

XVII<sup>ème</sup> 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

Suède

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

*Swedish answer to the questionnaire for the XVIIth Colloquium between the Councils of State and the Supreme Administrative Judicial Bodies of the EC*

### 1 Preliminary questions on the domestic law

#### 1.1

The general rule in section 22 of the Administrative Procedure Act (1986:223) is that a person whom a decision by an administrative authority concerns may appeal against it, provided that the decision affects him adversely and is subject to appeal. According to section 22a of the same law the decision can as a general rule be appealed against to a general administrative court. However, this does not apply to matters of management and decisions concerning the issuing of regulations. The term "matters of management" aims in this context at internal and comparable matters, such as staff cases and policy matters. The purpose of this is to exclude from judicial review matters that are not manifestations of the exercise of public authority against individuals outside the public body. The decisions that can not be appealed against to a court can instead as a general rule be appealed against to the closest higher authority and in the end to the Government.

The question if a decision is subject to appeal is not in a general way regulated by written law. This is instead regulated by specific provisions at different constitutional levels and by general principles developed in case law.

The provisions on the appealability of decisions are not uniform. Sometimes they just say that decisions according to a certain statute are appealable. Sometimes that they are not. Sometimes they say that certain decisions according to a statute are appealable but say nothing about other decisions according to the same statute. The intention behind this can sometimes be that the other decisions should not be appealable but it can sometimes be that they should be appealed to another body than the one designated in the statute for the cases mentioned.

The inconsistency of the provisions means that case law becomes of great importance in this field. Here it is possible to see two main reasons for limitations of the appealability. On the one hand certain basic demands are put on the actions of authorities in order to regard them as "decisions". On the other hand actions qualifying to be regarded as decisions must have some not to insignificant consequence for the parties concerned to be appealable.

In order to be regarded as a decision the action must constitute some by the authority made statement, which persists at the time when the appeal is tried. It can not otherwise be changed or quashed. It is as a general rule neither possible to appeal against pure inactivity by the authority. (In certain cases however, the absence of a decision within a specified time shall be regarded as a refusal, and thus appealable.) A decision must also be documented in writing to be appealable.

## 1.2

The decisions of the 23 County Administrative Courts can be appealed to four Administrative Courts of Appeal, whose decisions can be appealed to the Supreme Administrative Court. If an appeal has been dismissed because it has been lodged too late and if a court after an appeal has tried the dismissal or not given leave of appeal concerning such an appeal, the court decision may not be appealed against.

Court decisions that do not mean that the case is finally adjudicated can as a general rule be appealed against only in connection with an appeal against the final decision. There are however some exceptions to this rule. Against a decision by which a case is remitted to a lower court for retrial it is possible to appeal only if the decision settles a question that influences the outcome of the retrial.

## 1.3

The Supreme Administrative Court can decide on the merits of a case coming from a lower court. That is also the case when the lower court has tried a decision by an administrative authority. However, when the Supreme Administrative Court tries the legality of a decision by the Government or a municipality it can only confirm or quash the decision.

## 1.4

The competence of the Supreme Administrative Court comprises - in principle - all kinds of administrative matters and is thus not restricted to cases that could be seen as determining civil rights and obligations. Criminal cases are adjudicated by the general courts and not by the administrative courts.

## 1.5

In addition to the decisions by the Administrative Courts of Appeal the Supreme Administrative Court tries appeals against the decisions by the Court of Patent Appeals and the Council for Advance Tax Rulings. It also tries appeals against decisions by parliamentary organs concerning the right of public access to official documents.

Government decisions are not subject to ordinary appeal. According to the Act on Judicial Review of certain Administrative Decisions the Supreme Administrative Court can try the legality of Government decisions in administrative matters concerning certain issues of importance to individuals.

