Piotr Rączka[1]
Nicolaus Copernicus University in Toruń
ORCID ID: 0000–0002–1097–5712

Karolina Rokicka-Murszewska[2]
Nicolaus Copernicus University in Toruń
ORCID ID: 0000–0001–5402–4137

GLOSS TO THE JUDGEMENT OF THE SUPREME ADMINISTRATIVE COURT

OF 6 MAY 2021, II GSK 1057/20 (PARTIALLY CRITICAL)

ABSTRACT

Gloss to the judgement of the Supreme Administrative Court (SAC) of 6 May 2021, II GSK 1057/20, is another voice in the debate on the quality of training for young lawyers. The authors considered the judgment to be an obstacle to the formulation of general theses relating to the legal training and vocational training of trainees attorney-at-law and their impact on the quality of the services they provide in the future. The role of the National Bar of Attorneys-at-Law is to ensure the proper exercise of those professions in the public interest and for the protection of the public interest. The training of young lawyers therefore affects not only the provision of legal services to different actors, but also the need to safeguard the public interest. In the glossed

1 Attorney-at-law (Bar Association of Attorneys-at-Law in Toruń), post-doctoral degree; Professor at Nicolaus Copernicus University in Toruń (NCU); Head of the Chair of Administrative Law at NCU; member of the Local Government Board of Appeal in Toruń from 1999 to 2010; author of publications in the field of law and administrative procedure.

2 Attorney-at-law (Bar Association of Attorneys-at-Law in Toruń), PhD; assistant professor at the Chair of Administrative Law at NCU; author of publications in the field of law and administrative procedure.

judgement the Court rightly pointed out that the result of the examination must correspond to the level of legal training. However, it went beyond the scope of the decisions on the results of the examinations, which are laid down in a regulation according to which the administrative courts do not review the marks awarded by the examiners, but the result of the examinations based on them. A divergent, inappropriate judgement by the SAC could lead to a five-instance trial. The SAC has no power to comment on the content of the appraisals, which would require an appropriate legal definition of the criteria for the submission of the individual appraisals, which would appear to be impossible in the context of expert appraisals.

Keywords: attorney-at-law training, trainees attorney-at-law, vocational examination, attorney-at-law examination

The examiners give their grades using the scale and assessment criteria contained in the Act (cf. Art. 36^4 sec. 10 and Art. 36^5 sec. 2 of the AAL), and these grades are the implementation of the principle of the free assessment of evidence and a manifestation of the individual approach of specialists who, on the one hand, guarantee the knowledge of the rules of law and an objective assessment of the correctness of the solutions applied, and on the other hand, contain an element of their own "expert" assessment of the level of work. (thesis from Legalis legal information system)

The glossed judgement of the Supreme Administrative Court (SAC) was issued due to a complaint lodged by an exam candidate who took the examination for attorneys-at-law against the resolution of the 2nd degree Examination Committee at the Minister of Justice for appeals against the results of the attorney-at-law examination conducted in March 2019. As a result of its dismissal by the judgement of the Provincial Administrative Court in Warsaw of June 24, 2020, the applicant filed a complaint in cassation, which the Supreme Administrative Court dismissed by the above-mentioned judgement.

The judgement issued in the case concerning the failed professional examination by the trainee attorney-at-law constitutes a cause for a broader analysis of the scope of control of administrative courts provided for in Art. 36^8 of the Act of 6 July 1982 on attorneys-at-law,[3] which stipulates that against a resolution of the appeal committee (pursuant to Art. 36^8 sec. 2 of this Act, this is the 2^{nd}-degree Examination Committee at the Minister of Justice), a complaint may be lodged with the administrative court. Moreover, the analysis of the judgement in question may also be an impetus for a wider discussion about current issues related to the education of young attorneys-at-law, and in particular to the search for an answer to the question of whether the model of training for trainees not only for attorneys-at-law proposed in the corporate acts is optimal, or whether the implementation of tasks delegated in this regard to professional self-governments fits into the constitutional role of these entities and, finally, whether other solutions should

