

Stanislaw Biernat, Judge of the Supreme Administrative Court,
Professor of the Jagiellonian University, Cracow
Irena Wiszniewska, Judge of the Supreme Administrative Court,
Professor of the Institute of Legal Sciences, Warsaw

The Polish administrative judiciary viewed from the prospect of the accession of Poland to the European Union and the use of the procedure under Article 234 EC

I. Introductory remarks

1. Poland is not one of the member states of the European Union and thus the Polish courts cannot make preliminary references to the European Court of Justice (ECJ) under Article 234 EC. In view of the prospect for enlargement of the Union and the possibility of Polish accession as early as on 1 January 2004, intensive efforts are ongoing, aimed at adapting Polish law to the future membership of the EU. This regards also the procedures followed before the national courts.

Yet another fact should be taken into account: at present, intensive works have been undertaken in the Polish parliament, on drafting legislation to profoundly reform the administrative judiciary to adapt it to the requirements of the 1997 Constitution of the Republic of Poland. The new structure of administrative courts in Poland will also have an essential bearing on the use of the procedure under Article 234 by Polish courts, after the accession of Poland to the Union.

2. Further parts of this paper will present briefly the following issues:

- the present organisation of the administrative judiciary in Poland (Part II);
- forms of recourse from a decision and judicial review under the present Polish law (Part III);
- procedural solutions under the present Polish law, resembling the procedure for a preliminary ruling established in Article 234 EC (Part IV);
- brief characteristics of the prepared reform of the administrative judiciary (Part V);
- future procedural solutions under Polish law resembling the procedure for a preliminary ruling established in Article 234 EC (Part VI);

- adaptation of future solutions in Polish law to Article 234 EC (Part VII).

For obvious reasons the form of the questionnaire cannot be retained.

II. The present organisation of the administrative judiciary in Poland

The Supreme Administrative Court (*Naczelny Sad Administracyjny*) is a special court, outside the general jurisdiction of the court structure. Created in 1980 and presently operating under the 1995 Law on the Supreme Administrative Court, it functions in Warsaw and in ten local centres. The Court hands down decisions in one instance and is the only administrative court in Poland. The name of the court is misleading as it may suggest that there are also lower administrative courts. But under existing laws there are no such courts and they will only be created under the reforms currently being prepared. In addition to all this, the Supreme Administrative Court should be distinguished from the Supreme Court (*Sad Najwyzszy*).

The Supreme Administrative Court is the court, against whose decisions there is no judicial remedy under national law (Article 234 para. 3 EC). Decisions of the Court are valid and binding. Only in exceptional cases is it possible to petition the Supreme Court to make *an extraordinary review* of a case, if the Supreme Administrative Court's decision is in gross violation of the law or if it is of vital interest to the state. Those entitled to apply for such an extraordinary review are not parties to the proceedings but the Minister of Justice, the Chief Prosecutor, the Chief Justice of the Supreme Court, the President of the Supreme Administrative Court, the Ombudsman, and in some cases the Minister of Labour and the President of the Patent Office. If the review finds grounds to do so, the Supreme Court can overturn the decision of the Supreme Administrative Court and remand the case for renewed consideration.

In the year 2000, 219 applications for extraordinary reviews were submitted to the Supreme Court. This represents 0.4% of all cases considered by the Supreme Administrative Court (figures for previous years are: 0.4% in 1999, and 0.3 in 1998).

Under the reform of the legal system, the extraordinary reviews are to be abolished.

III. Forms of recourse from a decision and judicial review under the present Polish law

1. In Polish law, there is a general principle in Article 15 of the 1960 Code of Administrative Procedure that individual cases are handled at two administrative instances. A

party who is dissatisfied with a decision may appeal to the appellate body, which is typically an organ of higher standing in the hierarchy of the administrative apparatus. Only those decisions issued in the first instance by the central authorities cannot be appealed. In such a situation, a dissatisfied party may apply only for a reconsideration to the organ that issued the decision.

The appellate administrative organ examines the correctness of a first instance decision, both on its conformity with the law and its merits and may, if necessary, conduct evidentiary proceedings. In a second instance, the decision of the appellate organ upholds the challenged decision or overturns it, in whole or in part, and hands down a decision on the essence of the case or dismisses the appellate proceedings. The appellate organ may also overturn the questioned decision in its entirety and remand the case for renewed consideration by the organ of first instance.

Administrative decisions that can no longer be appealed within administrative proceedings are called *final*.

