Case C-711/22

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:

18 November 2022

Referring court:

Sąd Najwyższy (Poland)

Date of the decision to refer:

26 May 2022

Applicant:

Advance Pharma sp. z o.o.

Defendant:

The Treasury – Chief Pharmaceuticals Inspector

Subject matter of the case in the main proceedings

Admissibility of revision of civil proceedings closed by a final judgment of the European Court of Human Rights – Effective judicial protection –

Subject matter and legal basis of the request

Interpretation of EU law, in particular Article 47 of the Charter of Fundamental Rights, Article 19(1) and (2) of the Treaty on European Union; Article 267 TFEU

Question referred

In the light of Article 47 of the Charter of Fundamental Rights, read in conjunction with Article 19(1) and (2) TEU, does a remedy available in certain legal systems of the Member States of the European Union, in the form of the possibility of seeking revision of proceedings which led to a final judgment of the European Court of Human Rights finding a breach of the provisions of the Convention, constitute an essential element of the right to effective judicial

protection in civil matters where the legal system of a Member State provides for another legal remedy for the purpose of protecting the judicial rights of a party to proceedings which have resulted in a final judgment?

Provisions of Community law relied on

Treaty on European Union: Article 19

Charter of Fundamental Rights of the European Union: Article 47

Provisions of national law relied on

Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. (Constitution of the Republic of Poland of 2 April 1997) (Journal of Laws 1997 No. 78, item 483): Articles 45 and 77

Ustawa z dnia 17 listopada 1964 r. – Kodeks postępowania cywilnego (Law of 17 November 1964 – Code of Civil Procedure) (consolidated text: Journal of Laws 2021, item 1805): Art. 399, Art. 400, Art. 401, Art. 401^1, Art. 403, Art. 404, Art. 405, Art. 406, Art. 407, Art. 408, Art. 410

Succinct presentation of the facts of the case

By judgment of 8 February 2016, the Sąd Okręgowy w Warszawie (Regional Court, Warsaw) dismissed the action brought by Advance Pharma sp. z o.o. (defendant) seeking an order requiring the Treasury – Chief Pharmaceuticals Inspector, Warsaw, to pay a sum of PLN 37 242 220.00 by way of damages. The applicant challenged this judgment by way of an appeal, which was dismissed by the Sąd Apelacyjny w Warszawie (Court of Appeal, Warsaw) in a judgment of 30 October 2017. The applicant then submitted an appeal in cassation to the Sąd Najwyższy (Supreme Court, hereinafter "SN"), which was accepted for hearing and subsequently dismissed by a judgment of the Supreme Court of 25 March 2019.

Advance Pharma sp. z o.o. then brought the matter before the European Court of Human Rights ('the ECtHR'), contending that persons who had participated in the judgment of the Supreme Court of 25 March 2019 were not independent and impartial judges from the point of view of constitutional, contractual and treaty standards because the National Council of the Judiciary had been involved in their appointment. In its judgment of 3 February 2022, *Advance Pharma Sp. z o.o. v. Poland* (Application No 1469/20), the ECtHR found that there had been an infringement of Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR') on the ground that the infringements in the procedure for the appointment of seven judges to the Civil Chamber of the Supreme Court, including three judges who heard the case of the applicant, were

sufficiently grave as to infringe the very essence of the applicant's right to a 'tribunal established by law' under Article 6(1) of the ECHR. It also found that the composition of the Supreme Court Civil Division was not a 'tribunal established by law'.

Following the aforementioned judgment of the ECtHR, on 2 May 2022, Advance Pharma Sp. z o.o. lodged an appeal for revision of the Supreme Court proceedings that had given rise to the final judgment of 25 March 2019.

Essential arguments of the parties to the main proceedings

The applicant contends that the appeal should not be dismissed and argues, inter alia, that ruling out the possibility of a revision of proceedings following a judgment of the ECtHR could deprive citizens and other parties to proceedings of the guarantee of effective judicial protection.

Brief statement of and reasons for the request

1 Revisions of civil proceedings are a specific instrument for the elimination of defective decisions which constitutes an exception to the principle of res judicata and the protection of the acquired rights of parties to civil proceedings, and which guarantees them the possibility of reversing a final decision. The exceptional nature of that institution is linked to the effect which it entails, namely, calling into question the stability of civil decisions which have acquired the force of res judicata. Situations justifying the revision of proceedings arise where, after a final decision on the substance of a case, specific circumstances come to light showing that the decision has lost its legality due to an irregularity in the proceedings or in the delivery of the final judgment.