3 Act of 6 July 1982 on legal attorneys-at-law (Dz.U. of 2020, item 75, as amended), hereinafter: the AAL or the Act.

be sought in this respect. The authors will make an attempt to refer to the signalled issues, treating the ruling in question as an incentive to formulate more general theses referring to the structure of trainee attorney-at-law education provided for by law. Yet, in the case of the form of analysis, i.e., gloss, the reference to a specific judgement is of paramount importance. Additional, more general considerations elude this form of study, hence this analysis is in fact a hybrid study, aspiring to formulate more general conclusions, including *de lege ferenda*.

I. Scope of administrative court control

The starting point for the analysis of the first formulated problem (of a glossary nature) must be outlining the procedure accompanying the fulfilment of the statutory condition for entry on the list of attorneys-at-law, which, pursuant to Art. 24 sec. 1 point 6 of the AAL *in fine,* is to pass the attorney-at-law exam. The analysis of exceptions to this condition is beyond the framework of this paper and will be omitted. Detailed issues related to the attorney-at-law examination, including the grade for this examination, are regulated in Chapter 4 of the AAL "Attorney-at-law training and the attorney-at-law examination", and in particular in Art. 36 – 36^9 of the Act.

When characterizing the attorney-at-law training and the concluding final exam, it should be emphasized that pursuant to Art. 32 of the AAL "the purpose of the attorney-at-law training is to prepare the trainee to properly and independently practise the profession of an attorney-at-law, in particular, to develop skills in legal representation, drafting letters, contracts and legal opinions, and learning the rules of practising the profession", and the attorney-at-law exam consists in checking the legal preparation of a person taking the attorney-at-law examination for – which the Supreme Administrative Court highlights in the judgement – independent and proper performance of the profession of an attorney-at-law (Art. 36^4 sec. 1 of the AAL). In numerous judgements, the administrative courts also stressed that "the objective of this procedure (i.e., Examination procedure – author's note) is primarily to check the knowledge and degree of legal preparation of the person sitting the exam in terms of the ability to independently and properly practice the profession of attorney-at-law. In the proceedings concerning the determination of the result of the attorney-at-law examination, it is the duty of the Examination Committees to protect the public interest, which in this case should be understood as ensuring the possibility of practising the profession of public trust by persons duly prepared for this".[4] This is a vital point because it means that excessive leniency – issuing a higher mark in case of doubt – is against the public interest, and in fact also against the interest of the trainee who will not obtain the knowledge and competence required to properly perform the occupation of attorney-at-law. The Supreme

4 Judgement of the SAC of 24 November 2021, II GSK 411/18, Legalis No. 2643578; see also the judgement of the SAC of 19 March 2013, II GSK 2333/11, Legalis No. 666758; judgement of the SAC of 10 July 2012, II GSK 195/12, Legalis No. 779461.

Administrative Court, in its judgement of 10 July 2012, also indicated that "The essence and nature of the professional examination oblige the candidates, also in the scope of the task under civil law, to notice and raise all significant shortcomings of the court, and the proposed method of solving the examination task should contain correctly formulated allegations and conclusions as well as a proper justification for them. Since passing the attorney-at-law examination is to authorize to practise the profession, the solution adopted by the trainee should meet the requirements of the law, so that s/he can function in legal transactions as an effective measure, protecting the interests of the represented party in the best possible way in accordance with the content of the examination assignment".[5] In the voted judgement, the Supreme Administrative Court (SAC) rightly emphasized that the most important thing is that "the result of the attorney-at-examination should correspond to the level of legal preparation for the above-mentioned profession, and not, which is of secondary importance, to the interest of the person taking the examination, interested in obtaining a positive result". Administrative courts, in their judgements, agree that the solution of the task, even if correct in terms of formal and substantive law, which, however, does not take into account the interest of the party that the test taker represents, in accordance with the task, proves that s/he is not prepared to properly practise the profession of attorney-at-law.[6]

