



VISOKI UPRAVNI SUD REPUBLIKE HRVATSKE

HIGH ADMINISTRATIVE COURT OF THE REPUBLIC OF CROATIA

## **MECHANISMS OF COUNTERACTING CONFLICTING RULINGS FROM DIFFERENT DOMESTIC COURTS AND FROM THE CJEU AND ECtHR**

The focus of the Finnish - Swedish presidency of the ACA 2023 - 2025 will be on the vertical dialogue between the Supreme administrative jurisdictions, the Courts of the European Union and the Council of Europe in its procedural dimension. Within this framework, the seminar organized by ACA and the High Administrative Court of the Republic of Croatia, which will be held in February 2024 in Zagreb, will feature the topic of existing mechanisms of counteracting conflicting rulings from different courts at the European and domestic level. Considering the jurisdiction of the courts - members of the ACA, the submitted questionnaire refers to administrative disputes.

The questionnaire contains questions about observing and studying the case law of the Court of Justice of the EU (hereinafter: CJEU) and the European Court of Human Rights (hereinafter: ECtHR). Questions related to the implementation of the decisions of the CJEU, its principled positions, are also raised, as well as the possibilities of counteracting conflicting final rulings from domestic courts and the CJEU.

In relation to the ECtHR, the issues primarily relate to the status and application of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: Convention) in the legal order of a particular country. Furthermore, the questions are related to the procedure in the specific administrative dispute in which the ECtHR ruling was made, but also to the application of the positions expressed in other cases, that is, to the possibility of counteracting the inconsistency of final rulings from domestic courts with the case law of the ECtHR. Questions were also raised about the status of Protocol No. 16 to the Convention and the possible role of advisory opinions in preventing conflicts between the case law of domestic courts and the case law of the ECtHR.

Further questions deal with the relationship of domestic courts and the domestic Constitutional Court (if there is any), as well as the harmonization of the case law of domestic courts with the case law of the Constitutional Court.

Finally, attention is paid to mutual dialogue between the domestic supreme courts and the possibility of counteracting conflicting case law of these courts.



## I CJEU

### **1. How is the case law of the CJEU studied and observed at your Court? Do you have, e.g., a department for this purpose?**

The UK Supreme Court (the UKSC) does not have a particular department for monitoring the case law of the CJEU. Instead, as appropriate, the UKSC will consider relevant CJEU case law as it pertains to particular cases being heard by the UKSC. The UKSC will consider relevant authorities (including CJEU case law) brought to its attention by parties appearing before it and of its own motion.

#### **1.1. If the answer to the previous question is affirmative, how many people are employed in that Department and what education have they completed? What is the role of the Department (e.g., advisory)?**

See above.

### **2. Is there a possibility of repealing a final ruling made in an administrative dispute if the CJEU adopts a ruling in another case indicating that an earlier final ruling of a domestic court is erroneous? If there is such a procedure, in what formation (number of judges) does the administrative court adopt its decisions?**

#### General rule

Subject to appeal and to being amended or set aside, a court judgment is conclusive as between the parties. As such, parties cannot repeal an earlier ruling of a court on the basis of a subsequent decision of the CJEU. The principle of finality of litigation is of fundamental public importance (see *AIC Ltd v FAAN* [2022] UKSC 16).

#### Appeals

If a case is decided by a lower court and is then appealed to the UKSC, and in the intervening period the CJEU hands down a judgment relevant to the appeal, that judgment may be considered by the UKSC when ruling on that appeal.

However, where the UKSC overturns the decision of a lower court, that affects only the outcome of the dispute being appealed. It does not permit a person who was a party to now concluded litigation in another matter to re-open the final judgment in their concluded case (subject to a limited exception regarding issue estoppel).

#### Set aside of judgment

Exceptionally, a final judgment may also be set aside for another specific reason. For example, a party may apply to set aside a judgment because one party to the claim has committed fraud either through providing false evidence or not disclosing relevant evidence (*Jonesco v Beard* [1930] AC 289 (HL)). If a party were to succeed in setting aside a final judgment, a court would re-hear the case. In doing so, it would consider the current legal authorities applicable at the time of the re-hearing, including any CJEU



decision which may have been handed down in the intervening period. A final judgment cannot, however, be set aside solely because the judgment conflicts with a later CJEU decision.

