

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

Vienne du 8 au 10 mai 2000

R a p p o r t

Allemagne

Bundesverwaltungsgericht

XVII. Colloquium

between the Councils of State
and the Supreme Administrative Judicial Bodies of the EEC

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

in May 2000

Report for Germany
given by

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1 Preliminary questions on the domestic law:

1.1 Art. 19 (4) Grundgesetz - GG- (Basic Law) guarantees as a basic right that all measures of public authority - meaning the executive power - are subject to full judicial review on points of fact and law. So all administrative decisions can be appealed against before the courts. According to § 40 (1) Verwaltungsgerichtsordnung - VwGO - (Code of Administrative Court Procedure) the course of law is opened to the Administrative Courts in all public law disputes as long as the matter in question has not been assigned explicitly to any other court by law. This has occurred especially in fiscal and social affairs, for which the Fiscal or the Social Courts are competent, and in a few other cases like state liability affairs which fall into the competence of the Civil Courts. The recourse to the Administrative Courts, however, is only given in case of violation of subjective rights. Excepted from the access to the Administrative Courts are the constitutional litigations.

1.2 The Supreme Administrative Court (Bundesverwaltungsgericht - BVerwG- literally translated: Federal Administrative Court) is mainly competent for appeals for final revision on points of law ("Revision") against judgments of the Higher Administrative Courts. This appeal is only opened in cases of fundamental importance, if the Higher Administrative Court has diverged from a judgement of a Supreme Court or of the Federal Constitutional Court or if there has been a violation of procedural law. The appeal for final revision is restricted to the review of federal law. In these cases the Supreme Administrative Court is no fact finding instance. The appeal to the Supreme Administrative Court may be granted by the Higher Administrative Court or subsequent to a complaint against denial of the appeal by the Supreme Administrative Court itself.

The procedural law also provides the possibility of a direct appeal for final revision to the Supreme Administrative Court if it has been granted by the Administrative Court of first instance ("Sprungrevision"). That, however, seldom occurs.

In some matters defined by law the Supreme Administrative Court is the only - first and last - instance.

- 1.3 The Supreme Administrative Court can quash the decision of the lower instance and refer the matter back to it for a further hearing and new adjudication. If further fact finding is not needed the Supreme Administrative Court can decide on the merits of the case. In this case the Supreme Administrative Court is authorized like each other Administrative Court to quash the illegal administrative decision or to oblige the public authority to a certain decision or another performance. The Supreme Administrative Court also can grant legal protection by a summary proceeding in particular by decreeing a stay of execution. It may not decide instead of the public authority, however.
- 1.4 The competence of the Supreme Administrative Court is not restricted to cases that could be seen as determining civil rights and obligations. Its jurisdiction on public law disputes includes matters not referring to civil rights and obligations, e.g. the law of asylum, the civil service law. The Supreme Administrative Court is not competent to decide any kind of criminal cases, it, however, has to judge disciplinary affairs of civil servants and soldiers.
- 1.5 Only the decisions of the Administrative Courts of lower instance can be appealed against with the Supreme Administrative Court, not the decisions of other bodies (see above 1.2).
- 1.6 There is no distinction made in German procedural law concerning the Administrative Courts between cases that fall or do not fall within the scope of Art. 6 of the Convention.
- 1.7 There is not such a distinction (see above no. 1.2) for the procedure before the Courts of lower instance, too.

1.8 If a case falls within the scope of Art. 6 of the Convention the Supreme Administrative Court investigates the compatibility of the procedural law with Art. 6 (1) of the Convention and, if possible, gives the law an interpretation which is compatible with the Convention. Hereby the Courts in general have to follow the ECHR's interpretation of Art. 6 of the Convention (see the below - 3. - mentioned judgment of the Supreme Administrative Court of December 16, 1999 - 4 CN 9.98 - concerning § 47 (5) VwGO).

1.9 In Germany legal redress against each administrative act is given to the courts, mainly the Administrative Courts (see above 1.1). Two exceptions are made in the Constitution itself: According to Art. 10 (2) GG the recourse to the Courts shall be replaced by a review of the case by bodies and auxiliary bodies appointed by Parliament, if privacy of posts and telecommunications is restricted; second, the decisions of parliamentary committees of investigation shall not be subject to judicial consideration (Art. 44 (4) GG).

