Łaga, lecturer at University of Gdansk

Questioning the correctness and fairness of social security contribution basis declared by a person insured under non-agricultural activity scheme.

Summary:

In the resolution of seven judges of 21 April 2010 the Supreme Court rightly decides that the Social Security Board cannot question social security contribution basis, declared within the framework of binding law, applicable to beneficiaries insured under the non-agricultural activity scheme. Social security legal regulations do not provide any basis of such entitlement, even if in the circumstances it seems that there is an intention to gain overestimated social security benefits to the detriment of the principles of social solidarity and equal treatment, and thus it seems there is an abuse of law.

22. Resolution of the Supreme Court of 14 January 2010 in Case III PZP 4/09
Jakub Szmit, lecturer at University of Gdansk

Right to remuneration in the period of suspension from professional duties.

Summary:

While there are some doubts stemming from the fact that it has been based mainly on the purposive interpretation, the resolution under consideration is to be approved to the effect that carer employees at the care facility, to whom the Act of 2008 on Local Government Employees applies, are entitled to half of the remuneration in the period of suspension from the professional duties under Article 87a of the Act of 2004 on

Social Assistance. The second conclusion of the resolution cannot be agreed with, namely that Article 35 of the Act on Local Government Employees excludes applicability of Article 66 of the Labour Code to such employees.

EUROPEAN LAW

23. Judgment of the Court of Justice of 17 January 2006 in Case C-1/04
Arkadiusz Wowerka, Ph.D., LL.M., lecturer at University of Gdansk

Court jurisdiction after moving the centre of main interest to another State after lodging a request to open insolvency proceedings but before the proceedings are opened – the *perpetuatio fori* principle in cross-border insolvency proceedings.

Summary:

In the commentary under consideration the Author refers to the judgment of the Court of 17 January 2006, Staubitz-Schreiber, Case C-1/04, in which the Court determines the issue of the court jurisdiction under Article 3(1) of Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings after moving the centre of main interest to another Member State, having lodged a request to open insolvency proceedings but before the proceedings are opened. The Author agrees with the standpoint of the Court approving the *perpetuatio fori* principle in the field of cross-border insolvency proceedings.

24. Judgment of the Court of Justice of 30 April 2009 in joined Cases C-393/07 and C-9/08
Marcin Rulka, doctoral student at University of Łódź

Verification of the credentials of a Member of the European Parliament

Summary:

The commentary deals with the judgment of the European Court of Justice in Case of 30 April 2009, Italian Republic v. European Parliament. The case concerns the issue whether the power to verify the credentials of the PE Member lies within the competence of the Parliament as such or the Italian authorities. When dealing with the case, the ECJ states that the EU is entitled to regulate only matters approved by the primary law, while all remaining issues are governed by national electoral law and thus the power to verify the credentials of the EP Member is reserved for national authorities.

MISCELLANEOUS

25. Judgment of the European Court of Human Rights in Strasburg of 15 September 2009 in Case 10373/05
Katarzyna Łasak, Ph.D., lecturer at University of Gdansk

Good governance principle and the right to social security benefit.

Summary:

In 2001 the applicant was granted the right to early-retirement pension for an indefinite period of time. In 2002 the proceedings in the applicant's case were re-opened and her claim was found without foundation. The Court is right to declare a violation of the right to property. Interference in the right to property is conditioned by a statutory ground for it. The Court has consistently emphasized the need to respect the rule of law. National authorities are to act with utmost care when deciding on issues vital for individuals as it is in the case of social security benefits. The State is bound to ensure that correcting its own mistakes do not place excessive burden on individuals.