Case C-289/21

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

5 May 2021

Referring court:

Administrativen sad Sofia-grad (Bulgaria)

Date of the decision to refer:

5 April 2021

Applicant:

IG

Defendant:

Varhoven administrativen sad (Supreme Administrative Court)

Subject matter of the main proceedings

Following proceedings for a review of legality, a provision of a sub-statutory legal act of national law was repealed on the ground that it was incompatible with Directive 2012/27/EU. The repealed provision of that sub-statutory normative legal act was duly amended, which prompted the Court of Cassation to set aside the first judicial decision following an appeal in cassation brought against it. The parties are in dispute as to whether this is lawful and whether the amendment of a sub-statutory legal act constitutes a withdrawal of that legal act if, in the period between the point at which the action for a review of legality was lodged and the point at which that legal act was amended, the latter regulated the relevant legal relationships in a way that is alleged to have infringed a rule of EU law. The dispute between the parties also concerns the question of whether effective judicial protection is guaranteed against national legislation which infringes provisions of EU law that confer specific rights on individuals.

Subject matter and legal basis of the request for a preliminary ruling

Interpretation of the Charter of Fundamental Rights of the European Union on the basis of Article 267(1)(a) TFEU with regard to an allegation of incompatibility of national law with Article 47 of the Charter of Fundamental Rights of the European Union and with provisions of Directive 2012/27/EU

Questions referred for a preliminary ruling

1. Does the amendment of a provision of a national normative legal act previously declared by a court of appeal to be incompatible with an applicable provision of EU law relieve the Court of Cassation of the obligation to examine the provision applicable prior to the amendment and accordingly to assess whether it is compatible with EU law?

2. Does the presumption that the provision at issue has been withdrawn constitute an effective remedy with regard to rights and freedoms guaranteed by EU law (*in casu*, Articles 9 and 10 of Directive 2012/27/EU), or does the possibility provided for in national law to examine whether the national provision in question was compatible with EU law before it was amended constitute such a remedy if it exists only if the competent court is seised of a specific action for damages on account of that provision and only in relation to the person who brought the action?

3. If Question 2 is answered in the affirmative, is it permissible for the provision in question to continue to regulate, during the period between its adoption and its amendment, legal relationships in respect of an unlimited group of persons who have not brought actions for damages on account of that provision, or for the assessment of the compatibility of the national rule with the EU law provision in respect of the period prior to the amendment not to have been carried out in relation to those persons?

Provisions of EU law and case-law relied on

Charter of Fundamental Rights of the European Union, Article 47

Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC, Articles 9c and 10

Kantarev judgment (C-571/16, EU:C:2018:807)

Provisions of national law relied on

Administrativnoprotsesualen kodeks (Code of administrative procedure; 'the APK'), Articles 156, 187, 195 and 221

Zakon na energetikata (Law on energy), Article 155

Naredba N° 16-334 ot 6.04.2007 za toplosnabdyavaneto (Ordinance No 16-334 of 6 April 2007 on the supply of district heating), issued by the Minister for Economy and Energy, Article 61; Metodika za dyalovo razpredelenie na toplinnata energia v sgradi – etazhna sobstvenost (Method for the pro rata distribution of thermal energy in buildings in co-ownership), published as an Annex to Article 61 of the aforementioned ordinance, point 6.1.1.

Succinct presentation of the facts and procedure in the main proceedings

1 The method for the distribution of thermal energy in buildings in co-ownership; 'the Method') has been published as Annex 1 to the Naredba № 16-334/06.04.2007 za toplosnabdyavaneto (Ordinance No 16-334/06.04.2007 on the supply of district heating) issued by the Minister for Economy and Energy. In proceedings for a review of legality before the Varhoven administrativen sad (Supreme Administrative Court; 'the VAS'), IG contests that Method with regard to the calculation of the thermal energy consumption of vertical installations in multi-dwelling buildings. By decision of a three-judge chamber of the VAS of 13 April 2018, the formula in point 6.1.1. of the Method was annulled as it did not serve to achieve the objective of Articles 9 and 10 of Directive 2012/27/EU, transposed in Article 155(2) of the Energy Act, namely that billing for district heating energy must be based on actual consumption. The Minister for Energy brought an appeal in cassation against that decision before a five-judge chamber of the VAS.

2 On 20 September 2019, the Ordinance amending the Ordinance on the supply of district heating entered into force, by which the contested provision in point 6.1.1. of the Method was amended. On the appeal in cassation brought by the Minister, the five-judge chamber of the VAS held that the subject matter of the proceedings for a review of legality had ceased to exist, as the contested provision had been replaced by a new rule regulating the same legal relationships. The VAS stated that a review of sub-statutory normative legal acts is not time limited, but can relate only to normative legal acts in force, and not to repealed or amended legal acts that are longer part of the law in force at the time of the court's decision on the merits. For those reasons, by decision of 11 February 2020, which is final and not subject to appeal, the five-judge chamber of the VAS annulled the decision of the three-judge chamber of the same court of 13 April 2018, without ruling on the merits of IG's action for a review of legality.