### Issue estoppel

Typically, a party is prohibited from re-litigating an issue that has previously been litigated and determined between the same parties (save on appeal).

However, in exceptional circumstances, a party may be permitted to re-litigate the same point in a new claim where there is a subsequent change in the law (*Arnold v National Westminster Bank* [1991] 3 All ER; *Barber v Staffordshire County Council* [1996] 2 All ER). If a party does re-litigate such a point, the outcome of that second claim does not affect the outcome of its previous claim which is the subject of a final judgment; it affects only the new claim. For example, in *Arnold v National Westminster Bank*, a tenant challenged the outcome of a review of the rent payable under their lease, which took place periodically. In the first instance, the High Court found against the tenant. Subsequently, the law changed. Therefore, when the second review took place, the tenants again challenged the outcome of the review. The courts allowed the tenants to bring this claim on the basis that the law had changed. It did not, however, change the outcome of the first rent review, which was still valid as between the landlord and the tenant.

We are not aware of any such examples of successful re-litigation in relation to a subsequent CJEU ruling, but this exception would in principle also apply in such circumstances.

### The effect of CJEU case law in the UK

Following the UK's exit from the EU, decisions of the CJEU are not automatically binding on the UK courts.

Under section 6 of the European Union (Withdrawal) Act 2018, only judgments rendered by the CJEU on or before 11pm on 31 December 2020 are binding on UK courts. Any CJEU judgments handed down on matters referred from UK courts before 31 December 2020 are also binding on UK courts. CJEU judgments handed down after 31 December 2020 are not binding on UK courts.

However, the UKSC (and the Courts of Appeal throughout the UK) has the power to depart from any CJEU case law, even if handed down before 31 December 2020. When departing from CJEU case law, a court will apply the same test as the UKSC would apply in deciding whether to depart from its own case law i.e., where it is right to do so (section 6(5) EU(W)A 2018; see for example *Warner v TuneIn* [2021] EWCA Civ 441).

Even if not strictly binding, UK courts are free to have regard to CJEU case law, including decisions handed down after 31 December 2020, so far as they are relevant to the matter before the court (section 6 EU(W)A 2018). For example, in *Tower Bridge*



*GP Ltd v HMRC* [2022] EWCA Civ 998, the Court of Appeal of England and Wales had regard to a post-31 December 2020 CJEU decision in C-154/20 *Kemwater ProChemie* when interpreting UK VAT legislation that had implemented the requirements of the EU Principal VAT Directive.

## Precedent

In common law jurisdictions like the UK, the courts are bound by the doctrine of stare decisis. In other words, courts are generally bound to follow previous decisions.

However, the UKSC is able to depart from its own previous decisions (*Austin (FC) v Mayor and Burgesses of the London Borough of Southwark* [2010] UKSC 28, paragraph 25). The UKSC will only do so in very limited circumstances where it is right to do so (House of Lords, practice statement, 26 July 1966, which continues to apply in the UKSC: *Knauer v Ministry of Justice* [2016] UKSC 9). The Court will only do so sparingly, and will not do so where it merely considers that the earlier decision is wrong (*Geelong Harbor Trust v Gibbs* [1974] UKPC 2). The earlier decision must, for example, be out of keeping with some broad consideration of justice, contemporary social conditions, or modern perceptions of public policy (*Herrington v BRB* [1972] AC 877). This may include circumstances in which an earlier decision conflicts with a later decision of the CJEU, but (as the UK has now left the EU) not automatically so.

Importantly, however, if the UKSC does decide not to follow its own previous decision, this does not change the outcome of the final judgment in that case. The parties to that case remain bound by that judgment and cannot seek to re-open it or re-litigate the same matters in a new claim (as per the principle of res judicata). It also does not affect the outcome of concluded litigation between parties where the UKSC's decision (which is no longer to be followed) has been relied upon by the adjudicating court. The UKSC's decision to depart from its own previous judgment affects only prospective litigation.