The achievement of these objectives is to be carried out through the procedure provided for in an act, the essence of which comes down to a thorough assessment of the candidate's preparation. The analysis of the ruling being the subject of the study requires the presentation of a legal regulation governing the rules of assessing the examinee. Pursuant to Art. 36^5 sec. 2–4 of the Act, the assessment of the solution of each task from the first to the fourth part of the attorney-at-law examination is conducted independently of each other by two examiners specialising in the fields of law covered by the written work; one from among those indicated by the Minister of Justice, the other from among those indicated by the National Council of Attorneys-at-Law, taking into consideration, in particular, compliance with formal requirements, the application of relevant legal provisions and the ability to interpret them, and the correctness of the method of solving the problem proposed by the exam taker, taking into account the interest of the party s/he represents in accordance with the task. Each of the examiners who check the written assignment issues a partial mark and prepares a written justification for the partial mark and submits it immediately to the chairman of the examination committee, who encloses all the justifications for the partial marks for the examinee's work in the report of the attorney-at-law examination. The final grade for a written assignment on a given task in the part of the attorney-at-law exam is the average of the partial grades awarded by each examiner.

On the other hand, to determine the final result of the examination, Art. 36^6 of the Act applies. Pursuant to this provision, a candidate who receives a positive grade for

5 Judgement of the SAC 10 July 2012, II GSK 195/12, Legalis No. 779461.

6 Judgement of the SAC of 10 June 2015, II GSK 1155/14, Legalis No. 1395246; judgement of the SAC of 12 August 2021, II GSK 1478/18, CBOSA (Central Base of Administrative Court Decisions); judgement of the SAC of 8 August 2012, II GSK 1037/12, CBOSA; judgement of the Provincial Administrative Court (PAC) in Warsaw of February 5, 2020, VI SA/Wa 2379/19, Legalis No. 2392313.

each part of the examination receives a positive result from the attorney-at-law examination. By applying this principle, the examination committee adopts a resolution which constitutes the result of the attorney-at-law examination. This resolution is then delivered to the exam taker, and a copy of the resolution is sent by the committee to the Minister of Justice, the President of the National Council of Attorneys-at-Law, the competent council of the Regional Chamber of Attorneys-at-Law, and attached to the personal files of the candidate.

The legislator, in order to guarantee wider protection of the legal interest of the candidate, provided for an appeal procedure against the resolution of the examination committee. According to Art. 36^8 sec. 1 of the AAL, the examinee may appeal the resolution on the result of the attorney-at-law examination to the 2nd degree Examination Committee at the Minister of Justice within 14 days from the date of receipt of the resolution. For the proceedings before the appeals committee, pursuant to Art. 36^8 sec. 12 of the AAL, the provisions of the Code of Administrative Procedure shall apply accordingly.[7]

The Act on Attorneys-at-Law also provides for judicial control of decisions taken by examination committees. According to Art. 36^8 sec. 11 of the Act on appeal against a resolution of the appeals committee, a complaint may be lodged with the administrative court. Obviously, taking into account the principle of two-instance administrative court proceedings, a cassation appeal may be lodged with the Supreme Administrative Court against the judgement issued in this case by the Provincial Administrative Court.

The analysis of these provisions leads to several conclusions that are crucial for further considerations:

- the appeal to the appeal committee provided for in the provisions of the Act is not against the marks given by examiners, which are of an expert nature, but against the resolution on the examination result;
- the resolution on the examination result is not an administrative decision, because in such a case, the reference to the appropriate application of the provisions of the CAP in the proceedings before the appeal committee would be redundant, and the provisions of the Code would apply directly pursuant to Art. 1 of the CAP;
- in the proceedings before the appeal committee, the provisions of the CAP do not apply directly, but accordingly;
- the resolution of the appeal committee may be appealed against to the administrative court, based on Art. 36^8 of the AAL in connection with Art. 3 § 3 of the Act on proceedings before administrative courts,[8] and not any of the points of Art. 3 § 2 of the Law on Proceedings before Administrative Courts.