Traditionally the situation in Sweden was that if there were no rules stating otherwise, administrative decisions could be appealed against to the closest higher authority and in the last instance to the king, from 1975 - when a new constitution entered into force - to the

Government. "The right to go to the King" was regarded as a fundamental principle in Swedish administrative law. However, in the beginning of the 1980's Sweden was in numerous cases found to be in breach of Article 6 of the Convention since the Swedish legal system did not provide for judicial review of many administrative decisions. Something had to be done to remedy the situation and in 1988 the Law on Judicial Review of certain Administrative Decisions was enacted.

On the application of a private party to an administrative matter with the Government or an administrative authority, a court shall try if the decision violates any legal rule in the way that the applicant alleges or that otherwise clearly appears from the circumstances in the case. The law is applicable on decisions concerning the personal status of private subjects or their mutual personal and economic relations (private law). It also applies to decisions concerning the relations between private subjects and the public administration which relate to obligations incumbent upon private subjects or which otherwise encroach on the personal or economic affairs of private subjects (burdensome public law). The review can only concern decisions that implies the exercise of public power against the private party, that otherwise could only have been tried by a court after a petition for a new trial and that could not have been reviewed in any other way. The Supreme Administrative Court tries decisions by the Government and the administrative courts of appeal try decisions by administrative authorities within the circuit of the court.

The law does not apply to decisions by such boards whose composition is regulated in law and whose chairman shall be or have been a judge. Such boards would be regarded as courts in the sense of Article 6 of the Convention although they are not regarded as courts according to our national legislation. Neither does it apply to decisions on certain subjects regarded as falling outside the scope of Article 6 of the Convention and listed in the law, inter alia decisions on Swedish citizenship, military service, tax matters and arms control.

An application for judicial review should be filed with the competent court within three months from the day the contested decision was taken. The decision is applicable even though judicial review takes place. However, the competent court can rule that it should not be applicable pending the adjudication of the case.

If the court finds that the decision violates some legal rule and if it is not evident that the fault has had no impact on the decision, it shall quash the decision and remit the case to the authority that has taken the decision. Otherwise the decision stands good.

The judicial review is concentrated on the question of the legality of the contested decision. But the court also tries the assessment of the facts of the case made by the authority. In cases where the legislation gives the decision-making authority a certain margin of appreciation the court has to try if the decision falls within the limits of that margin. The court also tries if the administrative decision fulfils the constitutional requirements of objectivity and impartiality and the equality of all persons before the law.

1.6

No such distinction is made.

1.7

No such distinction is made.

1.8

The ordinary procedural rules for the courts should fulfil the requirements of Article 6 of the Convention, also in cases falling outside the scope of the Article. Should the procedural rules in an individual case prove to be inadequate, the court can apply Article 6 as such in order to remedy the situation. This is so from 1 January 1995, when the European Convention was incorporated into Swedish law and therefore directly applicable by the courts. The ambition of the legislator is still that the national legislation should fulfil all the requirements of the Convention. The incorporation is not a substitute for amending the legislation but should work as a safety net if inadequacies occur.

1.9

There are many administrative decisions that can not be appealed against with Administrative Courts, see the answer to question 1.1.

1.10

The Act on Judicial Review of certain Administrative Decisions was as said in 1.5 enacted to fulfil the requirements of Article 6 of the Convention. Otherwise there are no specific remedies for cases falling under the scope of Article 6 of the Convention.

## 2 Scope of application of Article 6

### A The notion of civil rights and obligations in general

2.1

There is no dispute concerning decisions putting burdens on the citizens under certain conditions regulated in law. They fall under the scope of Article 6. More questionable are decisions granting favours to the public. Decisions on social benefits fall under the scope of the article, but what about subsidies to companies?

2.2

The issue raised in the answer to question 2.1 can be illustrated by a case concerning agricultural subsidies. A farming lady filed a law suit with the general courts demanding compensation from the National Agricultural Board because they had, according to her, wrongfully paid subsidies according to a Government Regulation not to her but to the former owner of the farm. Although it found strong arguments in favour of the view that the right to the subsidies in question should be regarded as civil rights according to Article 6, the Swedish Supreme Court dismissed the suit because it thought that cases like that should be tried by the administrative courts. When the lady opened a case at those courts it was dismissed also there. When the case reached the Supreme Administrative Court it ruled that it was uncertain if the

subsidies in question fell under Article 6 and that it therefore were no ground for the conclusion that Article 6 should make judicial review of the demands necessary.