Further legal remedies for procedural actions on the part of public authorities may only be sought in conjunction with available legal remedies for substantive decisions (§ 44a VwGO).

1.10 The procedural law concerning the Administrative Courts does not provide for a different remedy in cases falling under the scope of Art. 6 of the Convention.

The procédurale rules, however, provide a specific remedy in the case of the so called court decree (Gerichtsbescheid - § 84 VwGO). This is a type of final decision granted only to the first instance of the Administrative Courts, that allows them a judgment without oral hearing if the case displays no particular complications of a factual or legal nature and the facts of the case have been established. The parties have the option to appeal from this court decree to the Higher Administrative Court, but they also can ask for an oral hearing, which in this case must be performed by the Court of first instance (§ 84 (2) VwGO).

Scope of application of Art. 6 of the Convention

A The notion of civil rights and obligations in general

2.1- 2.3 There are only a few decisions of the Supreme Administrative Court and the Higher Administrative Courts concerning the scope of application of Art. 6 of the Convention. In the - already above (1.8) noted - judgment of December 16, 1999 the Supreme Administrative Court has held in accordance with the ECHR that Art. 6 of the Convention is applicable in legal proceedings whose outcome has a direct bearing on civil rights and obligations of the parties. There are not only legal proceedings falling in the competence of the Ordinary Courts. Litigations before the Administrative Courts can also fall in the scope of Art. 6 of the Convention. In the judgment of December 16, 1999 the Supreme Administrative Court has held that Art. 6 of the Convention is applicable in a legal proceeding concerning a complaint against an urban development plan which affects the plaintiff's property.

On the other hand the Supreme Administrative Court has held that Art. 6 of the Convention is inapplicable to disputes concerning the law of asylum (Decisions of June 16, 1999 - BVerwG 9 B 1084.98 - NVwZ 1999, 1108, of February 15, 1999 - BVerwG 9 B 520.98 - and of May 08, 1998 - BVerwG 9 B 403.98 - Buchholz 140 Art. 6 EMRK Nr. 2) and also about the disciplinary law (Decisions of September 19, 1989 - BVerwG 1 D 69.88 - NVwZ 1990, 373; of March 15, 1982 - BVerwG 1 DB 2/82 - NVwZ 1983, 226 and of May 09, 1973 - BVerwG 1 D 8.73 - BVerwGE 46, 122).

In several cases the Supreme Administrative Court could leave it undecided whether Art. 6 of the Convention should be applicable because the Courts of lower instance at any rate did not violate this rule.

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

- 2.4 The notion „dispute" (on civil rights and obligations) in Art. 6 of the Convention has not yet been decisive in the jurisdiction of the Supreme Administrative Court - probably because the cases the Administrative Courts have to decide on always are legal „disputes".

C Specific fields of public administration

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

See above 2.1 -2.3.

- 2.5.1 No.

- 2.5.2 No.

- 2.6 Law on protection of the environment

There are no specific regulations in national law on protection of the environment with regard to Art. 6 of the Convention.

- 2.7 Tax matters

The Supreme Fiscal Court (Bundesfinanzhof - BFH) has held that Art. 6 of the Convention is not applicable in tax matters (Decision of December 13, 1995 - BFH XI R 43-45/89 - BFHE 179, 353; and of March 21, 1996 - BFH XI R 82/94-BFHE 180, 316).

- 2.7.1 No.

- 2.7.2 In the German legal system besides the taxes there is a variety of other public contributions, especially „Gebühren" (fees for having used a public service, e.g. having received an admission by the public administration), „Beiträge" (for

example contributions for the opportunity to use a public service) and „Sonderabgaben" (duties a certain group of the population has to pay because of their specific interest in the purpose which the duty supports). In a lot of German communities there is also known a „Fremdenverkehrsabgabe" as in Austria.

2.7.3 The administrative jurisdiction in Germany is only competent to decide on „other financial contributions" excluding taxes. In the case law of the Supreme Administrative Court there are no decisions with regard to the application of Art. 6 of the Convention in this legal area. Only in one decision concerning contributions for the connection with a public sewerage system the Supreme Administrative Court has applied Art. 6 (1) of the Convention and demanded an oral hearing before the Higher Administrative Court because there had been an amendment of claim in this instance (Decision of September 10, 1998 - BVerwG 8 B 102.98 - NVwZ 1999, 1000).

