The Colloquium of the Association of the Councils of State

and the Supreme Administrative Jurisdictions of the European Union:

Consequences of incompatibility with EC law for final administrative decisions and final judgments of administrative courts in the Member States

The Supreme Administrative Court of Poland

Warsaw 2008

REPORT OF THE UNITED KINGDOM

Questionnaire

1. Are there any procedural means under your national law which allow a final

administrative decision to be revoked, if it turns out to be contrary to Community law?

Please describe briefly the relevant provisions and national case-law:

a) do the legal provisions have general application or they relate specifically to the application of EC law?

b) which authority (administrative body or national court) is empowered under your legal system to make use of the procedural means in question?

Comment: This question focuses on the revocation of a final administrative decision in cases with Community element. However, if possible, the answer to this question should contain also the short description of all means, which allow the revocation of final administrative decisions in purely internal cases.

There are three means by which final administrative decisions may be challenged:

1. Judicial review is the procedure by which the Administrative Court of the High Court of Justice may revoke (quash) a decision which is unlawful, including a decision which, on a challenge brought to the Court, is established to be contrary to Community law. It is the means by which the High Court exercises its supervisory

role over public bodies or person exercising a public function, inferior courts and tribunals – see s.31 Supreme Court Act 1981.

2. In addition to this general power of judicial review, some statutes confer specific power on the High Court to revoke administrative decisions on the ground that they are inconsistent with the law or beyond the powers of the decision maker – see, e.g. the Town and Country Planning Act 1990 and the Wildlife and Countryside Act 1981.

3. Similarly, some statutes confer a right of appeal against a decision of a Minister, public body or tribunal, for example the. Mental Health Act 1983, the Medicines Act 1968, and the Tribunals and Inquiries Act 1992

(a) These procedures are not confined to challenges based on Community law.

(b) The initial application/appeal is to the High Court (Administrative Court). Appeal lies, with the leave of that Court or of the Court of Appeal, to the Civil Division of the Court of Appeal. A further appeal may be made with leave to the House of Lords. The institution of the new Tribunals System with an Upper Tier Tribunal will result in some appeals/applications being transferred to that Tribunal. The House of Lords is soon to be replaced by the Supreme Court.

2. Do national provisions concerning the revocation of final administrative decision by administrative body:

a) grant discretionary powers to decide the matter; or

b) provide the obligation to revoke a decision under certain conditions?

Judicial review is a discretionary remedy, but the discretion of the Court must be exercised judicially. An application for judicial review must be made promptly, and in any event within 3 months of the decision challenged, although the Court has power to extend this time limit. Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant the relief sought if it considers that the granting of the relief would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration. – s. 31(6) of the Supreme Court Act.

Remedies on statutory applications/appeals are not discretionary. If the condition set out in the statute is met - usually that the decision was wrong in law - the decision will be revoked.

3. Does the possibility (or obligation) of revocation of final administrative decisions depend on the reason of its incompatibility with EC law? Please consider the following cases:

a) in the light of the ECJ's subsequent judgment, an administrative decision turned out to be incompatible with EC law or based on the misinterpretation of EC law (as in the *Kühne & Heitz* and *Kempter* case);

b) the provisions of national law which provided the legal basis of a contested decision were incompatible with EC law (as in the *i-21 Germany* case);

c) an administrative decision infringed EC law or was issued without giving due consideration to the ECJ's case law.

A final administrative decision that is incompatible with EC law that is directly applicable (and therefore part of our domestic law) will always be quashed, unless there is a good reason for not quashing it, such as inordinate delay on the part of the claimant. If the incompatibility arises as a result of a failure by the UK Government correctly to implement a Directive, so that the relevant EC provision has not been incorporated into UK law, the decision will not be set aside, since it complies with our law. If there is an inconsistency between UK Law and an EC law that is directly applicable, EC law prevails and an administrative decision that is incompatible with that law, but compatible with what would otherwise be UK Law, will be revoked (quashed).

4. In order to revoke a final administrative decision which is contrary to Community law, is it a precondition that a party (a person concerned):

a) contests (challenges) the decision in the course of the administrative procedure?

b) appeals against the decision to the court? Is it sufficient to appeal to the national court of the first (lower) instance or is it necessary to exhaust all means of judicial review?

c) makes use of any other available legal means provided under national law?

