

In case 2565 / 2020

ANSWER

No. 8420

Sofia, 29.06.2020

IN THE NAME OF THE PEOPLE

The Supreme Administrative Court of the Republic of Bulgaria - Fifth Department, in a court session on the fourth of June,
composed of:

CHAIRMAN:

ANNA DIMITROVA

MEMBERS:

ILIANNA SLAVOVSKA

TINKA KOSEVA

to secretary

Nikolina Avramova

and with participation

to the prosecutor

Emil Dangov

listened to what was reported

by the judge

TINKA KOSEVA

by adm. case no

2565/2020

The proceedings are in accordance with Art. 208 et seq. of the Administrative Procedure Code /APK/.

It was formed on a cassation appeal by Adv.K. Boncheva, attorney of E. Todorova and I. Todorov against decision No. 7086 of
20.11.2019. of the Administrative Court of Sofia - city, decided on administrative case No. 7974/2019, which rejected their
appeal against decision No. PPN- 01 - 694/2018 of 23.05.2019. of the Commission for the Protection of Personal Data for

administrative penalties imposed on each of the applicants - a fine in the amount of BGN 5,000, for not providing access in violation of Article 58, §1, b"e" of Regulation 2016/679.

In the cassation appeal, arguments were developed for the incorrectness of the decision, due to a violation of the substantive law - its contradiction with Regulation (EU) 2016/679, Article 7 of HOPES and Article 8 of the Convention, as well as the practice of the ECHR. It is claimed that the decision is incorrect, due to a violation of the principles of effectiveness and equivalence, Art. 83 §2 of the Regulation and the principle of proportionality, as well as incorrectness due to significant violations of the procedural rules - lack of reasons and unreasonableness. The contested decision is requested to be annulled, as well as a preliminary inquiry to the CJEU from the current court on the issues mentioned in the cassation appeal. Claims an award of costs incurred.

The defendant - Commission for the Protection of Personal Data, through a procedural representative in a court session, contested the cassation appeal. Requests that the decision be upheld as correct. Claims an award of attorney's fees. Object to the excessiveness of the attorney's fees claimed by the respondent.

The defendant - A. Tsuneva, in a submitted written response, contests the cassation appeal and asks that the decision be left in force.

The representative of the Supreme Administrative Prosecutor's Office gives a reasoned conclusion that the cassation appeal is groundless.

The Supreme Administrative Court, in the current composition of the fifth department, after considering the facts of the case and the arguments of the parties, accepts the following as established:

The cassation appeal was filed by a proper party, against a contestable judicial act that is unfavorable to it, as well as within the preclusion period under Art. 211 of the APC, which is why it is procedurally admissible.

Considered on its merits, it is unfounded.

With the appealed decision, the court rejected the claimants' appeal against Decision No. PPN - 01 - 694/2018 of 23.05.2019. of the CPLD, whereby on the basis of Art. 58, §2, b"i" of Regulation 2016/679 in conjunction with Art. 83, §5, b"d", proposal the last administrative penalty "fine" in the amount of BGN 5,000 was imposed. of I. Todorov and a "fine" in the amount of BGN 5,000. of E. Todorova for not providing access in violation of Art. 58, §1, b"e" of Regulation 2016/679.

In order to render the appealed decision, the court discussed the evidence gathered in the case and accepted as factually

established that the CPLD was referred to a complaint filed by A. Tsuneva, containing allegations that the plaintiffs installed cameras on their building, such as one camera is aimed at the front door of the property and its building. The cameras were installed without the consent of her family, and they film them daily and she believes that they are not protected, therefore she opposes and does not want to be photographed and photographed with cameras aimed at the entrance her neck.

The court followed the conduct of the administrative proceedings before the CPLD, finding that by letter dated 15.11.2018. the assessors were notified of its formation in accordance with Article 26 of the APC and a 7-day period was granted for a written statement and presentation of relevant evidence. With the same letter, they were warned that for non-compliance with the provisions of the CPLD they may be fined in accordance with Article 83, §5, b "e" of Regulation 2016/679. The letter was returned to the CPLD as an unclaimed shipment, a new letter dated January 4, 2019 was prepared. with identical content, again returned as unclaimed. On the same date, a notice to the assessors about the initiated proceedings was published on the CPLD website, as on 28.01.2019. I. Todorov was notified by phone about the initiated proceedings, evident from the presented protocol, and by mail with a message received on 02/04/2019.