In the context of these findings resulting from the analysis of the provisions of the Act on Attorneys-at-Law, it should be emphasized that, in the authors' view, the voted judgement indicates that the SAC went beyond the scope of control of the resolution on the result of the examination provided for by law. The subject scope of the control

7 Act of June 14, 1960 – Code of Administrative Procedure (Dz.U. of 2021, item 735, as amended), hereinafter: CAP.

8 The Act of August 30, 2002, Law on Proceedings before Administrative Courts (Dz.U. of 2022 item 329), hereinafter: LPAC.

is determined by the regulation clearly stipulating that the administrative courts verify not the grades given by examiners, but the examination result determined on their basis, which obtained the form of a resolution adopted by the examination committee. In its substantiation, the court incorrectly defines the result of the examination with the concept of a decision – unless it does not use this concept in relation to an administrative decision, but as a different name of a decision resulting from the decision-making process (adjudication settlement). If the resolutions were administrative decisions, then the regulations referring to the appropriate application of the provisions of the CAP in the context of the regulation contained in Art. 1 of this Code, as well as providing for the possibility of bringing a complaint to the administrative court, in the context of Art. 3 § 2 point 1 of the LPAC, should be considered erroneous or even irrational.

Nevertheless, without a doubt, the court rightly indicates in the justification of the voted judgement that the resolution of the committee ('decision', as the court calls it) on the determination of the result of the attorney-at-law examination is not a decision made in accordance with, or under, administrative discretion, but is bound in its character, which undoubtedly constitutes a significant protection of the examinee against an arbitrary result of the examination, which is not covered by examiners' grades. The use of administrative discretion in this situation would mean that the authority would have the right to choose the content of the decision so that if positive marks were obtained in each part of the exam, there would be a potential possibility of obtaining a negative result in the exam, or vice versa – a negative mark in one or more parts of the exam would not exclude the possibility of obtaining a positive result in the attorney-at-law examination. The examination committee is bound by Art. 36^6 sec. 1 of the AAL, according to which a positive result from the attorney-at-law exam is awarded to the examinee who received a positive grade for each part of the attorney-at-law exam.[9] Even though the legislator provided for certain limited decision-making discretionary powers (related to the introduction of the grading scale from excellent to insufficient in Art. 36^4 sec. 10 of the AAL), however, the members of the examination committee are bound by the normative directives of the choice of consequences.[10]

The binding relation concerns, as clearly specified by the legislator, the adoption of a resolution on the result of the examination. The assessment made by examiners preceding the adoption of this resolution is of an expert nature, to which the reference to the procedure for making a decision on the examination result provided for in the Act may not apply. It is burdensome to adopt models appropriate for the procedure of applying the law when determining the assessment. Their application would require an adequate determination of the statutory criteria for giving individual assessments, which in the context of expert assessments seems infeasible. This is evidenced by the unambiguous admission by the legislator of the possibility of giving different grades by examiners based on the same material. In the process of applying the law, in the case of related

9 Judgement of the SAC 10 June 2015, II GSK 1155/14, Legalis No. 1395246.

10 Judgement of the SAC 19 March 2013, II GSK 2333/11, Legalis No. 666758; see: J. Lemańska, [in:] T. Scheffler (ed.), *Act on Attorneys-at-Law. Commentary*, Warsaw 2018, Legalis, Commentary on Art. 36^6, para. No. 4.

decisions, such a situation would have to lead to the conclusion that at least one of the assessments (decisions) is determined in an incorrect manner. In this regard, it is difficult to agree with the standpoint presented in some decisions of administrative courts, which relate to the assessment determined by the examiner.[11]

