

**XVII^{ème} colloque entre les Conseils d'Etat
et les juridictions administratives suprêmes
de l'Union Européenne**

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R a p p o r t

Danemark

The impact of Article 6 (1) of the European Convention on Human Rights on the procedures of the Supreme Administrative Courts and State Councils

Denmark

The answers to the questionnaire have been elaborated in preparation of the XVIIth Colloquium of the Councils of State and the Supreme Administrative Judicial Bodies of the European Union.

1. Preliminary questions on the domestic law:

1.1. Denmark has no administrative courts. Legal review of administrative decisions may be exercised by the ordinary courts. The ordinary courts are organised in a three tier system: city courts, high courts and the Supreme Court; empowered at each level with competence to try civil, criminal as well as administrative law cases. In all other cases than those concerning the determination of a criminal charge against the defendant (i.e. most cases involving civil law and administrative law), the rules on civil procedure will apply.

According to Section 63 of the Constitution the courts may review "any question concerning the limits of administrative authority". In principle, all administrative decisions may be brought before the courts. Traditionally, it is the general understanding that the court review may be excluded by statute. However, such provisions of "finality" are very rare in Danish law and they have been interpreted narrowly by the courts taking into account, inter alia, the composition of the administrative authority in question (cf. the majority opinion of the Supreme Court decision from June 1997 (UfR 1997, p. 1157). The Court found that it followed from an express provision in the

Aliens Act that the decision by the quasi-judicial Refugee Board concerning expulsion could not be subject to judicial review). Notwithstanding such statutory provision the courts will review assertions that errors of administrative procedure have occurred or that illegitimate considerations have been taken into account.

1.2. The right to appeal to the Supreme Court is not restricted according to the nature of the case. At the outset everybody is entitled to have his case tried at two levels of court. Thus, city court judgments may be appealed against to one of the high courts, and judgments delivered by the high courts acting as first instance courts may be appealed against to the Supreme Court. Judgments delivered by a special court, the Maritime and Commercial Court of Copenhagen, may likewise be appealed against directly to the Supreme Court. Cases tried by the city courts and on appeal by the High Court may, with leave from a special board, the Board of Leave to Appeal, be brought before the Supreme Court if the Board finds that they give rise to matters of principle. Cases brought against the central administration, e.g. ministries, are tried at the High Court in the first instance. Thus, appeal to the Supreme Court requires no leave.

1.3. Normally, the court may declare the administrative decision invalid or may, on the plaintiff's demand, award damages. Usually, the court will not modify the decision, i.e. replace the decision by the court's own decision, but instead the court will remit the case for administrative re-examination. There is no legal basis for injunctions against organs of the State and Municipalities, acting *jure imperii*, in Danish law, cf. Section 641 of the Administration of Justice Act (hereinafter also "the Act"). However, injunctions may be granted against public authorities on the basis of the guidelines laid down in the Factortame case (C-213/89, judgment of 19 June 1990) of the Court of Justice, cf. UfR 1995, p. 634. Stay of execution may be granted if provided for in law.

1.4. See 1.1.

1.5. The Supreme Court in Denmark works as an appellate court only. No other decisions than judgments and decisions made by the High Courts or the Maritime and Commercial Court can be appealed against to the Supreme Court. An appeal to the Supreme Court against such decisions will in some cases require leave from the Board of Leave to Appeal, see 1.2.

1.6. No.

1.7. No.

1.8. No special rules of procedure exist with regard to cases in which Article 6 of the Convention applies. The courts, including the Supreme Court, will examine issues relating to Article 6 if the Article is invoked by the parties. Article 6 is probably always taken into consideration *ex officio* in cases involving a criminal charge. If the parties in a civil case refrain from invoking the Article it is as a general rule not brought into play.