At a meeting of the CPLD on 27.02.2019. it was accepted that A. Tsuneva's complaint is admissible for consideration, the parties to the proceedings were constituted and an on-site inspection was appointed to clarify the case. For the scheduled meeting and the appointed inspection, Todorov was notified by phone, evident from the minutes of 20.03.2019, as by order No. RD -15 -91/21.03.2019. a verification team was appointed by the CPLD with the task of establishing whether a video surveillance system has been built and what its technical parameters are at an address in [town], and for the specific date and time, I. Todorov was introduced again by phone on 04/01/2019. A report of findings dated 04.02.2019 was drawn up for the inspection carried out. and prepared Constitutive act No. PPN - 02 - 208/12.04.2019, in which it was established that a video surveillance system of 6 video cameras was built on the site, one of them directed to the adjacent yard and another neighboring property and there is no information a sign warning about video surveillance in the object. It is recorded in the protocol that I. and E. Todorovi did not provide access for inspection by the appointed commission and the inspection team was prevented from establishing all the facts and circumstances related to the constructed video surveillance system.

With subsequent announcements from 12.04.2019. the assessors were notified of the attempt to carry out an inspection and that in case of repeated refusal, they will be imposed an administrative penalty "fine" according to the order of regulation 2016/679. On 17.04.2019 a meeting of the CPLD was held, as can be seen from protocol No. 18, at which the assessors

attended in person, and they stated that they refused to allow members of the CPLD to their home for an inspection. In the decision under item 1, a new inspection was appointed, and in item 4 it was accepted that, on the basis of Article 83, §5, b"d" of Regulation (EU) 2016/679, an administrative penalty was imposed for failure to provide assistance to E Todorova and I. Todorov "fine" in the amount of BGN 5,000. With the contested decision of the CPLD before the court of first instance, the administrative penalty "fine" in the amount of BGN 5,000 was imposed. to the assessors.

With the fact thus established, the court accepted from a legal point of view that the decision was issued by a competent authority, in the form provided for by law and contains the required details under Article 59, Paragraph 2 of the APC. No significant violations of the administrative procedure rules and in accordance with the substantive law were committed when it was issued. Reasons have been presented that the authority of the CPLD under Art. 58, §1, b"f" of Regulation 2016/679 to gain access to any equipment and means of data processing has been violated, which is why a coercive administrative measure was rightly imposed, with in order to prevent or stop the commission of a violation, thereby achieving due behavior in the field of personal data protection. It is accepted that the imposed fine is close to the minimum amount, with the aim of sanctioning the illegal behavior and disciplining the respondent party / in this case the assessors/ to provide assistance to the CPLD in carrying out a re-verification.

For these reasons, the court of first instance accepted that the contested decision of the CPLD was lawful and rejected the plaintiffs' appeal against it.

The decision thus rendered is correct.

The Commission for the Protection of Personal Data is a permanent, independent supervisory body that ensures the protection of individuals in the processing of their personal data and in the access to this data, as well as the control of compliance with Regulation (EU) 2016/679 and the GDPR . The Commission has the authority to carry out comprehensive control for compliance with the legal acts in the field of personal data protection, to carry out inspections and issue mandatory prescriptions to the administrators of personal data, to consider complaints against their acts or actions. Proceedings for complaints against acts or actions of a personal data operator are set out in Article 38 of the Labor Code and, in this case, were lawfully initiated following a complaint by A. Tsuneva with allegations of illegal processing of their personal data by the tax authorities for having installed cameras of her building, with one camera pointing at the front door of the property and her building. The cameras were installed without the consent of her family, and they film them daily and she believes that they are

not protected, therefore she resists and does not want to be photographed and filmed with cameras pointed at her front door. There is no dispute in the case, and from the evidence presented in the case, it is established that a video surveillance system consisting of 6 video cameras was built in the property of the assessees, and that E. and I. Todorovi did not provide access to carry out an inspection by the committee appointed by the chairman of the CPLD and the examining team was prevented from establishing all the facts and circumstances and ruling on the merits of the submitted complaint.

The authority of the CPDP to carry out inspections is expressly regulated in Article 12 of the CPDP, according to which the Chairman and members of the commission or authorized persons from its administration carry out control through inspections for compliance with Regulation (EU) 2016/679. In this case, the inspection was assigned on the complaint of an interested party, in accordance with Art. 14, Para. 4 of the Labor Code. The basis for carrying out the check is according to Art. 10a, para. 1 of the LLDP in conjunction with Art. 58, §1, b"e" of Regulation (EU) 2016/679, according to which the Commission for the Protection of Personal Data in the capacity of a supervisory authority has the power during an investigation to gain access to all premises of the controller and processor of personal data, including any equipment and means of processing personal data, in accordance with Union law or the procedural law of the Member State. Article 12a, paragraph 1 of the LLDP also stipulates the obligation, upon request, for the administrator and the processor of personal data to provide assistance to the commission in carrying out its tasks and powers.