2. Final administrative decisions may be challenged before the Supreme Administrative Court. Only in exceptional cases does a general jurisdiction court review a decision. The Law on the Supreme Administrative Court of 1995 significantly expanded the scope of this court's review. Based on Article 16 of the law, the Supreme Administrative Court presently hands down decisions in cases involving complaints concerning: (1) administrative decisions; (2) certain intermediary acts issued during administrative proceedings; (3) decisions issued in executory proceedings subject to appeal; (4) public administration acts or activities other than those specified in items 1-3 regarding the grant, confirmation, or acknowledgment of rights or obligations directly resulting from legal norms; (5) such resolutions of municipal authorities as constitute municipal ordinances and such acts of local government administration bodies as have the force of regulations in local law; and (6) supervisory acts over the activities of local government organs. In addition, the court hears complaints against the failure to act on the part of administrative bodies in the cases specified in items 1-4. On the basis of this law, it should be noted that every unilateral administrative organ's act is subject to review by the Supreme Administrative Court.

According to Article 33 of the law, the court initiates proceedings on the basis of a complaint filed by anyone who has a legal interest in a case, after all available appellate administrative procedures have been exhausted. A complaint is filed within thirty days from the day the challenging party receives a decision from the administrative organ. It is not

required that the challenging party be represented by counsel. The court costs at the Supreme Administrative Court are nominal and, in any event, lower than those imposed by courts of general jurisdiction in civil cases.

A complaint may also be filed before the Supreme Administrative Court by the Ombudsman, a Public Prosecutor, or a social organization acting within the scope of its statutory activities, in cases involving the legal interests of other persons.

On the basis of Article 21 of the law, the Supreme Administrative Court reviews the actions of administrative bodies for their conformity with the law. The term "conformity with the law" here is broadly understood in juridical practice; it includes, among other things, the review of the interpretation of vague legal concepts on the part of administrative organs or the manner in which administrative discretion is exercised.

Decisions of the Supreme Administrative Court acknowledging the appropriateness of a complaint have an invalidating effect, i. e., they overturn or pronounce as invalid the acts of administrative organs so complained against. Only in very exceptional cases does the court hand down a decision resolving a case on its merits.

IV. Procedural solutions under the present Polish law, resembling the procedure for a preliminary ruling established in Article 234 EC

1. The Polish legal system envisages the possibility to present legal questions to the Constitutional Tribunal. In pursuance of the Constitution, any court may refer to the Constitutional Tribunal, a legal question concerning the compatibility of a legal act with the Constitution, ratified international agreements or laws, when the decision in the case pending before that court could be affected by the answer to this question (Article 193 of the Constitution and Article 3 of the 1997 Law on the Constitutional Tribunal). Pursuant to the provision of the latter Law, the Tribunal, when considering the compliance of a legal act or a ratified international agreement with the Constitution, examines both the contents of such an act or an agreement, and the competence and compliance with the legal provisions required for passing such an act or entering and ratifying such an agreement (Article 42). According to Article 66 of the Law on the Constitutional Tribunal, it is bound by the limits of the legal question. Thus, the extent of the examined contents of a legal act is determined by the complainant in his formulation of the plea. Nevertheless, legal commentators highlight the issue that the Tribunal should examine whether the contents of the act do not prejudice the rights and freedoms of an individual. When examining the competence to issue a legal act or

to entering into or ratifying an agreement the Tribunal establishes whether a given organ had the legitimacy to issue such an act or whether the boundaries of its competences were overstepped when it issued the act. The examination of the procedure of the issuing the act consists in checking the compliance of the actions undertaken by the issuing entity with the laws in force.

In the year 2000, the adjudicating panels of the Supreme Administrative Court directed only four legal questions to the Constitutional Tribunal. The same number of questions was referred in 2001. The reason for such rare referrals to the Tribunal is that the Supreme Administrative Court aims to interpret within its own composition in order to achieve its compliance with the Constitution. One should also consider, that in the event of finding a provision of a lower-rank legislation that does not comply with the Constitution, international agreement or a law, any court may refuse to apply this provision in a specific case before it.