This case has been much debated in the Swedish law journals and the correctness of both the Supreme Courts and the Supreme Administrative Courts decisions has been questioned.

In a later case however, the Supreme Administrative Court ruled that a farmer claiming the right to agricultural subsidies regulated by EC law had a right to have his claim tried by a court according to EC law. A prohibition against appeals in a Government regulation was therefore set aside because of the primacy of EC law over national law. This case can according to many writers be seen as the most evident example of the impact on our legal system of the Swedish membership of the European Union. The question has also been raised whether the Supreme Administrative Court today would give the same ruling in a case like the one first mentioned.

### 2.3

See above.

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

### 2.4.1

The question has not arisen in any case before the Court.

### 2.4.2

The outcome of the dispute must have effects on the very applicant in order to give him the right to seek judicial review. If not, the decision does not concern him.

## C Specific fields of public administration

### 2.5.1

The cases in this field are generally regarded as falling within the scope of application of Article 6.

### 2.5.2

The problems in those fields do not concern Article 6 but Article 1 of the First Additional Protocol.

### 2.6.1

No such distinction is made.

### 2.7.1

No such changes have been made.

## 2.7.2

The Church of Sweden has since the 16th century been closely tied to the State. Swedish citizens have from their birth automatically been members of the Church of Sweden. The members have paid a special church tax that has been collected by the tax authorities together with the state tax and the local tax charged by the municipalities. As of 1 January 2000 the ties between church and state will be broken and the church separated from the state. The tax authorities will however continue to collect what will no longer be regarded as a tax but a membership fee to the church.

Another example of a peculiar financial contribution can be found in the law on intellectual property. The owners of copyright to music and film have a right to some compensation from businessmen who professionally produce or import devices upon which sound or moving pictures can be recorded and that are suitable for copying of film and music for private use. The compensation is charged as a certain amount of money for every single device. It is paid to an organisation of copyright owners that distributes the income to their members. This works like a tax on empty music cassettes and videotapes. The state has however no role in the collection of the money.

## 2.7.3

The procedure before the Swedish courts in tax matters is thought to fulfil the requirements of Article 6 even if the article is not applicable. The courts therefore do not differentiate in such a manner.

## 2.8.1

Yes.

## 2.8.2

No.

## 3. Main Problems of a fair trial

### 3.1

The application of Article 6 has radically increased the number of oral hearings, the usefulness of which could sometimes be disputed. Article 6 has also increased the pressure upon the courts to adjudicate their cases within a reasonable time, which is very useful.

### 3.2

The problem concerns the question if certain cases must be appealable to courts or if an administrative procedure is enough. If and when a case reaches the courts there are no significant problems.

### 3.3

Problems do not frequently arise but there are examples.

There was a problem with the impartiality of some members of the former Housing Court (Bostadsdomstolen) that resulted in the Langborger case in the Strasbourg Court. This led to some amendments of the law regulating the composition of the court but that special court is now abolished and the cases are tried by the general court system.

There has also been a problem with the composition of the jury in cases concerning breaches of the press law. The political parties nominate the members of the jury. In the Holm case a private person accused an author of a book published by a publishing house affiliated to a political party for slander. The author was acquitted by a jury some of its members being members of that political party. In those cases an acquittal is not appealable. The problem of the impartiality of the jury in similar cases has been much debated. The law has however not been changed because it is said that it should be possible to solve the problem in an individual case by taking exception to those members of the jury that are the political friends of the accused. But if only those members are excluded the jury will consist exclusively of political enemies to the accused. The court has to find jurors outside the parties if such a case should occur again. And that is possible.

What could not be called a problem but a circumstance that requires observation is that when a man and a wife are both judges and working at different instances, the one can not sit on a case where there is an appeal against the decision of the other.

### 3.4

The principle of equality of arms is respected.