In this case, this due behavior and cooperation was categorically refused by the assessors and reflected in the minutes of a meeting of the CPLD, which caused them to be sanctioned for not providing access to the cameras as a means of processing personal data. As the court of first instance correctly stated in its decision, the actions of recording and storing with an automatic means - a video surveillance system, fall under the concept of "processing" in the sense of Article 4, item 2 of Regulation (EU) 2016/679, since data from the system allows individuals to be identified.

The court discussed the objection of the assessors regarding the inapplicability of the provisions of Art. 2, §2, b"c" of Regulation (EU) 2016/679 and Art. 9, para. 1 of the Personal Data Protection Act /repealed/ when processing personal data, carried out by individuals for their personal and domestic activities, such as in this case the installation of cameras by the assessors in order to protect their health, life and property, and has carried out a thorough analysis of the provisions, as well as the interpretation given by the CJEU in a decision dated 11.12.2014 . in case C - 212/13. The present instance fully agrees with the conclusions of the court of first instance that when the video surveillance system also covers public places, it does not

constitute processing of personal data when carrying out entirely personal and domestic activities within the meaning of Article 3, §2, second indent of Directive 95/ 46/ EC of the European Parliament and of the Council of 24.10.1995. and it is not necessary to repeat them, even more so the question raised by the appellants concerns the substance of the filed appeal. In this case, the administrative penalty imposed in the contested decision was imposed for a violation of the authority of the CPLD under Art. 58, §1, b"e" of Regulation (EU) 2016/679 to gain access to any equipment and means for processing personal data, what is the video surveillance system installed by the cashiers. The powers under Art. 58, §2 have the character of a coercive administrative measure, the purpose of which is to prevent or stop the commission of the violation, thereby achieving the due behavior in the field of personal data protection.

Correctly, upon an overall assessment of the evidence collected in the case, the court came to the conclusion that the assessors did not provide access to the CPLD to carry out the necessary inspection, which is why the inspection team was prevented from establishing all the facts and circumstances in connection with the established system for video surveillance, which is why the administrative body lawfully exercised its powers under Art. 58, §2, "and" of Regulation 2016/679 to impose an administrative penalty "fine", according to Art. 83, §2 depending on the circumstances of the specific case. When discussing the circumstances specified in the cited provision, the CPLD came to the conclusion that it should impose on the assessors an administrative penalty "fine" in the amount close to the minimum, which aims to sanction their illegal behavior and discipline them to provide assistance to the CPLD upon re-verification. When determining the amount of the imposed fine, the administrative body took into account the circumstances under Art. 83, §2 of Regulation 2016/679, having set forth detailed considerations for the presence of the following elements: "b."a" - the violation affects the powers of the supervisor authority, without the exercise of which the case file cannot be clarified from a factual point of view, which leads to the postponement of its examination on the merits, as well as affecting the rights of the person who appealed to the CPLD with complaints about unlawful processing of his personal data. The authority has justified and with the presence of the element under b."b" under Art. 83, §2 - the violation was committed intentionally - there is an express refusal to grant access by the assessors. The reasons presented by the administrative body for the presence of the above-mentioned elements , it is indisputably established by the evidence collected in the case, from which it is evident that the appellants categorically refused to grant access to the CPLD to carry out the necessary inspection. Their behavior is permanent, evident from the conducted conversations and correspondence, as well as the protocol of the CPLD meeting, which is why the same is uncritical and purposeful.

The imposed penalty and its amount is objectively justified by the criteria specified in Article 83, §2 of the Regulation, taking into account that the violation was committed intentionally and the behavior of the assessors was uncritical. The current court does not agree with the complaints in the cassation appeal about the violation of the principle of proportionality when imposing the administrative penalty and the clear injustice of the imposed fines, as well as the lack of reasons presented by the court for the possibility of replacing the fine with a reprimand, due to the insignificance of the committed violation by the appellants.

When issuing the disputed administrative act, the administrative body presented consistent, logical reasons corresponding to the severity of the violation. The same as was stated above in the decision is expressed in the refusal of the assessors to assist the CPLD in implementing its control powers by providing access to the means for processing personal data - a violation under Art. 58, §1, b."e " from Regulation 2016/679. Initially, the judicial control over the act of imposing the NRA includes checking its compliance with one of the main principles of administrative law, namely - the principle of proportionality in the exercise of the powers of administrative bodies. In the formal presence of the legal prerequisites for issuing an act with content such as that of the procedural decision, application of the principle of proportionality requires an examination of the question of whether the act and its content affect rights and legal interests to a greater extent than is necessary for the purpose , for which the act is issued, whether this goal can be realized only by applying the measure, as well as whether the effect intended by the measure could be achieved by other more favorable legal means for the person.