3 Not satisfied with that development, IG brought the action which is the subject of the main proceedings. IG claims compensation for material damage in the amount

of 830 leva (BGN) for the costs of the judicial proceedings before the three-judge chamber of the VAS and for non-material damage in the amount of BGN 300 for the disappointment, anger and insult caused as a result of the conduct of the supreme judges – of the five-judge chamber of the VAS, which failed to ensure the effectiveness of EU law and, instead of resolving the dispute, declined to exercise its control over the activities of the executive. IG also claims payment of the statutory interest due. He takes the view that the second decision of the VAS infringed his right to effective judicial protection under Article 47 of the Charter of Fundamental Rights of the European Union and the right to make a request for a preliminary ruling under the first paragraph of Article 267 of the TFEU.

Essential arguments of the parties in the main proceedings

4 The applicant submits that the judgment of 11 February 2020 of the five-judge chamber of the VAS was delivered in breach of EU law, since the court did not give a decision on the merits. He claims that the VAS confirmed (in respect of the period from the filing of the action for a review of legality until the repeal by means of the subsequent normative legal act) the validity of a provision of national law (point 6.1.1. of the Method) which was incompatible with Articles 9 and 10 of Directive 2012/27/EU, transposed in Article 155(2) of the Zakon za energetikata (Law on energy). He was thereby deprived of effective judicial protection under Article 47 of the Charter, in the light of the principles of effectiveness and equivalence. The applicant submits that the amendment of the Method took place only after the delivery of the decision of the three-judge chamber of the VAS annulling the relevant provision. Furthermore, he opposes the previous practice of the VAS, according to which it is assumed that the amendment of a sub-statutory legal act is tantamount to the withdrawal of that legal act. IG takes the view that there is no withdrawal because the withdrawal of a legal act precludes the possibility of that legal act producing legal effects. In the present case, however, the legal effects continued to exist for the period of validity of the contested provision until it was subsequently amended on 20 September 2019. Furthermore, the applicant recalls that, under Bulgarian law (Article 156(2) of the APK), the withdrawal of a contested legal act after the first hearing is possible only with the applicant's consent. IG submits that, since no such consent was given in the present case, there is no withdrawal of the contested legal act. The consequences of the amendment of the contested provision should have been regulated ex officio by the competent authority (within the time limit under Article 195 of the APK – no longer than three months from the point at which the judicial decision becomes final). However, since the judicial decision to annul the Method had been set aside and had not become final, Article 195 of the APK could not be applied. He was thereby denied the right to effective judicial protection against point 6.1.1. of the Method for the period preceding its amendment on 20 September 2019. The applicant quantifies that right by reference to the amount of the costs of the court proceedings before the VAS and the non-material damage for the disappointment, anger and insult caused as a

result of the conduct of the supreme judges. He requests that the matter be referred to the Court of Justice of the European Union for a preliminary ruling.

5 The defendant – the Supreme Administrative Court (VAS) – states that the circumstance that a legal act subject to judicial review has ceased to exist in proceedings for a review of legality does not mean that that legal act cannot be reviewed for legality. It states that there is a withdrawn sub-statutory legal act in the present case, and the provision of Article 204(3) of the APK is applicable. Under that provision, where damage has been caused by the withdrawal of an administrative act, the illegality of that act is to be determined by the court called on to rule on the action for damages. Therefore, the applicant's rights are protected and he can claim compensation for damages caused by the withdrawn point 6.1.1. of the Method for the period preceding the amendment of 20 September 2019. Therefore, the principle of ensuring effective judicial protection has not been violated in the proceedings for a review of legality concerning the incompatibility of point 6.1.1. of the Method with the objective of Articles 9 and 10 of Directive 2012/27/EU.

6 The defendant opposes the request for a reference for a preliminary ruling by the Court of Justice. It takes the view that this would revise the operative part of the court's judgment, even though that judgment is final and has acquired the force of *res judicata*. Moreover, submits the defendant, the applicant cannot rely on the Charter, since Article 47 thereof concerns effective judicial protection against rules of national law which infringe provisions of EU law conferring rights on the applicant. In the present case, the rule of national law has been withdrawn.

