Constitutional Court of Korea

3rdCongress of the World Conference on Constitutional Justice
'Constitutional Justice and Social Integration'
28 September – 1 October 2014
Seoul, Republic of Korea

SUPREME ADMINISTRATIVE COURT
OF FINLAND

Justice Matti Pellonpää

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Questionnaire

A. Court description

I. Basic texts

Basic rules on the Finnish judiciary are contained in Chapter 9 of the Constitution of Finland which entered into force in 2000. According to Section 99(1) of the Constitution:

> "Justice in civil, commercial and criminal matters is in the final instance administered by the Supreme Court. Justice in Administrative matters is in the final instance administered by the Supreme Administrative Court."

Thus there are two highest courts on the same hierarchical level. There is no separate constitutional court in Finland.

II. Composition, procedure and organisation

The work of the Supreme Administrative Court is headed by its President. In addition, there are 20 other judges (also called "justices") who work in three Sections. The basic decision-making composition is five judges, but in certain cases three judges is enough. In particularly important cases the decision may be given by an enhanced chamber consisting of all the members of the relevant section (normally seven) or, exceptionally, by the Plenary Court. However, the latter normally only deals with issues of an administrative nature.

The procedure is mainly written but occasionally an oral hearing or an on-site inspection is held. Oral proceedings are more common in lower, regional, administrative courts of which there are, as from 1 April 2014, six in the country (earlier eight). Cases in the Supreme Administrative Court are prepared by a referendary who participates in the deliberations, signs the decision and can even attach a separate opinion to it (althoug his or her vote does not count in the calculation of the majority).

III. Jurisdiction/Powers

The Supreme Administrative Court has jurisdiction in the field of administrative law. It deals as the last instance with appeals against decisions of administrative authorities and other holders of public power (including municipal authorities). Normally the appeal is first made to the regional administrative court. The jurisdiction is wide, comprising areas such as tax law, social law, aliens law, patent and trade mark law, competition law, including public procurement, environmental law, building and planning law, law relating to agricultural subsidies etc. In many questions, notably in the fields of aliens law and taxation law, the Court deals with the merits of the appeal only provided it has first granted the requesting party a leave to appeal. The current legislative tendency is to widen the scope of the leave to appeal requirement.

IV: Nature and effects of judgments

The Court decides on the legality of administrative decisions. However, when deciding on the legality the Court has wide powers to examine also questions of fact and the exercise of discretion by the authorities. In most cases the Court has power to annul the decision attacked or change it. In certain cases, typically when it concerns so-called municipal appeals (i.e. appeals against the authorities of municipalities which enjoy certain autonomy), the appeal is of a cassatory nature meaning that the Court can either uphold the decision under appeal or quash it but, in principle, not change it.

B. Social integration

1. Challenges of social integration in a globalised world

1.1. What challenges has your Court encountered in the past, for example in the field of asylum law, taxation law or social security law?

The biggest challenge of recent years in the field of asylum law has been the increasing number of cases. Aliens law cases, of which asylum law forms an important part, now make almost one fourth of the caseload. About 1000 of the totality of the some 4300 cases decided in 2013 (two years earlier the rough numbers were 800/4000 and in 2012 900/4000) belonged to the category of aliens law.

High number of cases has been a characteristic feature of our case-law in taxation cases for long. One of the main challenges in the past few years in this field has been what may be called the Europeanisation of Finnish law. Especially challenges brought about by the EU law have grown in importance. More often than not the relevant cases concern enterprises (i.e. juridical persons), but there are also several examples of EU influences affecting natural persons. The case KHO (this abbreviation stands for the Supreme Administrative Court) 2007:34, in which the decision was preceded by a preliminary ruling given by the ECJ (C-520/04, *Turpeinen*), concerned discrimination in connection with income taxation of retired persons living abroad as compared to those residing in Finland. Also tax treatment of importation of second-hand cars by private individuals from other EU member states has been the subject of several decisions.

In the field of social law one of the main challenges has been provided by what may be called "privatization" of social care, i.e. solutions whereby public authorities, in order to fulfil their duties imposed by law, buy services from private enterprises. Issues arise as regards the supervision of the service providers, and there has been increasing tension between the need for budgetary restraints and growing need for services caused by, for example, demographic developments. Consequently, care of elderly persons has been in the focus of some notable cases, such as KHO 2013:73, in which at issue were conditions to be attached to a license to run a home for elderly persons and the role of soft-law type of recommendations in that context. The position of elderly persons has been at issue not only in the field of social security law in the ordinary sense. Also in aliens law the question of elderly persons has arisen especially when such persons from other countries, such as Russia, have sought to be allowed to settle down in Finland in order to join their children legally residing in the country.

1.2. How were issues of social integration or conflict transformed into legal issues?

In a case (decision of 1 October 2013, number 3120) belonging to the category referred to at the end of the previous section, an elderly person claimed right to join her family members residing in Finland invoking, notably, various provisions and principles relating to fundamental rights and human rights. She

clearly did not fulfil the specific rules on the right to reside in Finland on the basis of family reunification or on other gounds. Even so, she could benefit from certain supplementary provisions of the law making it possible to take into account equitable considerations. Thus there is a provision according to which a residence permit can be granted on specific grounds relating to the individual circumstances of the person in question, although he or she would not fulfill the more specific conditions provided by law. The Supreme Administative Court decided in favour of the appellant after a 3-2 vote overruling the negative decision of the administration (and of the lower court). In a way a confllict between different approaches to social integration were transformed into a question of the interpretation of a provision which clearly was susceptible of various interpretations.