2.8 Social security

2.8.1 The Supreme Administrative Court has no competence in the matters of social security.

2.8.2 The Supreme Social Court (Bundessozialgericht - BSG) has held that Art. 6 (1) of the Convention is not applicable on litigations concerning pensions and related benefits for war victims and the law of disabled persons (Decision of June 21, 1994 - BSG 9 BV 38.94).

3. Main problems of fair trial

3.1 - 3.4 In the procedure before the German Administrative Courts the different requirements of the principle of a fair trial deduced from Art. 6 of the Convention are all guaranteed by basic rights laid down in the Constitution and specific provisions in the procedural law. On the level of the Basic Law these are especially Art. 19 (4) <effective legal protections Art. 97

Independence of the judges>, Art. 103 (1) <due process of law> and in general Art. 20 (3) together with Art. 2 (1) and Art. 3 (1) <fair trial> The Federal Constitutional Court (Bundesverfassungsgericht) and the Supreme Administrative Court have developed a variety of concrete requirements out of these guarantees that the Administrative Courts on the whole have to observe. The principle of the equality of arms belongs to these requirements (question 3.4). Therefore there are no contentious issues concerning the procedure before the Administrative Courts with regard to the principle of a fair trial deduced from Art. 6 of the Convention. In particular it is not necessary to distinguish between cases that fall in the scope of Art. 6 of the Convention and other ones that do not.

4. Oral Procedure

4.1 - 4.2 § 101 VwGO also applies to cases pending before the Supreme Administrative Court:

- (1) Unless otherwise stated, the court decides on the basis of an oral hearing.
- (2) With the agreement of the parties, the court may decide without oral hearing.
- (3) Where nothing is provided to the contrary, decisions of the court which are not judgments may be taken without oral hearing.

§ 101 VwGO applies as a general rule. In practice, in most final revision cases there is an oral hearing, whereas the decisions concerning complaints against denial of leave to appeal for final revision („Nichtzulassungsbeschwerden“) are taken without oral hearing.

4.3 Yes: According to German procedural law unless there is an exception to the requirement of an oral hearing; according to Art. 6 of the Convention if applicable in the case to be decided (see above 2.1-2.3)

- 4.4 Yes
- 4.5 On principle: no (cf. judgment of the Supreme Administrative Court of December 16, 1999, mentioned above 2.1-2.3).
- 4.6 No.
- 4.7 Yes: according to § 101 (2) VwGO (see above 4.1); an explicit agreement is necessary.
5. Rules of evidence
- 5.1.1 No.
- 5.1.2 There is no consistent case law; only a few decisions by Administrative Courts exist. The question, under which circumstances illegally obtained evidence must not be used by an Administrative Court, is controversial. Some authors distinguish between violations of procedural law (prohibition to take the evidence) and violations of substantive law and oppose the admissibility mainly in the first group of cases. There is more material with respect to criminal law cases (for example under which conditions a violation of a constitutional right during the taking of the evidence causes inadmissibility).
- 5.1.3 The relevant procedural law regulates the use of evidence only in part. There are no specific rules concerning the Supreme Administrative Court (see 5.4 however). According to § 108 VwGO the court decides according to its free conviction formed by the overall result of the proceedings; the judgment is to be based solely on facts and evidence on which parties have had an opportunity to be heard.

Important in this context is the rule of § 96 VwGO which regulates the reception of evidence:

- (1) The court takes evidence during the oral hearing. It may in particular take ocular evidence, examine witnesses, experts and parties and require documents to be produced.
- (2) In suitable cases the court may appoint one judge to take evidence prior to the court hearing or may request another court to take evidence specifying the individual questions relating to the evidence.

On principle, a violation of the rule, that evidence must be taken during the oral hearing, means that the use of the evidence is unlawful. Such a violation may, if the judgment may rest on it, be claimed as a deficiency of procedure with the respective superior court (the Supreme Administrative Court in case of a judgment by the Higher Administrative Court, § 132 (2) No. 3 VwGO). A party may according to § 173 VwGO, § 295 Zivilprozeßordnung - ZPO - (Code of Civil Procedure) waive such a claim explicitly or tacitly.