The above-mentioned allows critical reference to the part of the justification of the voted judgement in which the Supreme Administrative Court verifies the grades given by examiners within the examination procedure. In this respect, it goes beyond the scope of control provided for by the statutory regulation. This is because it does not allow for the verification of partial grades that – which is worth emphasizing once again – are expert assessments constituting the basis for adopting a resolution on the examination result by examination committees, but only for verifying whether, having at their disposal such expert assessments, most and foremost applying Art. 36^6 of the AAL, the committee correctly used the provisions and adopted a resolution (in this case negative one) on the exam result. On the other hand, adopting the position presented in the justification of the voted judgement would lead to the result in which the expert assessment procedure would be essentially five-stage (examiner, examination committee, appeal examination committee, provincial administrative court, Supreme Administrative Court). Furthermore, from the academic point of view presented by the authors, they would not guarantee a factually correct assessment of the examination. Following this logic, administrative courts do not cover (when verifying administrative decisions on removal from the list of students) the validity of giving grades for individual exams obtained during the didactic process, which contributed to the occurrence of the condition specified in Art. 108 sec. 2 point 2 of the Act – Law on Higher Education[12] which is finding no progress in the learning process.

II. The education model of trainee attorneys

The second element of the considerations contained in this elaboration, and signalled in the introductory deliberations, is a general reflection on the statutory solutions in the field of preparation for exams conditioning the acquisition of the right to practice the profession of an attorney-at-law, or more broadly – the legal professions of public trust. It is hard to ignore this thread in the context of the analysed judgement, the issuance of which was the result of insufficient preparation of a person who passed the attorney-at-law examination, who had previously completed attorney-at-law training. One may even risk a claim (due to the fact that the claimant completed legal training) that the judgement should contribute to a broad discussion on the formula of postgraduate training for lawyers in general.

11 Judgement of the PAC in Warsaw of May 9, 2019, VI SA/Wa 364/19, CBOSA (Central Base of Administrative Court Decisions).

12 Act of July 20, 2018 – Law on Higher Education and Science (Dz.U. of 2021 item 478 with later amendments).

First of all, it should be pointed out, as S. Pawłowski and L. Staniszewska rightly emphasize, that the professional preparation of trainees in legal professions is closely related to the quality of the services provided in the future, which means that it directly impacts the better representation of the interests of the entities using them, and more broadly – to better protect the public interest.[13] These authors point to a link of professional training with the public interest for a reason. As Art. 17 sec. 1 of the Constitution of the Republic of Poland[14] states "Professional self-governments may be formed by way of legislation and be represented by persons performing professions of public trust and supervising the proper performance of these professions within the limits of the public interest and for its protection". First of all, the task of self-governments is to represent persons practising the profession of public trust. Secondly, they are to supervise the proper performance of these professions within the limits of the public interest and for its protection.[15]

Currently, it is now assumed in the context of the cited constitutional regulation that both the education of trainees and, perhaps above all, the verification of their knowledge, are elements enabling the exercise of care that the self-governments of professions of public trust (including attorneys-at-law) are obliged to ensure in order to guarantee the proper performance of the profession. The legislator does not define the concept of "self-government supervision over the performance of the profession". Although, it seems that it can be assumed that this formulation includes the possibility of influencing the self-government on the quality of professional services provided by members of a given corporation also by assessing their suitability (ability) to perform the profession.[16] An inseparable part of the indicated 'care' is also the appropriate representation of the self-government in "conducting examinations deciding on the acquisition of the right to practice a profession by ensuring that self-government bodies participate in establishing the examination requirements and conducting the examination itself".[17] One should not lose sight of the fact that this care is not autotelic, but, in the present case, serves to ensure the legal security of individuals who can trust and entrust their cases to persons having the status of attorney-at-law.

