EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Information Note on the Court's case-law 229

May 2019

Sine Tsaggarakis A.E.E. v. Greece - 17257/13

Judgment 23.5.2019 [Section I]

Article 6

Administrative proceedings

Article 6-1

Civil rights and obligations

Fair hearing

Contradictory court judgments on applications seeking the closure of a rival commercial structure: *Article 6 applicable ; violation*

Facts – The applicant company, which runs a cinema multiplex, brought an application for judicial review of the building permit and the operating licence issued to a rival company for the construction and operation of a similar complex in a neighbouring district. It argued, in particular, that the urban plan set aside this area for residential premises.

In respect of this first application, the 4th Section of the Supreme Administrative Court delivered a judgment finding that the compliance with the principle of "legitimate expectation" prevented the authorities from re-examining the lawfulness of the building permit at the stage of issuing the operating licence. Having noted that this finding conflicted with the case-law of the 5th Section, the 4th Section decided to refer the case to the plenary Supreme Administrative Court.

Although the plenary found against its approach, the 4th Section nonetheless dismissed the applicant company's application for judicial review, on the grounds that the circumstances of the case were "exceptional". In parallel, on another application by the applicant company, the 5th Section ordered that the new multiplex be sealed off.

Considering that the judgments delivered in its case were contradictory, the applicant company complained of conflicting case-law, in breach of its right to legal certainty.

Law – Article 6 § 1

(a) *Applicability*

(i) *Dispute concerning a "civil right"* – Although it seemed at first sight to concern a question of upholding the law, the applicant company's application for judicial review could not be regarded as an *actio popularis*. The applicant company also raised arguments concerning the loss of clientele suffered by it as a result of the rival multiplex.

The Court had repeatedly acknowledged that a company's clientele was to be regarded as a proprietary interest that qualified it as an "asset".

The applicant company's standing to apply for judicial review had never been disputed by the parties to the proceedings or by the various formations of the Supreme Administrative Court which had ruled on the case.

Thus, given what was at stake in the application, the nature of the impugned decisions and the applicant company's standing, the "dispute" raised by the applicant company had a sufficient link with a "right" to which it could claim to be entitled.

(ii) *Decisive nature of the dispute* – The outcome of the proceedings before the Supreme Administrative Court was directly decisive for the right in question, since a decision in the applicant company's favour would have caused the rival multiplex to be closed; indeed, this was in reality the ultimate purpose of those proceedings.

(b) *Merits* – The conditions laid down by the Court in the area of legal certainty did not appear to have been fulfilled in the present case.

(i) *Observable differences* – There were indeed "profound and long-standing" differences in the case-law of the 4th and 5th Sections of the Supreme Administrative Court with regard to whether it was possible, and even necessary, to re-examine the lawfulness of a building permit when examining the lawfulness and appropriateness of issuing an operating licence.

These differences had existed for several years. In addition, it concerned a matter of general interest, since it affected several similar cases and involved the authorities' respect for very important principles of administrative and constitutional law.

(ii) *Existence of a mechanism for resolving conflicts in the case-law* – In the Greek administrative system, it was the Supreme Administrative Court, sitting as a full court, which had responsibility for resolving differences in the case-law of its various sections, or between the other administrative courts.

In the present case the plenary court had considered that – in order to ensure respect for the principle of environmental protection as guaranteed by the Constitution – the question of whether it was permissible to open the multiplex had to be examined not only at the stage of granting the building permit, but also when deciding on whether to grant an operating licence.

Moreover, the plenary court's judgment had not been limited to setting out the applicable principles in abstract terms, but had ruled on the central question of the dispute in issue.

(iii) *Effectiveness of the mechanism* – In rehearing the case, the 4th Section had essentially followed the approach taken in its previous case-law, referring to "exceptional circumstances". However, the plenary court had already taken account of the specific aspects of the particular case before it.

The outcome of these applications for judicial review had created a situation where, on the one hand, the 4th Section's judgment permitted the multiplex to function normally, while, on the other, the 5th Section's judgment ordered that its activities be terminated (by having it sealed off).

In addition, the situation was worsened by the city council's refusal to comply with the 5th Section's judgment – a refusal endorsed by the committee of the Supreme

Administrative Court responsible for monitoring the proper execution of its judgments, on the grounds that the rival multiplex had submitted an application for "regularisation".

Thus, the conflicting case-law between the 4th and 5th Sections had persisted for years, and still continued, in spite of the intervention by the plenary Supreme Administrative Court. The ensuing situation of legal uncertainty showed that this mechanism for harmonising the case-law had not been effective.

Conclusion: violation (five votes to two).

Article 41: EUR 8,000 in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed, but obligation on the respondent State to re-open the proceedings within six months, if the applicant company so wished.