What kind of means (ombudsman, etc.)?

(a) There are instances in which an administrative body has the power to withdraw its decision without the need for a court order – e.g. a local authority decision relating to housing. However, it is not a precondition of judicial review that the claimant challenged the decision on the ground of its incompatibility with EC law in the course

of the administrative procedure. He will, however, be required to challenge the decision by judicial review promptly.

(b) The High Court has the power to grant relief on judicial review or on statutory appeals or applications. It is not necessary to appeal to the Court of Appeal. Lower courts (county and magistrates' courts) do not have jurisdiction in judicial review proceedings, except where there is a specific statutory right of appeal to a lower court. However, incompatibility with EC law may be raised as a defence in civil or criminal proceedings in any court.

(c) There are a number of Ombudsmen:

the Parliamentary Ombudsman who investigates complaints about government departments and certain other public bodies

the Local Government Ombudsman who investigates complaints about local councils and some other local organisations

the Health Service Ombudsman

the Financial Ombudsman Service

the European Ombudsman

the Legal Services Ombudsman

the Ombudsman for Estate Agents

the Housing Ombudsmen

the Prisons and Probation Ombudsman.

the Energy Supply Ombudsman.

In most cases, the decision of the Ombudsman is advisory, and is not binding on the public authority in question.

5. As far as the admissibility of revocation of final administrative decisions contrary to Community law is concerned, does it matter whether a party (a person concerned) raises the question of the infringement of Community law in the course of administrative procedure or the proceedings before the national court? (This issue has been raised in the *Kempter* case).

No, but in general the application to the High Court for revocation must be made promptly and within 3 months of the decision complained of.

6. Does pursuant to national law the national court reviewing the legality of administrative decisions take into consideration the provisions of Community law:

a) on request of the parties only?

b) on its own motion (ex officio)?

The Court may itself raise the question of compliance with Community law.

7. Are the powers described in Question 6 treated differently, if the case is examined by the court against whose decisions there is no judicial remedy under national law?

No

8. When an administrative decision, which has become final as a result of a judgment of a national court, turned out to be contrary to EC law, is it appropriate:

a) to revoke the decision (as in the *Kühne* case); or

b) to reopen the judicial proceedings?

a) If it is within the power of the administrative body to revoke its own decision, a person may seek that revocation in the light of the EC law. A refusal to do so might be open to judicial review.

*b) The High Court and the Court of Appeal Civil Division have power to reopen an **appeal** in limited circumstances - Taylor v Lawrence [2002] EWCA Civ 53 and Civil Procedure Rules Part52.17*

52.17 (1) The Court of Appeal or the High Court will not reopen a final determination of any appeal unless –

(a) it is necessary to do so in order to avoid real injustice;

(b) the circumstances are exceptional and make it appropriate to reopen the appeal; and

(c) there is no alternative effective remedy.

(2) In paragraphs (1), (3), (4) and (6), "appeal" includes an application for permission to appeal.

(3) This rule does not apply to appeals to a county court.

(4) Permission is needed to make an application under this rule to reopen a final determination of an appeal even in cases where under rule 52.3(1) permission was not needed for the original appeal.

(5) There is no right to an oral hearing of an application for permission unless, exceptionally, the judge so directs.

(6) The judge will not grant permission without directing the application to be served on the other party to the original appeal and giving him an opportunity to make representations.

(7) There is no right of appeal or review from the decision of the judge on the application for permission, which is final.

As to the application of the principles, see ***Feakins and another v Intervention Board for Agricultural Produce*** *[2006] EWCA Civ 699, a decision of the Court of Appeal.*

The claimants were successful sheep farmers and exporters, exporting live sheep. Between 1989 and 1992 such exports were subject to a European Community system applicable only to the United Kingdom. A premium was payable on lambs of appropriate quality sold in the market for slaughter. However, if such lambs were exported elsewhere within the Community an amount equivalent to the premium had to be repaid by the exporter so as to remove the price advantage that exporter would have over other producers elsewhere within the Community. That repayment of the premium was called 'clawback'. Some categories of sheep had not attracted the premium and thus, when exported, were exempt. The recovery of

clawback was provided for by a Community Regulation made in 1984. In proceedings between the claimants and the defendant board, in which the claimants claimed recovery of all clawback paid, summary judgment was given in favour of the board on a counterclaim on 23 June 2000. The claimants' appeal against that judgment was dismissed on 23 October 2001. The claimants sought permission to re-open the appeal, pursuant to CPR 52.17.