2. The institution of referring legal questions also operates within the Supreme Administrative Court itself. According to Article 49 of the Law on the Supreme Administrative Court, an adjudicating panel may apply to the President of the Court to examine the case in a panel of seven judges, in view of essential legal doubts raised in the case. This provision also indicates that the adjudicating panel may ask the President to clarify legal doubts by a panel of seven judges, a chamber, or combined chambers. The President of the Supreme Administrative Court is bound by the applications of the adjudicating panels. After receiving the rulings adopted in the case, the President appoint a panel of seven judges and the date of consideration of the case or presents the legal doubts to be solved to a panel of seven judges, a chamber of combined chambers of the Court (Article 49). In practice, the legal doubts are solved by a panel of seven judges; the large number of judges in the Financial Chamber and General Administration Chamber, considering the issue by an entire chamber or combined chambers would face major difficulties.

In the event of a referral for the clarification of legal doubts, the proceedings in the case are suspended (Article 97 § 1 subparagraph 4 of the Code of administrative procedure in connection with Article 59 of the Law on the Supreme Administrative Court). Although the resolution clarifying the legal doubt is binding only in a given case, as the adjudicating panels of the Supreme Administrative Court also conform in practice with the resolutions when deciding other cases, the procedural solution concerned contributes greatly to the uniformity of the decisions in the jurisprudence of the Supreme Administrative Court.

In 2001, the adjudicating panels of the Supreme Administrative Court requested the President for the consideration of 12 cases by the extended panels (11 were considered, 1 remained for 2002), and in 29 cases requested the clarification of legal doubts (24 of these were clarified, with the 5 remaining left for 2002).

3. Finally, it should be mentioned that the Supreme Administrative Court, in line with Article 18 para. 2 of the Law on the Supreme Administrative Court, provides answers to the legal questions referred to it for clarification by the review boards of local governments (*samorządowe kolegia odwoławcze*). These are collective administration bodies considering appeals against the decisions of the local government authorities. According to Article 22 of the 1994 Law on the local government review boards, such a board acting in its full composition may refer a legal question to the Supreme Administrative Court, when a decision in a case depends on the answer. The referral of a question results in an *ex officio* suspension of the proceedings in the case concerned. The Court considers these in a panel of five judges (Article 50 of the Law on the Supreme Administrative Court). The Court answers some 40 legal questions from the local governments' review boards annually.

V. Brief characteristics of the prepared reform of the administrative judiciary

As mentioned earlier, the administrative judiciary operates at present as a sole instance – the Supreme Administrative Court). Such a structure does not match the present stipulation in the Constitution in Article 176 para. 1: *Court proceedings shall consist of at least two instances*. Thus the Constitution includes also Article 236 para. 2: *Laws bringing Article 176 para. 1 into effect, to the extent relevant to the proceedings before administrative courts, shall be adopted before the end of 5 years from the day on which the Constitution comes into force. The provisions relating to extraordinary review against the Supreme Administrative Court decisions shall remain in effect until the entry into force of such laws*.

The time limit prescribed in the Constitution will elapse on 16 October 2002.

The work in the Polish parliament, on drafting laws introducing the reform of the administrative judiciary has been in progress for several months now. The initial drafts were submitted by the President of the Republic of Poland.

The drafted law – the Law on the structure of administrative courts – introduces two levels of judiciary. There will administrative courts of first instance created for one or several provinces (voivodships) and the new Supreme Administrative Court as a court of second instance. Another draft law, i.e. the Law on the proceedings before administrative courts

provides that the administrative courts shall administer justice through overseeing the activities of the public administration, and by solving the competence disputes between various public authorities. The extent of the judicial review will be the same as in Article 16 of the 1995 Law on the Supreme Administrative Court currently in force (cf. II.2 above). The cases belonging to the jurisdiction of the administrative courts are to be considered by the administrative courts of first instance. The Supreme Administrative Court oversees, to the extent stipulated by relevant laws, the administrative courts of first instance in the area of adjudication. In particular, the Supreme Administrative Court is to consider the appellate measures pertaining to the decisions of the administrative courts of first instance (this regards cassations, above all), to pass resolutions aimed at clarifying legal provisions whose application have given rise to divergent decisions in the administrative judiciary, to pass resolutions clarifying serious legal doubts in specific cases and to resolve disputes over competence between various organs of public administration. It should be emphasised that after the new law comes finally into force, the Supreme Administrative Court will become an utterly different court compared with the one bearing this name today.

Beyond any doubt, both the administrative courts of first instance and the Supreme Administrative Court will be the courts within the meaning of Article 234 EC, which will be – after the accession of Poland to the EU – in the position to ask for preliminary rulings of the ECJ (after the Treaty of Nice comes into force – to the Court of First Instance). The Supreme Administrative Court will be the court against whose decisions there is no judicial remedy under national law (Article 234 para. 3 EC).