When a party applies for permission to appeal to the UKSC, they are asked to specify whether they are asking the UKSC to depart from one of its own decisions or one made by the House of Lords (the UKSC's predecessor) (UK Supreme Court, practice direction, 3.1.3). If permission to appeal is granted for such a case, the UKSC will sit in a larger formation (normally seven) than its typical panel of five justices..

**2.1. Are the parties authorized to initiate the repealing of a final ruling in the aforementioned case? Apart from the parties, is any other body (authority etc.) involved in such a procedure? Is there a deadline for submitting such a request?**

Parties cannot re-open concluded litigation save in the circumstances described above.

**2.2. Is the administrative court authorized to react *ex officio* in the aforementioned case? Is there a prescribed deadline for such action?**

There is no possibility for the UKSC *ex officio* to repeal a final ruling because it is contrary to a later decision of the CJEU. The UKSC may only rule on cases which



parties choose (with the UKSC's permission) to litigate before it. If, when ruling on such a case, the UKSC considers that it is necessary to depart from its own previous decision (for example, where it conflicts with a later decision of the CJEU), it may do so of its own motion (even where it has not been raised by one of the parties to the case).

**2.3. In the case of conflict between a domestic court decision and a newer CJEU judgment, what kind of procedure is adopted for establishing that the earlier final ruling is not in accordance with the position of the CJEU? How are the positions of parties collected in such a procedure?**

Parties cannot re-open concluded litigation save in the circumstances described above.

If a decision of the lower court is appealed, either to an appeals court in one of the three jurisdictions in the UK or the UKSC, the question of whether a later CJEU decision conflicts with previous domestic decisions is one which would be considered by the court seised of the matter.

In any such appeal, the parties can present their positions (including as regards any new CJEU case law) via written and oral pleadings.

**2.4 Is a legal remedy permitted against such a ruling?**

As noted, parties who have received a judgment at first instance may appeal that judgment. The route of appeal depends upon the nature of that judgment and the jurisdiction within the UK in which the dispute has been heard. For example, in England and Wales, an administrative dispute will be typically be heard first by the High Court of England and Wales. It may then be appealed (with the relevant court's permission) to the Court of Appeal of England and Wales, and then to the UKSC.

**2.5. If the aforementioned procedure exists, in approximately how many or what kinds of administrative disputes in the period 2012 - 2022 was the possibility of changing a final ruling that is not in accordance with the later position of the CJEU used?**

As noted above, it is not possible to re-open an earlier ruling on the basis that it conflicts with a later CJEU decision. There are, therefore, no figures in this regard.

**3. Has the legislation been changed due to observed conflicts between the case law of domestic courts and the case law of the CJEU? In the affirmative, please provide an example!**

Section 3 of the European Communities Act 1972, which has now been repealed following the UK's exit from the EU, made the judgments of the CJEU binding on all UK courts. As such, prior to 31 December 2020, any domestic court addressing matters of EU law, including where there was a domestic court decision which conflicted with CJEU case law, was obliged under section 3 to follow the case law of the CJEU.



As that Act has now been repealed, the position on the relevance of EU law (including CJEU judgments) is set out in the answer to question 2.1 above.

We have no other information regarding legislation that may have been enacted by the UK Parliament (or the devolved UK authorities) to resolve a conflict between domestic law and that of the EU, including judgments of the CJEU.



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## II ECtHR

### 1. How is the case law of the ECtHR studied and observed at your Court? Do you have, e.g., a department for this purpose?

The UKSC does not have a particular department for monitoring the case law of the ECtHR. Instead, as appropriate, the UKSC will consider relevant ECtHR case law as it pertains to particular cases being heard by the UKSC. The UKSC will consider relevant authorities (including ECtHR case law) brought to its attention by parties appearing before it and of its own motion.

#### 1.1. If the answer to the previous question is affirmative, how many people are employed in that Department and what education have they completed? What is the role of the Department (e.g., advisory)?

Please see answer to question 1 above.

### 2. What is the hierarchical status of the Convention in the legal order of your member state?

Section 1(2) of the Human Rights Act (1998) (the HRA) incorporates the rights set out in the Convention into domestic UK law which therefore form part of the internal legal order.