## 4. Oral procedure

### 4.1

The procedure before the administrative courts is according to the law regulating the court procedure a written procedure. There can however be an oral hearing on a specific question, if that can be assumed to be of advantage for the investigation or further a rapid adjudication of the case. The County Administrative Courts and the Administrative Courts of Appeal shall hold an oral hearing when a private person who is party to the case demands it if the hearing is not unnecessary or particular reasons do not speak against it. When a court case reaches the Supreme Administrative Court oral hearings has therefore often already been held. It is consequently not often necessary to hold an oral hearing there.

In the cases concerning judicial review of Government decisions, where the Supreme Administrative Court is the first court to try the case, it is said in the law on such cases that the court shall hold an oral hearing if the applicant demands it and it is not manifestly unneeded.

## 4.2

The Supreme Administrative Court holds about 10 to 15 oral hearings every year. The number is increasing and most of them take place in cases concerning judicial review of Government decisions, where the court is the first court to hear the case. In 1998 the court received 102 such cases of in total 8 671.

## 4.3

The Court has this competence also in cases falling outside the scope of Article 6.

## 4.4

The Court can quash the decision of a lower instance because of any breach of the rules of procedure that can have had an impact on the adjudication of the case.

## 4.5

It is possible to amend the fault by holding an oral hearing in the Supreme Administrative Court but that is practically never done. The reason behind this is the principle that a higher court shall not base its judgement on facts that have not been tried by the lower instances.

## 4.6

There are no such problems. The public has access but very seldom shows up.

## 4.7

In order to have a right to an oral hearing the party must demand such a hearing. You could therefore say that the right could be tacitly waived.

## 5. Rules on evidence

### 5.1 Admissibility of illegally obtained and other evidence

#### 5.1.1

A general principle in Swedish procedural law is the free evaluation of the evidence presented before the court. This means that any evidence is admissible. The court then assesses the value of it on its merits. Also wrongfully obtained evidence is admissible, but the value of it might be small if it has been obtained in a way that can cast a shadow of doubt on its accuracy.

#### 5.1.2

No case law of importance can be reported.

## 5.2

The general courts may use only the evidence presented at the oral hearing. This is the situation both in criminal and civil cases. In the administrative courts however - where there is a basically written procedure - there are no such restrictions. The decision shall according to the law on the procedure be based on the content of the documents and on what has otherwise occurred in the case.

## 5.3

The administrative courts may obtain opinions in questions that require special knowledge from authorities, civil servants or other experts on the matter. Expert opinions are never compulsory and there are no specific rules on the qualifications necessary to be regarded as an expert. The court assesses the value of the statements made by the experts in the same way as evidence is evaluated. The experts most often produce written statements but it is also possible to hear them at an oral hearing where the parties and the court can put questions to them.

## 5.4

In cases where leave of appeal is required, circumstances or evidence that the complainant invokes firstly in the Supreme Administrative Court may only be taken into account if there are special reasons.

## 6. Parties to the case

### 6.1

Only the parties to a case in the lower courts may appeal their rulings to the Supreme Administrative Court and only parties to an administrative procedure may seek judicial review of the decision by an administrative authority.

### 6.2

There are no rules on intervention by other parties than those of the lower instances. The extent to which it is possible to intervene is disputable. It is certainly very small.

### 6.3

See 6.1.

### 6.4

The fundamental rights and freedoms should give those concerned a standing already in the lower instances.

## 7. The right to the public pronouncement of the judgement

### 7.1

No such problems arise. A decision by which an administrative court adjudicates a case shall according to the law on the procedure be sent to the parties by a document that completely reproduces the decision and a dissenting opinion if there is one. If it is possible to appeal against a decision it shall also contain information on what anyone who wants to appeal against it has to observe. If leave of appeal is necessary to have the case tried by a higher court, the decision shall contain information about that and about the grounds upon which such leave can be given.

### 7.2

There are no rules obliging the administrative courts to pronounce their judgements orally. As to any other documents held by the court and not covered by secrecy the public has access to the judgements without having to state their name or why they want to study them. It is free of charge to read the document on the spot. In order to obtain a copy you have to pay the prime cost of the court for the copying.