- 5.3 Where nothing is provided to the contrary in the VwGO, according to § 98 VwGO the rules of civil procedure (§§ 402 - 414 ZPO) apply on opinions of experts. When deciding on an appeal for final revision the Supreme Administrative Court may not ask for an expertise (see 5.4). In other proceedings Administrative Courts decide about the selection of the expert; they use their own discretion and are not bound by suggestions of the parties. With respect to the exclusion and rejection of experts (cf. because of fear of bias) the same standards apply as in the the case of exclusion and rejection of judges (§§ 406, 41 - 48 ZPO). If a written expertise is furnished it is within the discretion of the court to hear the expert in the public hearing; at a party's respective request, however, on principle the expert has to be heard.
- 5.4 When deciding on appeals for final revision the Supreme Administrative Court may not take evidence. This court is bound by the findings of facts contained

in the impugned judgment, except where admissible and well-founded grounds for an appeal for final revision have been raised in respect of these findings (§ 137 <2> VwGO). Such a case may be remanded to the lower instance court for a further hearing and new adjudication. On principle the Supreme Administrative Court may not raise new facts. There are, however, certain exceptions to this rule (cf. in the case of undisputed facts).

The Supreme Administrative Court may on principle take evidence and raise facts when it decides as first (and last) instance court (cf. lawsuits against the prohibition of an association, § 50 VwGO).

6. Parties to the case

- 6.1 The capacity to take part in proceedings extends to natural and juridical persons; associations, to the extent that they can have legal rights; public authorities, to the extent that this is provided under Land law (§ 61 VwGO). The parties in proceedings are the plaintiff; the defendant; any third party, who has been summoned to attend (for example because his legal interests are touched by the decision, § 65 VwGO); the Chief Federal Public Attorney or the representative of the public interest should he make use of his right to participate (§ 63 VwGO).

These general rules also apply to proceedings before the Supreme Administrative Court. The plaintiff, the defendant and a third party, who has been summoned to attend, are entitled to assert claims to means of prosecuting and defending a case as well as to undertake all procedural acts. Every party must be represented by a solicitor or a professor of law; there are exceptions for public authorities (cf. § 67 VwGO for details). To the extent that a decision has been made on the subject at issue decisions are binding upon the parties and their heirs at law (§ 121 VwGO).

- 6.2 The most important actions are rescissory actions (actions brought to seek the quashing of an administrative act) and actions for mandatory injunction

(actions brought to seek an order to issue an administrative act which has been refused or omitted).

Unless otherwise provided by law, these actions are admissible only if the plaintiff claims that his rights have been infringed by the administrative act or by its refusal or omission (§ 42 (2) VwGO). Under these conditions the person concerned has a right to be heard.

A „right" in this sense need not be recognised explicitly by law. It is the prevailing view that the necessary subjective right may only be derived from a rule of law that shall protect individual rights; if the object of the rule of law is the protection of public interests, it is sufficient, that it also aims at the protection of private interests (for instance certain building restrictions that serve both the public interest and the protection of the neighbour). It is sufficient, that the plaintiff states the possibility of an infringement of a subjective right. In many decisions there is a tendency toward less severe standards: It is sufficient, that the non-existence of the claimed subjective right is not obvious (cf. Judgment of February 27, 1996 - BVerwG 1 C 41.93 - BVerwGE 100, 287 <299>).

6.3 No (cf. 8.1).

6.4 Yes, unless an explicit rule of law applies.

7. The right to the public pronouncement of the judgment

7.1 No specific problems.

7.2 According to § 116 (2) VwGO the judgment may be pronounced by service. Where the court makes a decision without oral proceedings, pronouncement of the decision is replaced by service upon all parties (§116 (3) VwGO).

These rules do neither provide for public access nor a substitute for public access.

In early decisions the Supreme Administrative Court had held that the exclusion of a public pronouncement in § 116 (2) VwGO does not violate Art. 6 of the Convention (cf. Judgment of August 25, 1971 - BVerwG 4 C 22.69 - Buchholz 310 § 116 VwGO Nr. 6). These decisions seem to be outdated because they categorically exclude the application of Art. 6 in Administrative Court proceedings (cf. Schoch/Schmidt-Aßmann/Pietzner VwGO§ 116 No. 9).