In accordance with section 3 of the HRA, all UK courts, including the UKSC, have a duty to interpret legislation so as that it is compatible with the Convention, so far as it is possible to do so. If it is not possible to interpret legislation compatibly with the Convention, the courts can issue a "declaration of incompatibility" under section 4 of the HRA which signals to the UK Parliament that the law should be changed to make it Convention-compliant. No UK court, including the UKSC, has the power to "strike down" legislation if it is incompatible with the Convention. In practice, there have been relatively few declarations of incompatibility and most are remedied by primary legislation or remedial orders made in the form of delegated legislation.

Section 6 of the HRA requires public authorities to act in a way which is compatible with Convention rights unless primary legislation requires them to act otherwise. If a public authority is found to have breached a Convention right, a UK court has the discretion (as in other civil cases) to grant relief by way of judicial review. UK courts can award damages in such cases.

Under section 2(1)(a) of the HRA, UK courts, including the UKSC, are only required to "take account" of decisions of the ECtHR. They can therefore decline to follow a decision of the ECtHR, particularly if they consider that the ECtHR has not sufficiently appreciated or accommodated particular aspects of the UK domestic constitutional position. For example, the first time the UKSC declined to follow a decision of the ECtHR was in *R v Horncastle* [2009] UKSC 14, a case relating to the issue of when hearsay evidence could be used in criminal proceedings. The UKSC pointed to the lack of clarity and practical difficulties in the ECtHR's decision in *Al-Khawaja and*



*Tahery v UK* (2009) 49 EHRR 1. The UKSC noted that the case represented one of the “rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course.” It is worth emphasising that such examples are rare, and the UKSC enjoys a very fruitful relationship and dialogue with the ECtHR.

### **2.1. How does this status affect the application of the Convention in administrative disputes (is the Convention applied directly)?**

Please see answer to question 2 above. The UK courts apply the Convention directly in domestic proceedings, including in respect of administrative disputes.

### **2.2. Is there a specific body (court) that controls the application of the Convention in administrative disputes?**

All UK courts, including the UKSC, are tasked with deciding whether public bodies have acted compatibly with the Convention. In England and Wales, for example, an administrative dispute will be typically be heard first by the High Court. It may then be appealed (with the relevant court's permission) to the Court of Appeal of England and Wales, and then to the UKSC. Each of these courts is required to apply the Convention to the extent applicable to the dispute, with the UKSC being the highest domestic authority on its interpretation and application.

### **3. According to the domestic law (or case law), is a violation of Convention or a deviation from the ECtHR case law, determined by a domestic court (e.g. court of appeal), a possible reason for repealing the ruling of a lower court that committed the violation? If the answer is affirmative, which legal remedies or instruments are available and what is the procedure like?**

If a case is appealed to an appeal court, including to the UKSC, the decision of the lower court may be overturned by the appeal court for reasons that include a determination that the lower court violated the Convention or deviated from the case law of the ECtHR. In so doing, the UKSC may also decide to overrule previous case law that it considers to be in conflict with its judgment.

However, where the appeal court overturns the decision of a lower court, that affects only the outcome of the dispute being appealed. It does not permit a person who was a party to now concluded litigation in another matter to re-open the final judgment in their concluded case. Similarly, where the UKSC has decided to overrule previous case law, the parties to that case remain bound by that judgment and cannot seek to re-open it or re-litigate the same matters in a new claim (as per the principle of *res judicata*). It also does not affect the outcome of concluded litigation between parties where the decision in the previous case law (which is no longer to be followed) has been relied upon by the adjudicating court. The UKSC's decision to depart from





previous case law affects only prospective litigation. Please refer to the answer at question 2 of the CJEU section of this questionnaire for a full discussion.

**4. What are the procedural possibilities of a party whose administrative dispute has been concluded, and in relation to which the ECtHR found that a violation of the Convention has been committed?**

The decision of the ECtHR will be binding on the UK who will be required to implement individual measures for the benefit of the claimant to remedy past violations and/or implement general measures to prevent violations going forwards. The responsibility for this lies with the UK government, not the courts.

In accordance with the principles explained above, the parties to the dispute cannot re-open litigation which has become final.