7 The dispute between the parties concerns the question of whether the amendment of a national sub-statutory legal act which was incompatible with a provision of EU law provides justification for not ruling on the substance of the action for a review of legality brought against that legal act after it has been amended, since it has become devoid of subject matter and the applicant has no legal interest in bringing proceedings in respect of the contested legal act, which no longer exists in law. The dispute also concerns the question of whether the amendment of a sub-statutory legal act constitutes a withdrawal of that legal act, since, for the period running from the point at which the action for a review of legality is brought to the point at which the legal act is amended, the latter continues to regulate legal relationships in a manner alleged to be contrary to a provision of EU law.

Succinct presentation of the reasoning in the request for a preliminary ruling

8 In the first place, the referring court recalls the rule according to which a sub-statutory normative legal act is deemed to be annulled as from the date on which the judicial decision declaring it to be annulled becomes final. Having established that the judicial decision annulling the legal act has not become final in the present case, the referring court proceeds to review the relevant national case-law. The

referring court finds that, in similar cases, the VAS considers that the amendment of such a legal act after it has been challenged by an action for review of legality constitutes a withdrawal of that legal act. The VAS proceeds on the assumption that a court judgment is to be considered to be impermissible if it annuls a sub-statutory normative legal act that was amended in whole or in part before the judgment became final. As such, it can be set aside and should be replaced by another judicial decision, which terminates the proceedings on the ground that the review of legality has become devoid of subject matter.

9 The referring court notes that a divergent view has also been taken in the national case-law. That view takes into account the circumstance that, at the time when the action for a review of legality is brought against the sub-statutory normative legal act concerned and also at the time of the decision of the court of first instance, the proceedings nevertheless have a subject matter and it is to be assumed that the court seised will rule on it in a permissible manner. Moreover, according to that divergent view, it is assumed that a sub-statutory normative legal act can be withdrawn by the body that enacted it only up until the point at which it is challenged before the courts. When a court is seised of an action for a review of legality brought against a sub-statutory normative legal act, it and only it (the court) can annul that legal act if it considers it to be unlawful. In that case, the administrative authority loses its competence to annul the contested legal act and becomes a party to the dispute, and as such must prove the legality of the legal act and cannot dispose of the subject matter of the proceedings. After the contested sub-statutory legal act has become the subject matter of the proceedings, neither party can independently dispose of the subject matter of the proceedings. This serves as a guarantee against arbitrariness, such as would materialise if the normative legal act already contested were to be annulled by way of the adoption by the authority concerned of a new sub-statutory normative legal act with the same content. Such a course of action would make effective judicial review in such cases dependent solely on the will of the defendant if that conduct of the authority continues even in the event of a subsequent action for a review of legality brought against the new sub-statutory normative legal act and renders judicial review impossible.

10 The referring court also relies on the *Kantarev* judgment (C-571/16), in which the Court of Justice held that the existence of two different remedies is permissible in the national legal order, subject to compliance with the principles of equivalence and effectiveness, but that this does not relieve the court of the obligation to examine the legal framework in force until the entry into force of the normative legal act and to determine the criteria for determining the procedural regime under which the cases are to be ruled on. The referring court states that the parties to the present case are in dispute as to whether there are two different remedies. The applicant submits that there is only one remedy, which is that the Court of Cassation is to rule on the merits of the dispute with regard to the amended sub-statutory normative legal act, since it continues to produce legal effects until it is amended. The defendant submits that, after the legal act has been amended, the effect of the provision prior to the amendment is to be taken into account not in

the proceedings for a review of legality, but in the proceedings concerning the claim for damages based on the withdrawal of the legal act. The referring court concludes that, in view of the specific facts of the present case, these questions cannot be clearly answered on the basis of the abovementioned case-law of the Court of Justice.

11 In summary, the referring court states that, in order to resolve the dispute, it is necessary to clarify whether the amendment of a provision of a normative legal act of national law which, prior to the amendment, was declared by a court judgment to be incompatible with an applicable provision of EU law relieves the Court of Cassation of the obligation to examine the provision in force until the amendment or to assess whether it is compatible with EU law. The referring court seeks to ascertain whether an effective judicial remedy is guaranteed if the approach of deeming the provision in question to be withdrawn is followed. Furthermore, concerns are raised as to the existence of an effective remedy, because the possibility provided for in national law to examine the compatibility of the national provision in question with EU law prior to the amendment of that provision exists only if the competent court is seised of an action for damages in respect of harm arising from that provision and only in relation to the applicant concerned.

12 The referring court emphasises that it has doubts as to whether effective judicial protection for the interests of the party is ensured, since the amendment of a normative legal act does not amount to its withdrawal. The provision in force until the amendment continues to regulate the legal relationships during its period of validity, whereas a withdrawn administrative act no longer produces any legal effects whatsoever.