They contended that the Court of Appeal had been misled by an official of the board as to the way the system for claiming clawback was operated and as to the underlying documentation which went to support the original counterclaim. Had the Court of Appeal not been misled, it was argued, the claimants would have been permitted to defend the counterclaim.

The application would be granted.

It had been established that the amounts claimed in the counterclaim, by way of clawback, were excessive and that the judgment below and that of the Court of Appeal had led to an erroneous result. The fact that the Court of Appeal was led to that conclusion was not the fault of the claimants. Only by permitting them to re-open the appeal could justice, after so long, be achieved.

In considering the exceptional circumstances of the instant case and the injustice to the claimants it had to be recalled that over the years a government department had sought to recover sums to which it now appeared it was not entitled. Albeit at the last moment, it had produced a statement which was untruthful and which seriously misled the Court of Appeal. In such circumstances, were the claimants not permitted to re-open the appeal and challenge the counterclaim a serious injustice would result.

That conclusion should not inevitably lead to the re-opening of the appeal. The sensible course was for both parties to meet, with all cards on the table, and for there to be a full analysis of all the available material, preferably before a mediator to establish what, if any, sums were still due from the claimants to the board. That would require a spirit of openness and cooperation which had never been achieved in the past but every effort had, in the interests of everyone, to be made to reach finality.

Alternatively, the claimant may seek leave to appeal to a higher court out of time.

9. The ECJ's judgment in the *Kapferer* case concerned matters of civil law. Do you think that the position of the ECJ (paragraph 24 of the *Kapferer* judgment) is also applicable to the judgments of national courts?

Yes

The Court of Appeal regarded itself as bound by its own earlier decision in relation to the interpretation of Community law, even where there were strong grounds for thinking that the previous decision was wrong: Condé Nast Publications Ltd v Customs and Excise Commisioners [2006] EWCA Civ 976, [2007] 2 CMLR 904

10. What is your interpretation of the above mentioned judgments of the ECJ (*Kühne, i-21 Germany*):

a) the ECJ accepts the principle of procedural autonomy of the Member States; or

b) it means the imposition of an obligation on the Member States to introduce, if necessary, procedural means to ascertain that the principle of full effectiveness of EC law is respected?

(b) It is not clear that the decisions in Kühne and i-21 Germany are consistent. My interpretation of the latter, later, decision, is that a national court is not required to disapply its internal rules of procedure in order to review and reopen a final judicial decision if that decision should later be considered to be contrary to Community law.

11. Does your national law in the discussed field comply with the principles of equivalence and effectiveness, as interpreted by the ECJ (see e.g.: *Case i-21 Germany*, paragraph 57)? Please state your opinion.

Yes:

See Fleming (t/a Bodycraft) (Respondent) v Her Majesty's Revenue and Customs (Appellants) Conde Nast Publications Limited (Respondents) v Her Majesty's Revenue and Customs (Appellants) [2008] UKHL 2, in which the House of Lords held:

> *It is a fundamental principle of the law of the European Union ("EU"), recognised in section 2(1) of the European Communities Act 1972, that if national legislation infringes directly enforceable Community rights, the national court is obliged to disapply the offending provision. The provision is not made void but it must be treated as being without prejudice to the directly*

enforceable Community rights of nationals of any member state of the EECwithout prejudice to the directly enforceable Community rights of nationals of any member state of the EEC.

12. When the case under consideration concerns the revocation of a final administrative decision, is it necessary to interpret your national law in compliance with Community law? Moreover,

a) does such an interpretation have any influence on the scope of discretion of administrative bodies (the problem was discussed in the case *i-21 Germany*)?

b) are there any examples of the interpretation of national law in compliance with EC law to be found in the practice of national courts?

It is necessary for national law to be interpreted in compliance with Community law. That interpretation will affect the scope of the discretion of administrative bodies. Examples of the interpretation of national law in compliance with EC law are R v Secretary of State for Transport, ex p Factortame Ltd (No 2) [1991] 1 AC 603, [1991] 1 All ER 70, HL and, more recently, the Bodycraft case referred to above.