## 8. Reasonable Delay of Definitive Judgements in Administrative Law-Suits

### 8.1

See the answer to question 1.2. In addition to that it can be said that the Supreme Administrative Court only tries appeals of judgements from the administrative courts of appeal if leave of appeal has been given. The question of leave of appeal is tried by the Supreme Administrative Court in a reduced composition (1-3 judges) compared to when a case is tried (5 judges).

According to the rules of procedure adopted by the court itself certain cases shall be tried with priority. This applies to

- a) cases where the suit has been repelled or should be immediately rejected
- b) cases concerning the execution of decisions not having gained legal force
- c) cases concerning the right of access to official documents
- d) cases concerning the execution of judgements on the custody of children and similar cases
- e) cases concerning advance rulings on tax matters
- f) cases on tax matters where the outcome can have importance for criminal cases concerning tax fraud
- g) cases according to the Foreigners Act
- h) cases concerning compulsory psychiatric care or forensic psychiatric care.

Also cases where delay of the adjudication would cause the suit to be useless or where a rapid adjudication otherwise is of special importance to the individual or the public should be tried with priority.

Cases that are not tried with priority shall according to the instruction for the court be handled in the order in which the cases have been filed with the court if certain circumstances do not motivate otherwise.

## 8.2

The annulment of a decision does not automatically entitle the individual concerned to compensation. The State is however liable to pay compensation for damages on persons or property and for economic loss that has been caused by wrongful or negligent exercise of public authority in activities for which it is responsible. If there are special reasons the State shall also compensate for economic loss caused by wrongful information or advice given by an authority. A claim for compensation is statute-barred according to the normal ten years rule. Compensation is paid from state funds. The authority responsible has to carry the cost. Claims can be raised with the Chancellor of Justice, whose decisions may not be appealed against. The party not contended with the decision can however file a suit against the state at a district court, where the Chancellor will appear as representative of the State. Such a case is in the last instance adjudicated by the Supreme Court, not by the administrative courts.

There is no compensation for the delay as such. There can however be compensation for costs and damages caused by unreasonable delays if the requirements for state liability are fulfilled.

## 8.3

a) At the end of 1998 the average age of pending cases in the administrative courts of first instance was 18,6 months in tax cases, 9,1 months in social insurance cases and 3,3 months in cases on social welfare. In the Supreme Administrative Court the average age of all pending cases was 12,7 months in that court. There are no statistics available on their age from the original opening of the case.

b) 96 098 cases where opened in the first degree in 1998.

c) 108 823 cases where adjudicated in the first degree in 1998.

d) 8 671 cases where opened in the last degree in 1998.

e) 7 068 cases where adjudicated in the last degree in 1998.

f) The number of pending cases at the end of 1998 was 47 420 cases in the first degree and 8 603 in the last degree.

## 8.4

The actions taken by the Supreme Administrative Court have been concentrated on making the internal work of the court more efficient. This sometimes necessitates amendments of the legislation but is often a matter for the court itself to decide upon.

Government proposals for new laws of any importance are in Sweden scrutinized by a body consisting of judges from the Supreme Court and the Supreme Administrative Court before they are tabled in Parliament. The judges can in that context point out problems that the proposal might cause in the work of the courts.

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

### 9.1

The greatest problem is probably that the Law on Judicial Review of certain Administrative Decisions does not cover decisions concerning the relations between private subjects and the public administration which are not burdensome but favourable to the individual, for example state subsidies. Many decisions in such matters can not be appealed against to courts. Article 6 of the Convention probably covers also those decisions, which means that there is a risk that the law on judicial review might be insufficient. See the answer to question 2.2.

### 9.2

There are no written rules to that effect but in practice the hearing is normally repeated in such a case.

### 9.3

When the judicial review concerns decisions where the authorities have discretionary powers, the review comprises the question whether the decision falls within the limits of the margin of appreciation granted to the authorities but not the suitability of the choice between different legally possible options.