In this case, it is clear from the data in the file that when issuing the contested act, the administrative body substantiated in detail the individualizing circumstances and the proportionality of the imposed penalties. The purpose of the imposed measure is to prevent or stop the commission of a violation, thus achieving the proper behavior in the field of personal data protection, as the penalty under Art. 58, §2 of the Regulation has a punitive nature. When implementing it, the administrative body took into account the nature, gravity and consequences of the violation, namely violation of the interests of the person who appealed to the CPLD with a complaint and the inability of the independent body to examine it in substance. It should be noted that the behavior of the assessors has been persistently uncritical and consistent in their refusal to provide access to the video surveillance system, thereby hindering the control powers of the supervisory authority to carry out the necessary verification.

The sanction of BGN 5,000. is set to the legal minimum considering the amounts specified in Article 83, §5 of Regulation (EU) 2016/679, namely up to EUR 20,000,000. By determining the sanction in the specified amount, the goal of the law has been achieved, as the punishment should have an educational, deterrent and warning function, without affecting the interests of the

person who committed the violation more than necessary. In this case, this condition is met. It cannot be assumed that the committed violation does not imply the imposition of a fine, as this is an option provided for in the law and the legal requirement to state the reasons for choosing this option has been met. The factual and legal grounds for the imposition of the penalty are specified, which complies with the requirement of Art. 159, paragraph 1, item 4 of the APC. The act was issued in the written form provided for by the law, by a competent authority, within the framework of the powers granted to it.

Regarding the request for a preliminary ruling under the CJEU

The cassation court finds that, in view of the formulated questions, indicated in the cassation appeal and the subject of the legal dispute, there is no basis for sending a preliminary inquiry pursuant to the order of art. 267 of the Federal Law and art. 268 of the Code of Civil Procedure, in conjunction with art. 144 of the Civil Procedure Code to the Court of The European Union.

Pursuant to the provision of Article 628 of the Code of Criminal Procedure, the court makes a request to the Court of the European Union when the interpretation of a provision of the law of the European Union is relevant for the correct decision of the case. The analysis of the norm as well as the provision of art. 629, paragraph 3 of the Code of Civil Procedure requires the conclusion that an inquiry can be made in case of ambiguity regarding the interpretation of the applicable provisions of the law of the European Union, related to the specific legal dispute. The subject of the preliminary inquiry should be the interpretation of a specific Community law norm in the context of a certain national legal regulation, in order to establish, on the basis of this interpretation, the contradiction of the national law with the norms of European law. A consequence of the same is non-application of the conflicting national legal regulation in the specific case.

In the trial case, none of the questions formulated by the cassation appellant concern the establishment of a contradiction of national law with norms of European law / such a contradiction was not at all indicated and substantiated by the cassationer in the questions raised/, but an interpretation by the CJEU of the norm of Art. .2, §2, b"c" of Regulation 2016/679, which is part of national law as it applies directly by virtue of the Regulation. With the rest of the questions asked, an interpretation of legal issues introduced for resolution in the first-instance court proceedings is requested, on which, according to the cassator, the ASSG formed incorrect conclusions in the appealed decision - subject to control by the present instance.

For the stated reasons, the appealed decision, as correct, should be left in force.

Given the outcome of the dispute, the claim of the Commission for Protection against Discrimination for the award of a legal

consultancy fee, which the court determines in the amount of BGN 100, should be respected. on the basis of Article 78, Paragraph 8 of the Code of Civil Procedure, in conjunction with Article 37 of the Civil Code.

For the stated reasons and on the basis of art. 221, paragraph 2 of the APC, the Supreme Administrative Court, fifth department

RESOLVE:

THE request of E. Todorova and I. Todorov, through legal representative Adv. K., is DISREGARDED. Boncheva to send a preliminary inquiry to the Court of the European Union.

Decision No. 7086/20.11.2019, issued in administrative case No. 7974/2019, REMAINS IN FORCE. according to the inventory of the Administrative Court Sofia - city.

CONDEMNED E. Todorova with [EGN] and I. Todorov with EGN: [EGN] to pay to the Commission for Protection from Discrimination an amount in the amount of 100/hundred/ BGN costs in the case.

The decision is final.

True to the original,

CHAIRMAN:

/p/ Anna Dimitrova

Secretary:

MEMBERS:

/p/ Iliana Slavovska

/p/ Tinka Koseva