It seems reasonable to note that obtaining the right to practise a profession must not always be preceded by training. The legislator also admits persons who have not

13 See S. Pawłowski, L. Staniszewska, *Training and professional development of attorney trainees – postulates de lege lata and de lege ferenda*, [in:] *Prospects for the development of legal self-governments*, Series: "Legal professions of public trust", Volume I, ed. P. Rączka, K. Rokicka-Murszewska, Toruń 2020, p. 95.

14 Constitution of the Republic of Poland of 2 April 1997 (Dz.U. No. 78, item 483, as amended), hereinafter: Constitution of the Republic of Poland.

15 P. Kłusek, *The state and the self-governments of public trust professions*, "Law and Administration Review" 2015, volume CIII (No. 3695), p. 76.

16 Cf. J. Murszewski, K. Rokicka-Murszewska, *Selected issues related to the path of a doctor of juridical science to the profession of attorney-at-law without attorney-at-law professional training*, [in:] *Prospects for the development of legal self-governments*, Series: "Legal professions of public trust", Volume I, ed. P. Rączka, K. Rokicka-Murszewska, Toruń 2020, p. 113.

17 B. Banaszak, *The Constitution of the Republic of Poland. Commentary*, Warsaw 2012, Legalis, Commentary on Art. 17, para. No. 2 along with the judgement of the Constitutional Tribunal of 19 April 2006, K 6/06, OTK-A 2006, No. 4, item 45.

completed their training (Art. 25 sec. 2 of the AAL, e.g., doctors of law or attorneys-at-law of the General Prosecutor's Office of the Republic of Poland), as well as persons who, holding the appropriate qualifications, do not have to undergo examination verification. Nonetheless, these are exceptions to the rule and as such should not be extended. Apart from special cases enabling entry on the list of persons authorized to practice a legal profession without prior verification of their professional qualifications through a professional examination (i.e., persons referred to in Art. 25 sec. 1 of the AAL), it seems that it is the professional exam, in the case of an attorney-at-law, that is to be the key verification element in the acquisition of the qualifications necessary for the proper performance of the profession – both theoretical and practical, professional and ethical. "The difficulty level and the scope of the tasks in individual parts of the exam guarantee an appropriate selection of future attorneys-at-law".[18]

Replacing the main path of access to the profession of attorney-at-law, which is the attorney-at-law training, with the examination itself, would not be the right solution. The attorney-at-law training should remain the core path to becoming an attorney-at-law. In this regard, the attorney-at-law training (each, but in particular, referring to the subject of a gloss – attorney-at-law) should be perceived more broadly – not only as a time of learning but also as a space to gain appropriate experience and practice as well as a time to become part of the local government community. The education process of a trainee attorney-at-law ought to be a full introduction to the profession of an attorney-at-law, so that individuals can entrust their cases to them with a sense of legal security, and that they will be professionally run. To this end, appropriate verification must be carried out, which now is in the form of an examination. The high level of requirements during the exam reinforces the legal security of individuals and their confidence that by requesting assistance from an attorney-at-law, they can expect the provision of services at an appropriate level. In the voted judgement, the exam candidate received an unsatisfactory grade in civil law. She made mistakes that, according to the examination committee, proved that she was not properly prepared to practise as an attorney-at-law, which was the primary objective of both the attorney-at-law training and the attorney-at-law examination. Through this prism – the common purpose of the training and the final examination, according to the legislator – should be to evaluate the training of lawyers and to strive for its best possible implementation in practice. This, indeed, serves to reinforce the legal state recognising a constitutional value (Art. 2 of the Constitution).

18 Cf. J. Murszewski, K. Rokicka-Murszewska, *Selected issues related to the path of a doctor of juridical science to the profession of attorney-at-law without attorney-at-law professional training*, [in:] *Prospects for the development of legal self-governments*, Series: "Legal professions of public trust", Volume I, ed. P. Rączka, K. Rokicka-Murszewska, Toruń 2020, p. 118.

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