2 The judicial application of the law, for reasons of guarantee, entails the highest degree of regularity, so that only procedural steps expressly provided for by law are permissible. There is no room for arbitrariness as regards the observance of the procedural basis of an exceptional review procedure and, subsequently, of the basis for the actual judicial decision (7 SN judges of 30 November 2010, III CZP 16/10). Consequently, civil proceedings may be reopened only in the cases provided for by law. In Polish procedural law, an application for revision is admissible only on one of the grounds specifically listed in the legislation and the admissibility of the revision is based on the existence of such grounds. This remedy is provided for in the case of serious procedural defects.

3 The Polish Code of Civil Procedure does not provide for the delivery of a judgment of the ECtHR, including a judgment finding an infringement of Article 6(1) of the ECHR, as legal grounds for revision of civil proceedings which led to a final judgment. A ground allowing a procedure to be reopened cannot be inferred from the provisions through broader interpretation or by analogy. In its decision of 30 November 2010, III CZP 16/10, the Supreme Court found that the

final judgment of the ECtHR, which found that the right to a fair hearing guaranteed by Article 6(1) of the ECHR had been infringed, did not constitute, under Polish procedural law, a ground for reopening civil proceedings.

4 If a legislature has not provided for the possibility of reopening proceedings after a judgment of the ECtHR, then there is no legislative basis for doing so, especially where a party can seek judicial protection by means of another remedy. Exercising such legal remedies makes it possible to guarantee the party concerned the opportunity to protect its legitimate interests. A fair hearing as referred to in Article 6(1) of the ECHR must therefore respect the principle of legal certainty deriving from res judicata. From that point of view, it is not permissible to re-examine and rule on a case in which a final judgment has been issued. That is why countries whose legal systems do not provide for the possibility of review following a judgment of the ECtHR provide for other alternative remedies (*restitutio in integrum*).

5 Polish law provides for a compensation mechanism and the party whose rights have been infringed in civil proceedings, as established by a decision of the ECtHR, may, following the judgment of that Court, avail itself of that mechanism and, for example, bring an action for damages against the Treasury. In Polish law, the principles relating to the possibility of incurring liability are set out in the judgment of the Trybunał Konstytucyjny (Constitutional Court) of 22 September 2015, case SK 21/14, which held, inter alia, that the judgment of the ECtHR can constitute a prejudged opening to an action to establish general liability. In this way, Polish law achieves the objective of inviolability of res judicata and of security of civil-law relations between parties, while ensuring that the parties have adequate recourse to restitution.

6 Consequently, the absence of adequate provisions allowing the reopening of the procedure would appear to strengthen the role of the courts, as it is up to the courts to ensure that the victim has access to other alternative remedies, provided that the latter formulates his claims appropriately. In this context one could imagine a situation where Member States of the European Union, which are unaware of the legal basis for the reopening of civil proceedings following a judgment of the ECtHR, would have to change their practice by changing the interpretation of the provisions governing the reopening of proceedings in order to ensure the enforcement of judgments of the ECtHR. This appears to be the intention of Recommendation R (2000) 2 of the Committee of Ministers to Member States on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights (adopted on 19 January 2000) and the Council of Europe report entitled *Reopening of Domestic Judicial Proceedings Following the European Courts Judgments*, (Strasbourg 2022, https://www.coe.int/execution). To this end, however, it would be necessary, according to the referring court, to create a basis for that purpose (within the European Union, for example, a decision of the Court of Justice of the European Union), from which the domestic court might infer that the provisions

of the national procedural law previously existing should be interpreted as allowing the reopening of civil proceedings.

7 According to the referring court, it is doubtful whether the application of European law would also result in a need to provide for the reopening of civil proceedings. Thus, the Court of Justice's interpretation outlines an obligation to put in place mechanisms whereby final domestic rulings which infringe fundamental rights should be declared invalid, which suggests a new development in European law (judgment of 11 December 2007 in Case C-161/06, *Skoma-Lux*, paragraphs 71 to 73). However, in another ruling, the Court of Justice stated that EU law does not require the return of final judgments which prove to be contrary to EU law (judgment of 29 July 2019 in Case C-620/17, *Hochtief Solutions Magyarországi Fióktelepe*, paragraphs 81 and 88).

8 National procedural rules which provide for the reopening of proceedings following a judgment of the ECtHR, as is often stated, may prove, in practice, so doubtful that the list of possible grounds for reopening them must incorporate the principle of legal certainty and the fact that infringement of a provision of a convention is most often due to an interpretation of national law whereby the national court fails to understand the provisions of the ECHR in the established case-law of the ECtHR. Article 6(1) of the ECHR merely defines the European standards of the right to a fair trial and does not have the function of consistently identifying specific irregularities which might give rise to a reopening of proceedings.