1.9. See 1.1.

1.10. The national legal system does not provide for a different remedy in cases falling under the scope of Article 6. An amendment to the Administration of Justice Act from 1997 provides for measures in order to secure a more speedy trial in civil cases. The amendment was, according to its travaux préparatoires, motivated by the case law of the European Court of Human Rights on the Reasonable-Time Requirement, in particular *A and others v. Denmark* (judgment of 8 February 1996, Reports 1996-1, p. 85)

2. Scope of application of Article 6

A The notion of civil rights and obligations in general

2.1. Legislation concerning certain decriminalised offences (e.g. parking fines, cf. Commission decision of 14. September 1998 (no. 24989/94) D.R. 94, p. 56) and legislation providing for disciplinary measures against certain professions (e.g. lawyers, doctors).

2.2. See 2.1.

2.3. As regards disciplinary measures against lawyers the Supreme Court, relying on Commission decision of 24 November 1998 (38644/97), has found that Article 7 of the Convention is not applicable to such measures under the present legislation, cf. the Supreme Court's judgment of 3 November 1999. By the same token, the "criminal charge" head of Article 6 will not be considered applicable to disciplinary measures against lawyers. It has to be seen whether these measures will be considered falling under the "civil rights" head of Article 6.

As regards other disputed fields of public administration no cases have yet arisen before the Supreme Court.

B "Dispute on civil rights and obligations" and other particular circumstances of the case.

2.4.1. No special weight is laid on the criterion "a dispute" in the practice of the Supreme Court.

However, it is a precondition for instituting civil proceedings, including actions against public authorities, that the plaintiff has legal standing i.e. that the case relates to a genuine, concrete and "mature" dispute. This condition is probably less strict than the Convention case law relating to the autonomous concept of "a dispute".

2.4.2. See 2.4.1. and 6.2.

C Specific fields of public administration

2.5. Land planning, building regulations, management of efficient use of space

2.5.1. No.

2.5.2. No.

2.6. Environmental hazardous activities - rights of neighbours to industrial plants in general

2.6.1. No.

2.7. *Tax matters*

2.7.1. No.

2.7.2. No Danish case law.

2.7.3. No. In all cases brought before the courts the litigants have the right to an oral hearing. However, in the Supreme Court the oral hearing may be replaced by a written procedure, cf. 4.1.

2.8. *Social security*

2.8.1. Yes, cf. 1.1.

2.8.2. No.

3. Main problems of a fair trial

3.1. No particular difficulties with regard to fair trial requirements in the field of administrative law.

3.2. The procedure in lower instances fulfils all requirements of Article 6 of the Convention.

3.3. In cases involving administrative law problems relating to impartiality rarely arise.

3.4. No contentious issues with regard to the principle of equality of arms.

3.5. In many administrative areas (e.g. taxation, competition) the tax-payers, companies etc. are obliged to supply the authorities with information and documents under penalty of fines. This information may subsequently be used against the individual in a criminal trial. It has been argued that this practice does not conform with the freedom from self-incrimination, cf. Saunders v. UK (judgment of 17 December 1996, Reports 1996-VI, p. 2064).

4. Oral procedure

4.1.-2. Appeals against judgments are usually dealt with at oral hearings. However, civil cases may be subjected to written procedure with the parties' consent or if the Court find the case suitable for written procedure. Thus, there is no obligation to hear civil cases (unlike criminal cases) at oral hearings in the Supreme Court. However, the vast majority of administrative decisions are heard orally. Such oral hearings do not imply that witnesses are heard directly by the Supreme Court. Testimonies by witnesses subsequent to the judgment of the lower court are given at the city court and made available to the Supreme Court in writing.

Appeals against decisions made during the preparatory stage or.. at trial (usually of a procedural nature) are dealt with on a written basis. However, the Court may allow an oral hearing at the request of a party.

4.3. Yes, generally.

4.4. Yes.

4.5. Yes. See 4.1.

4.6. No, in general, the public has access to all hearings

4.7 See 4.1.

5. Rules of evidence

5.1. Admissibility of illegally obtained and other evidence

5.1.1. The Danish Administration of Justice Act contains one express provision governing evidence obtained accidentally: Wire-tapping can only be applied with the consent of the court and only for investigation of certain serious crimes (e.g. drug cases) . If lesser offences are disclosed during tapped conversations, the tapping itself cannot be admitted in evidence during the trial for such offences, cf. Section 789 of the Act. On the other hand, the police are expressly authorised to use the evidence for the purpose of further investigation and to adduce such derivative evidence.