**4.1. Must the party react within a prescribed deadline?**

Please see answer to question 4 above.

**4.2. If the party has not submitted a request to change the final ruling (that is, for example, to renew the dispute), is the administrative court authorized to react *ex officio*?**

There is no possibility for the UKSC *ex officio* to repeal a final ruling because it is contrary to a decision of the ECtHR. The UKSC may only rule on cases which parties choose (with the UKSC's permission) to litigate before it. If, when ruling on such a case, the UKSC considers that it is necessary to depart from a previous decision, including its own previous decision (for example, where it conflicts with a later decision of the ECtHR), it may do so even where it has not been raised by one of the parties to the case. In any event, as noted above the UKSC is only required to "take account" of decisions of the ECtHR, albeit it is only in rare instances that the UKSC will decline to follow the ECtHR's jurisprudence.

**4.3. In what formation (number of judges) does the administrative court adopt its decisions on amending the final ruling?**

See answer to question 4 above.

**4.4. In the case of conflict between a domestic court decision and a newer ECtHR judgment, what kind of procedure is adopted for establishing that the earlier final ruling is not in accordance with the position of the ECtHR? Is there a special procedure adopted establishing that the earlier final ruling is not in accordance with the position of the ECtHR? Are the parties from other administrative disputes authorized to request the change of their final rulings based on the decision of the ECtHR made in another case? Is there a deadline for submitting such a request? How are the positions of parties collected in such a procedure? Is a legal remedy permitted against a ruling of the domestic court deciding the case?**



As mentioned above, UK courts, including the UKSC are only required to "take account" of decisions of the ECtHR. They can therefore decline to follow a decision of the ECtHR, particularly if they consider that the ECtHR has not sufficiently appreciated or accommodated particular aspects of the UK domestic constitutional position.

Moreover, parties to the dispute cannot renew the litigation which has become final. Please refer to the answer at question 2 of the CJEU section of this questionnaire for a full discussion.

However, when the opportunity arises in a future case, the UKSC may (but is not obliged to) overrule previous case law that it considers to be in conflict with a judgment of the ECtHR. Save to the extent set out above, in most cases the UKSC will treat the ECtHR's judgment as the authoritative determination of the interpretation of the Convention and will not apply domestic case law that conflicts with it.

**4.5. In approximately how many or what kinds of administrative disputes in the period 2012 - 2022 was a request for changing the final ruling submitted due to it being conflicting with the position of the ECtHR?**

As noted above, it is not possible to re-open an earlier ruling on the basis that it conflicts with a later ECtHR decision. There are, therefore, no figures in this regard.

**5. In what types of administrative disputes are violations of Convention rights most often established? Can you provide a reason therefor?**

The Convention right most commonly found to have been violated in UK domestic cases (including administrative disputes) is the right to a fair trial and the length of proceedings under Article 6 of the Convention. This corresponds with the Convention right most commonly found to have been violated in the ECtHR's case law with respect to the Council of Europe member States as a whole.

**6. Is there a special body in your country responsible for the execution of ECtHR rulings (apart from the Government as regards just satisfaction afforded in judgments by the ECtHR) and what is its name? If there is such body, what is its composition and its powers (which instruments does it apply to prevent case law of domestic courts from conflicting with the case law of the ECtHR)?**

There is no such special body.

**7. Has the legislation been changed due to observed conflicts between the case law of domestic courts and the case law of the ECtHR? Please, provide an example!**

As mentioned in question 2 above, if it is not possible to interpret legislation compatibly with the Convention (and associated ECtHR case law), the courts can issue a "declaration of incompatibility" which signals to the UK Parliament that the law should be changed to make it Convention-compliant. In so doing, any previous domestic law



decisions that upheld the compatibility of such legislation with the Convention would be considered to be in conflict with the Convention and associated ECtHR case law. No UK court, including the UKSC, has the power to "strike down" legislation in such circumstances. While the UK Parliament may refuse to change the law, to date it has invariably chosen to make the required change.