13, Do the provisions of national law prescribe any time limit for submitting a motion to revoke a final administrative decision or reopen the judicial proceedings when the contested decision or the judgment is contrary to Community law? Do you think that the fourth prerequisite for the revocation of final administrative decisions set in the *Kühne* case - that the person concerned files a complaint to a administrative body immediately after becoming aware of the decision of the ECJ - should have general application? (this issue has been raised in the *Kempter* case.)

Any application for judicial review must be made promptly, and in any event within 3 months of the decision challenged, although the Court may extend this time limit. This time limit would apply to an application to revoke an administrative decision on the ground that it has later been found to be contrary to Community law, although the Court might be more lenient in considering an application to extend time in such circumstances. Promptness would also be required in the case of an application to a court to re-open an appeal. Thus the answer to this question is Yes.

14. What is the relationship (if any) under your national law and practice between the procedure for revocation of final administrative decisions and/or

reopening of the court's proceedings analysed above, on the one hand, and the proceedings concerning the state liability for damages in case of the infringement of Community law, on the other hand (cases: C-46/93 and C-48/93 Brasserie, [1996] ECR I-1029 and C-224/01 Köbler, [2003] ECR I-10239)?

Especially:

a) are there any formal links between the two types of proceedings?

b) which national court is empowered to decide on state liability cases (above all,

is it an administrative court)?

c) what are the main factors influencing the choice of the person concerned between the two above mentioned types of proceedings? (e.g.: time limit, costs, burden of proof)?

d) can the two types of proceedings be undertaken concurrently?

Comment: For the purposes of this question it is not necessary to analyse problems of the State liability for breach of EC Law in detail. That issue is only called upon in order to identify possible links with the subject of the Colloquium.

Except where express provision is made by statute, proceedings for the revocation of administrative decisions must be brought in the Administrative Court. However, the Administrative Court is not a tribunal or separate court; it is part of the High Court and it applies ordinary principles of English law. The High Court has power to direct transfer of proceedings between Divisions and specialist courts – e.g. the Chancery Division and Queen's Bench Division of the High Court and the Administrative Court - and claims for damages for infringement of Community law may be joined with judicial review claims. There are no formal links between the two types of proceedings, and they may be started concurrently, but if both proceedings are begun in the High Court, the Court would normally order them to be heard together.

State Liability cases may be considered by courts other than the Administrative Court see e.g. Case 152/84 Marshall v Southampton and South West Hampshire Area Health Authority [1986] QB 401, [1986] 2 All ER 584, ECJ; Marshall v Southampton and South West Hampshire Area Health Authority (No 2) [1994] AC 530n, [1994] 1 All ER 736n, HL.

Time limits for judicial review are more stringent than a private law claim (which is governed by the normal limitation period of 6 years). The discretionary

nature of judicial review is also a factor. In addition, a claimant in judicial review proceedings must obtain the permission of the Court for the case to proceed to a full hearing, and permission will only be granted if the claim is arguable, i.e. it has a real prospect of succeeding. However, the process of judicial review is less formalised and is intended to provide a speedy remedy. In particular an indication of the strength of the case may be given by the judged considering whether or not to grant permission to make the application (a consideration of the arguments on paper on the basis of written grounds and response submitted by the parties).

15. Please provide any other information concerning national law and its application (above all, the examples of relevant national administrative decisions or court's judgments) which could in your opinion be interesting for the discussed subject matter and it was not covered by the questionnaire

The impact of the The Tribunals, Courts and Enforcement Act 2007 may be a useful topic for discussion

The Tribunals, Courts and Enforcement Act 2007 (the 2007 Act) received Royal Assent on 19 July 2007. It contains provisions for a new, judicial and legal framework to complement the common administrative arrangements of the Tribunals Service, including:

• the creation of two new tribunals, the First-tier Tribunal and the Upper Tribunal, into which most existing tribunal jurisdictions will be transferred;

• permitting the flexible deployment of Judges and Members across jurisdictions and the creation of judicial 'chambers' each with responsibility for a range of related jurisdictions;

• establishing a consistent approach to onward appeals.

The Tribunals will have power to review their decisions (sections. 9 and 10).