5.1.2. The admissibility of other kinds of illegally obtained evidence in criminal cases depends on the weighing of various factors such as the nature and severity of the interference, the severity of the crime investigated, the importance of the evidence in question and whether the interference is directed against the suspect or other individuals. Normally, illegally obtained evidence will be admitted for trial . There are no restrictions in non-criminal cases.

5.2. Specific rules with regard to the use of evidence

The judgment must be based solely upon the evidence adduced - directly or, according to law, indirectly - at the hearing cf. Sections 340, 342, 343 and 344 (civil cases) and Sections 896

and 877 (criminal cases) of the Act, see further 5.3. As a main rule, evidence in the form of testimonies subsequent to the judgment of the lower court, is not taken during the hearing in the Supreme Court. Such evidence may, however, be produced before the city court for the subsequent use in the Supreme Court trial. In the courts of lower instances evidence is normally produced directly at the hearing. The assessment of evidence is free, cf. Sections 344 and 896.

5.3. *Opinions of experts*

In civil cases, as a main rule, only opinions of experts obtained on the basis of questions prepared by the parties in collaboration and approved by the court may be admitted for the hearing. The expert is appointed by the court acting on a proposal from the parties. Some public authorities (e.g. the Medico-Legal Council) are *per se* regarded as objective and independent. In addition, the parties are entitled to call their own expert witnesses to give testimony during the hearing.

In criminal cases the prosecution is entitled to obtain expert opinions at an early stage in order, *inter alia*, to decide on whether to indict the suspect. Such opinions, obtained from public authorities or from authorised accountants, may normally be used during the hearing, cf. Section 877. The defence may subsequently direct questions to the authority or the accountant. In addition, the prosecution and the defence alike may call expert witnesses to give testimony during the hearing.

5.4. *Restrictions with regard to the raising of new facts*

New evidence (facts) can be introduced before the Supreme Court unless it is considered to be superfluous.

In civil cases new arguments will - if the other party objects thereto - not be admitted in the absence of an excuse for not introducing them before the first instance court. If the new

arguments make it necessary to consider factual circumstances, which were not examined by the first instance court, the Supreme Court may declare them inadmissible even in the absence of the other party's objection thereto.

In criminal cases the Supreme Court is competent only to consider whether the lower court committed procedural errors and to mete out the sentence. The Court is not competent to determine the guilt of the defendant. New evidence can be introduced before the Supreme Court in so far as it is relevant to the issues subject for review.

6. Parties to the case

6.1.-2. At the outset, the rules governing civil proceedings are followed, see 2.4.1.

Typically, the plaintiff will have legal standing if binding decisions are addressed to him specifically or if he is directly affected by, inter alia, plans on regional development.

In environmental law the concept of standing is broadly defined. For instance, it has been possible for Greenpeace to bring judicial action against the decision to build a bridge between Denmark and Sweden (UFR 1994 p. 780) .

In a landmark decision in 1996 concerning the admissibility of a request for constitutional review of the Danish ratification of the Maastricht Treaty the Supreme Court granted the plaintiffs standing in a suit against the Prime Minister, cf. UFR 1996, p. 1300, although no concrete interest on the part of the plaintiffs was proven.

All parties to the case enjoy the rights guaranteed to civil procedure, including the right to be heard. The decision of the Supreme Court has binding effect on the parties.

6.3. No.

6.4. The right to take part in the procedure is always dependant on the criteria mentioned in 2.4.1. and 6.1. - 6.2.

7. The right to public pronouncement of the judgment

7.1.-2. Section 219, subsection 3, of the Administration of Justice Act prescribes that the conclusion be pronounced publicly. Pursuant to Section 41 of the Act everybody with a "legitimate interest" can acquire a copy of the judgment. A recent amendment to the Act (Section 41 a) has made it possible for journalists and editors of mass media to obtain copies of judgments and court transcripts without it being necessary that they establish a "legitimate interest".