VI. Future procedural solutions in Polish law resembling the procedure for a preliminary ruling established in Article 234 EC

1. The currently drafted laws regarding the administrative judiciary do not alter the principle that all courts have the right to refer legal questions to the Constitutional Tribunal (cf. IV.1 above). This competence will rest both with the administrative courts of the first instance and the Supreme Administrative Court.

2. The draft of the Law on the proceedings before administrative courts stipulates that the Supreme Administrative Court will pass the resolutions aimed at clarifying the legal provisions whose application resulted in diverging decisions in the administrative courts. The initiative to take such resolutions will rest with the President of the Supreme Administrative Court.

3. The same draft envisages that the Supreme Administrative Court will pass resolutions providing solutions to the legal questions raising serious doubts in a specific case. The initiative to formulate such a resolution could come from any adjudicating panel of the Supreme Administrative Court considering the cassation. The Supreme Administrative Court may refuse taking up a resolution when it considers that there is no need to resolve doubts.

The resolutions referred to under subparagraphs 2 and 3 above will be passed by a panel of seven judges, the whole chamber or the entire composition of the Supreme Administrative Court. When any of the adjudicating panel of the Supreme Administrative Court does share the views expressed in the resolution, it will have the right to request reconsideration of the resolution.

VII. Adaptation of future solutions in Polish law to Article 234 EC

1. In the draft of the Law on the proceedings before the administrative courts there is a general provision that a court (both the administrative court of first instance and the Supreme Administrative Court), can *ex officio* suspend the proceedings when the decision in the case depends on the outcome of other pending administrative proceedings, proceedings before an administrative court, before other court or the Constitutional Tribunal. It seems that nothing can prevent the assumption that such “other court proceedings” covers also the proceedings before the ECJ. This provision could be just interpreted as language enabling the Polish administrative courts of first instance and the Supreme Administrative Court to refer the questions to the ECJ under Article 234 EC after the accession of Poland to the European Union.

2. To introduce an express provision in the draft law, giving the right to make a reference to the ECJ (and placing the obligation on the Supreme Administrative Court) would be a better solution. Such a provision could obviously come into force only upon the accession of Poland to the European Union. The postulates to introduce such provisions into Polish law are presented in legal literature.

Further reading on adaptation of Polish law to Article 234 EC:

C. Mik, Sady polskie wobec perspektywy przystąpienia Rzeczypospolitej Polskiej do Unii Europejskiej [*Polish courts vis-à-vis the accession of the Republic of Poland to the European Union*], Przegląd Prawa Europejskiego, 1997, No. 1; N. Póltorak, Zmiany w postępowaniu przed sadami polskimi jako konsekwencja przystąpienia Polski do Unii Europejskiej [*The*

alterations of the proceedings before the Polish courts as a consequence of the accession of Poland to the European Union], in: C. Mik (Ed.) *Polska w Unii Europejskiej [Poland in the European Union]*, Torun 1997; J. Skrzydło, *Konieczne zmiany w prawie polskim w perspektywie współpracy sądów polskich z Trybunałem Wspólnot (na podstawie Article 177 Traktatu WE) [The necessary changes in Polish law from the viewpoint of the co-operation of the Polish courts with the European Court of Justice (under Article 177 EC Treaty)]*, *Panstwo i Prawo*, 1998, No. 8; C. Banasinski, *Stan i metody przygotowania polskiego prawa konstytucyjnego do członkostwa w Unii Europejskiej [The status and methods for preparing the Polish constitutional law for the membership of the European Union]*, in: E. Popławska (Ed.) *Konstytucja dla rozszerzającej się Europy [The constitution for the enlarging Europe]*, Warszawa 2000; K. Kukuryk, *Postępowanie w sprawach wydawania orzeczeń wstępnych w świetle przyszłego rozszerzenia Unii Europejskiej [The procedure regarding the references for the preliminary rulings in view of the future enlargement of the European Union]*, in: C. Mik (Ed.) *Wymiar sprawiedliwości w Unii Europejskiej [The administration of justice in the European Union]*, Torun 2001; S. Biernat, *Wpływ członkostwa Polski w Unii Europejskiej na polskie sądy [The effect of Poland's membership of the EU on the Polish courts]*, *Przegląd Sądowy*, 2001, No. 11-12.

Note: This paper expresses the personal views of the authors and by no means represents the official position of the Supreme Administrative Court.