Furthermore, when the ECtHR finds a violation of the Convention by the UK, the UK may be required to amend existing legislation or to enact new legislation to remedy the violation. This includes where the judgment of the ECtHR conflicts with the approach taken by the UKSC. However, conflicts between the UKSC and the ECtHR are rare, and where such disagreements arise, the position is usually remedied by the UKSC overruling the relevant domestic court decision. For example, following the decision of the ECtHR in *Al-Skeini v United Kingdom* (2011) 53 EHRR 589, the UKSC in *Smith v Ministry of Defence* [2013] UKSC 41 decided to overturn its earlier judgment on the issue in *R (Catherine Smith) v MoD* [2011] 1 AC 1, holding unanimously that soldiers were under the personal jurisdiction of the UK at all times when serving out of the UK by virtue of the fact that the UK exercised full authority and control over them.

We are not aware of any instances in which the UK Parliament has amended legislation of its own volition in circumstances of an observed conflict between UK case law and ECtHR case law.

## **8. Has your country ratified Protocol No. 16 to the Convention (which provides for the possibility of seeking advisory opinions)?**

The UK has not ratified (or signed) Protocol No. 16 to the Convention.

### **8.1. Do you believe that an advisory opinion could prevent the adoption of a ruling by a domestic court that would not be in accordance with ECtHR case law? Explain your answer.**

As mentioned, section 2(1)(a) of the HRA requires the UK courts, including the UKSC, to "take account" of decisions of the ECtHR. This provision also expressly includes any "advisory opinion of the European Court of Human Rights". A UK court could therefore rely on an advisory opinion to justify that its ruling is Convention-compliant. On the other hand, there is no mechanism in the UK to prevent a domestic court from adopting a ruling that is not in accordance with the ECtHR's case law.

If the UK were to ratify Protocol No. 16, it is envisaged that where the UKSC sought an advisory opinion from the ECtHR it would follow it save in exceptional circumstances.

### **8.2. Do you have practical experience with seeking an advisory opinion provided for in Protocol No. 16 to the Convention? Provide an example.**

As mentioned above, the Protocol has not yet been ratified by the UK so we do not have any practical experience with seeking an advisory opinion.



### III CONSTITUTIONAL COURT

#### 1. Is there a Constitutional Court in your country?

There is no separate court fulfilling the role of a constitutional court in the UK. To the extent that litigation before the UK courts addresses constitutional questions, these are addressed by the UK courts. The UKSC is the final court of appeal in the UK in respect of all such cases, save for criminal cases in Scotland where the High Court of Judiciary is the final court of appeal.

#### 1.2. If the answer to the question is affirmative, what are the powers of the Constitutional Court?

N/A.

#### 2. Does the Supreme administrative jurisdiction have powers similar to those of the Constitutional Court? Please describe the competence/jurisdiction of these two jurisdictions!

N/A.

#### 3. In the event that the Supreme administrative jurisdiction deems that a provision of the law to be applied in a specific case is unconstitutional, must it initiate appropriate proceedings before the Constitutional Court, or is it authorized to interpret the contested provision taking the Constitution into consideration?

N/A.

#### 4. What are the possibilities of the parties in an administrative dispute to request the repeal of the final rulings that were made on the basis of a regulation that the Constitutional Court found unconstitutional (in the process of abstract review of constitutionality)? Is there a prescribed deadline for such action?

N/A.

#### 5. What are the possibilities of the parties in an administrative dispute to request the repeal of the final rulings that are not in accordance with the ruling of the Constitutional Court made in the constitutional action of another person? Is there a prescribed deadline for such action?

N/A.



#### **IV RELATIONSHIP OF THE DOMESTIC SUPREME ADMINISTRATIVE JURISDICTION WITH ANOTHER DOMESTIC SUPREME COURT**

**1. Is there another supreme jurisdiction in your system?**

The UKSC is the final court of appeal in the UK in respect of all cases, save for criminal cases in Scotland where the High Court of Judiciary is the final court of appeal.

**2. Please describe the competence/jurisdiction of the two supreme jurisdictions.**

See above.

**3. In general, how is the conflict of different rulings of domestic courts counteracted in your legal system? How is a possible conflict of positions between the (two supreme) jurisdictions counteracted?**

N/A.

**4. In your opinion, is conflict prevention possible?**

N/A.