8. Reasonable Delay of Definitive Judgments in Administrative Law-Suits

8.1 Present Situation in each contry (considered from the point of view of judicial organisation)

- a) The above mentioned (6.2) actions require previous complaints to administrative authorities (§ 68 VwGO).
- b) According to § 82 VwGO the statement of claim must state the identity of the plaintiff and the defendant and the substance of the claim. It shall also contain a specific petition. The facts and evidence adduced to justify the claim are to be stated and either originals or copies of the directive being challenged or the relevant decision on an objection are to be appended. In the case of a statement of claim failing to satisfy these requirements delays are the consequence; the competent judge shall require the plaintiff to furnish whatever is missing within a specified period of time.

A delay may also occur if the defendant does not respond in time to the allegations made in the statement of claim (cf. § 85 VwGO) or if the parties do not comply with directions given by the court, for instance to elucidate their pleadings or to present certain documents (as the file of the administrative

proceedings which normally has to be presented by the administrative authorities, cf. § 87 VwGO).

- c) There are three instances.
- Leave of appeal is required (§ 124 VwGO).
 - See above 1.3
- d) There is no statutory rule concerning a fixed order of priority in calling the cases. In practice, in all three instances cases are usually called according to the length of pendency; exceptions are possible (cf. relevance of the decision to many other cases; individual circumstances as the age of a party).

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

- a) The annulment of an illegitimate administrative decision does not automatically entitle the individual involved to compensation. The most important rule for compensation in such cases is Art. 34 of the Basic Law: If any person, in the execution a public office entrusted to him, (wilfully or negligently) violates his official obligations to a third party, liability shall rest in principle on the state or public body which employs him (for personal liability of a civil servant („Beamter“) see § 839 BGB). Depending on the circumstances of the case compensation may be possible according to other rules of law. General limits do not exist.

On principle compensation claims are actionable in the ordinary courts.

There is no internal procedure which allows individuals to recover damages caused by unreasonable delays in judgment.

- b) The annulment of a decision which suspended public service entitles the civil servant („Beamter“) to payment of past salaries and reconstruction of status. Only the Court may put an end to public service.

8.3 Present situation in each country-statistics

- a) Average length of cases decided by the Administrative Courts in the year 1998 (without summary proceedings)
- in first degree: 16.8 months (summary proceedings: 2.9 months),
 - in second degree: 8.7 months (summary proceedings: 2.3 months).
 - in third degree: leave to appeal for final revision: 2 months 20 days; appeal for final revision 11 months 11 days.
- b) Number of law suits started in first degree including summary proceedings (1998): 201 543 ; out of these are 112 321 petitions for summary proceedings.
- c) Number of judgments (decisions) passed in first degree (1998): 85 209 (completed cases together including summary proceedings: 218 272).
Number of cases completed in second degree (including summary proceedings): 35 682.
- d) All proceedings: 3944 (appeals for final revisions: 313; leaves to appeal for final revision: 2716)
- e) Number of judgments (decisions) passed in last degree (1998): 277 (completed cases of appeals for final revision: 347; completed cases of leaves to appeal for final revision: 2 645; all proceedings: 4028)
- f) Backlog of cases awaiting judgment (decision) of the end of the year 1998
- In first degree: 318 682 (including summary proceedings)

- In last degree: 1028 (appeals for final revision: 240; leaves to appeal for final revision: 437).

8.4. Action to be taken by the Supreme Administrative Courts

- a) Cases pending at the Supreme Administrative Court: yes.
- b) The Court succeeded in reducing the length of proceedings considerably. There is no general time-table, however.
- c)-d) -

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

- 9.1 Both questions: no (see above 1 and 3).
- 9.2 No; on principle the taking of evidence need not be repeated in such a case (see also § 112VwGO).
- 9.3 Yes. § 114 VwGO provides that to the extent that the administrative authority is authorised to act at its discretion, the court shall also examine whether the administrative act or its refusal or omission is unlawful for the reason that the statutory limits of its discretion have been exceeded or discretion has not been used in accordance with the purpose of the authorisation.