9 Furthermore, an application for revision is not intended to standardise national case-law. The introduction of that legal principle into the civil procedural law of the Member States of the European Union would go beyond the jurisdiction of the ECtHR and might encroach, inter alia, on the jurisdiction of the Court of Justice of the European Union. In other words, the need to reopen civil proceedings in the Member States of the European Union after a judgment of the ECtHR would bring about a situation where the real significance of the judgments of the ECtHR would greatly exceed the competences bestowed upon it under the Convention.

10 It should also be noted that in practice, the ultimate source of breaches of the ECHR is national legislative provisions which are incompatible with the ECHR. It is true that the ECtHR does not have jurisdiction to examine the compatibility of national laws with the ECHR, but, in practice, it does so indirectly. Thus, in order to ensure the standards of the Convention, an amendment of that national legislation may be necessary. However, if the national court has applied the national provisions correctly, there would be no need to reopen the proceedings. The purpose of an application for revision is not to adapt national legislation to the standards of the Convention. The ECtHR does not rule on whether certain provisions of national law are in line with the Convention, but instead examines the conduct of the State as a whole as regards infringements of the Convention/human rights.

11 All the above circumstances need to be considered when creating a list of the conditions for reopening proceedings under national law. More generally, the issue of the reopening of civil proceedings following a decision of the ECtHR would therefore be an intrinsic part of the national legal system and rules of procedure which, because of the differing traditions and needs of the various Member States, may be conceived differently in individual Member States. The stability of judicial decisions in civil matters which also involve parties other than those who apply to the ECtHR alleging infringements of the standards of the Convention in proceedings which have acquired the force of res judicata, and who base their legal position on confidence in decisions which have acquired the force of res judicata, speaks in favour of the idea that the reopening of proceedings is not an essential element in the right to effective judicial protection. The principle of stability of judicial decisions which have acquired the force of res judicata in civil matters is intended to uphold confidence in the domestic legal system of the Member State of the European Union and to safeguard the rights acquired by the parties through that system. These entities, acting in the confidence provided by a judicial decision which has acquired the force of res judicata, would also be able to remedy their legal situation in a way that does not require the review of a final judgment issued by the ECtHR. Res judicata safeguards the legal position of an entity. The finality of res judicata in civil proceedings and the consequences thereof have already been addressed in the case-law of the ECtHR [judgments of 28 October 1999, *Brumarescu v. Romania* (application No 28342/95), paragraphs 50 and 62; of 10 April 2001, *Sablon v. Belgium* (application No 36445/97), paragraph 86; of 23 July 2003, *Ryabykh v. Russia* (application No 52854/99), paragraph 51; and of 30 November 2010, *Urban v. Poland* (application No 2316/08), paragraph 66]. As the case-law shows, the ECtHR requires that the concept of the right to a fair hearing (as set out in Article 6(1) of the ECHR) be interpreted in conjunction with the preamble to the Convention, according to which the rule of law is an important part of the common heritage. From this follows the principle of legal certainty, which prevents a final judicial decision based on the merits of a case from being called into question. The principle of legal certainty thus entails respect for res judicata and final judicial decisions. The referring court shares that view.

12 For these reasons, in the opinion of the referring court, the remedy of seeking the revision of proceedings, which have resulted in a judgment having the force of res judicata, following a judgment of the ECtHR which finds an infringement of the principles of the Convention does not constitute, in civil matters, an essential element of the right to effective judicial protection, in particular where the legal system of a Member State provides for a different remedy to safeguard the rights of a party to proceedings which have resulted in a final judgment. A remedy such as the reopening of civil proceedings following a judgment of the ECtHR is admissible, but its admissibility is inherent in the national legal system and procedural rules which, because of the diversity of traditions and needs, may be conceived differently in the different Member States of the European Union. The availability of legal remedies in a country's legal system allowing judicial protection of a party's rights other than by reopening civil proceedings which

resulted in a judgment which has acquired the force of res judicata is sufficient to ensure that party's right to a tribunal, including in the light of the constitutional legislation of the Member State concerned, also, in the case of Poland, in the light of Article 45(1) of the Polish Constitution.

13 The answer to the question referred is important for the outcome of the case, as it will remove the uncertainty as to how effective judicial protection can be ensured in the event of a judgment of the ECtHR finding an infringement of the standards of the ECHR in a civil case concluded by a final judgment of a court of a Member State of the European Union. For this reason, it is first necessary to rule on the admissibility of the reopening of proceedings in such a case and for the Court of Justice of the European Union to determine whether, in the light of the standards of the Treaty, the remedy of requesting the reopening of proceedings that have been concluded with a final judgment, following a judgment of the ECtHR finding an infringement of the standards of the ECHR, is an essential element of the right to effective judicial protection in civil matters where the legal system of a Member State provides for another legal remedy to protect the judicial rights of a party to proceedings which have resulted in a final judgment.