8. Reasonable delay of definitive judgments in administrative law suits

a) In general there is no need to exhaust administrative recourse before instituting civil proceedings before the courts. However, statute bound exceptions exist, *inter alia*, in the field of tax law and competition law. As a matter of practice, cases involving administrative law are very often submitted to quasi-judicial bodies before court proceedings are instituted; a large number of such bodies exists.

b) No statistics;

c) See 1.1., 1.2. and 1.3. Some civil cases of little financial value determined by the city courts cannot be tried by a high court without leave from the Board mentioned in 1.2.

d) In the field of administrative law there is, at the outset, no fixed order of priority in calling the cases, neither in the Supreme Court, nor in the courts in general. However, as a consequence of the aforementioned judgment A and others v. Denmark (see 1.10), high priority is probably now given by the courts to cases in which personal matters of crucial importance are at stake for one or both of the parties.

8.2. Present situation in each country (considered from the point of view of mechanisms for neutralising some effects of delays); instances.

a) Pecuniary compensation to a litigant in a suit against a public authority follows the rules of general (civil) tort law. Compensation is not dependant on the courts' annulment of the administrative decision, nor will annulment of the decision automatically lead to compensation. In any case a loss must have been established as a consequence of an administrative error. The possibility of being awarded damages is not restricted to certain types of cases or within certain limits. Actions for damages against a central administrative body must under the present legislation be instituted before the High Court acting as first instance court, with the possibility of appeal to the Supreme Court. The State or the municipality is liable in case the court finds in favour of the plaintiff.

b) Annulment of a decision which has put an end to public service will not automatically entitle the civil servant to payment of past salaries or restitution of status. Payment or restitution depends, inter alia, on the criteria mentioned under a).

There is no internal procedure which allows individuals to recover damages caused by unreasonable delay of proceedings.

8.3. Present situation in each country-statistics.

a) Average length of cases from the date the case is received by the court until the judgment by that court (1998). All civil cases:

the high courts: approximately 14 months.

the Supreme Court: 623 days.

The numbers include time spent on pre-trial proceedings, delay between close of such proceedings and trial and delay between

trial and pronouncement of judgment. (As regards the average length of civil cases in the city courts there are no statistics.)

b) No separate administrative courts. It is not possible to extract statistics concerning Administrative Law cases from other cases.

Number of civil cases started at first degree (1998):

the city courts: 105.122.

the high courts: 1.864.

c) Number of civil cases finalised in first degree (1998) :

the city courts: 102.250.

the high courts: 1.611.

d) Number of civil judgments appealed against to the Supreme Court (1998): 279.

e) Number of civil cases finalised by the Supreme Court (1998) 240.

f) Back-log of civil cases awaiting judgment (end of 1998)

No statistics on the city courts.

In the high courts: 5.984

In the Supreme Court: 438.

8.4. Action to be taken by the Supreme Administrative Courts

a) Observance of a reasonable time-scale is the responsibility of the attorneys of the parties and of the judge in charge of the preparation of cases. Provisions in the Administration of Justice Act on time-limits for e.g. exchange of briefs during preparation have been tightened, and the judge oversees that time-limits are complied with. However, the need for speedy procedure should be weighed against the need for the presentation of all relevant facts etc. - an aspect of particular importance at courts of last instance.

b) No.

c) Yes.

d) No.

9 : The decision of the Council of State or Supreme Administrative Court:

9.1. See 1.1. and 1.3.

9.2. Section 214, subsection 3, of the Act prescribes that in order for a judge, a lay judge or a juror to decide a case he or she must have sat on the bench throughout the entire hearing. However, in High Court proceedings with lay judges or a jury participating the proceedings may continue if only one judge and one lay judge or juror have vacated their seat from the start of the hearing. In other cases the hearing must be resumed.

9.3. The courts are also competent to review the exercise of administrative discretion, i.e. fields where the statute provides that the administration may take certain steps but does not specify the conditions or does so in broad terms only. However, with regard to the administration's weighing of lawful considerations, a considerable judicial restraint is shown.