To take a second example, there is legislation on handicapped persons which grants these persons, inter alia, a subjective right to certain free transportation services (typically a certain number of free taxi drives during a certain period). Being old is as such not a "handicap" for the purposes of the law, but there has been an increasing number of cases involving the drawing of a border line between those who fall under the sphere of application of the law and those whose vulnerable position is rather due to the aging. One may say that the traditional notion of a handicapped person has been challenged in order to make it possible for a broader group of vulnerable persons to be included within the sphere of application of the benefits in question.

1.3. Is there a trend towards an increase in cases on legal issues relating to social integration? If so, what were the dominant questions before your Court in the past and what are they at present?

Reference can be made to the examples mentioned under 1.2. Yes, there seems to be a tendency towards such an increase. Legislation contains not only strict rules defining the conditions for obtaining social benefits but often additional, residual, rules necessitating the weighing of competing private and public interests in a way which formerly was rather regarded as something belonging to the competence of the legislator. The enhanced role of constitutionally guaranteed fundamental rights has also contributed to the "judicialization" of questions relating to social integration.

2. International standards for social integration

2.1. What are the international influences on the Constitution regarding issues of social integration/social issues?

The catalogue of fundamental rights of the Finnish Constitution was reformed and modernized in 1995. This catalogue was included with only minor changes into the new Constitution of 2000. Unlike the original Constitutional document of 1919 (called "Form of Government"), the relevant chapter (ch. II) of the Constitution of 2000 contains, in addition to traditional civil liberties, a rather comprehensive list of economic, cultural and social rights. In this respect the Constitution was influenced by international treaties and Conventions on such rights. In addition, one may say that the Finnish constitution not only follows international examples but in certain respects itself gives an example. Thus the provision on everyone's responsibility for the environment (Section 20, sub-section 1 of the Constitution: "Nature and its biodiversity, the environment and the national heritage are the responsibility of everyone.") was no doubt one of the first of its kind in a constitutional document.

2.2. Does your Court apply specific provisions on social integration that have an international source or background?

Yes, for example in the case 2013:73 mentioned above the Supreme Administative Court took, among other things, into account the constitutionally guaranteed right to private life when dealing with the question concerning the space which each inmate of a home for elderly persons should be entitled to. This constitutional provision and many others have been been inspired by corresponding provisions in international human rights treaties binding on Finland.

2.3. Does your Court directly apply international instruments in the field of social integration?

In so far as the material contents of international instruments have been transformed into specific domestic laws it may not be necessary to apply the underlying international source explicitly. But all depends on the context. Thus in the aliens law case of October 2013 referred to above certain provisions of the European Convention on Human Rights were taken into account as standards guiding in the interpretation of the Aliens Act.

2.4. Does your Court implicitly take account of international instruments or expressly refer to them in the application of constitution law?

Reference can be made to the previous comments (2.3.). All depends on the circumstances and the context. If the interpretation of the constitutional provision is clear-cut, it may not need support of international instruments. However, if the constitutional provision is susceptible of several interpretations and if an international instrument has decisively or in an important manner influenced the interpretation of the provision, this is mentioned. Thus, in the case of KHO 2014:1 which concerned the registration of the Finnish Cannabis association (Suomen kannabisyhdistys), the Court concluded that when the Act on registration of associations was interpreted in a fundamental rights friendly manner and in light of the practice of the European Court of Human Rights, it was not justified to refuse to register the association.

2.5. Has your Court ever encountered conflicts between the standards applicable on the national and on the international level? If so, how were these conflicts solved?

No real conflicts. If, for example, a judgement of the European Court of Human Rights discloses a conflict between the Convention and Finnish law, the national actors (courts, the legislator) normally change their position in line with the international interpretation. Once it happened (KHO 2012:75), however, that in our Court's view the European Court had in a related case had an erroneous understanding of Finnish law (the Mental Health Act). In such circumstances it may be difficult to follow without reservations the interpretation of the international body.

3. Constitutional instruments enhancing/dealing with/for social integration

3.1. What kind of constitutional law does your Court apply in cases of social integration – e.g. fundamental rights, principles of the Constitution ("social state"), "objective law", Staatszielbestimmungen,...?

Our Court applies fundamental rights as defined in the Constitution. We would not easily, if ever, refer to Staatszielbestimmungen or the principle of social state or the like in the concrete interpretation of constitutional provisions. Such principles may underlie the legislation in question, and they may influence atti-

tudes of individual judges (our decision-making process is of a collective nature), but they do not directly determine the outcome of a concrete case.

On the other hand, as revealed by some of the previous comments, fundamental rights as guaranteed in the Constitution may be applied both directly in the sense of determining the outcome of the case and, more indirectly, as a guidance for the interpretation of laws. Recommendations of a soft law nature and their role in the interpretation of social law arose in the above-mentioned case of KHO 2013:73. At issue were especially certain recommendations issued by administrative authorities as regards the space which each inmate of a home for elderly persons should enjoy.

3.2. In case where there is access of individuals to the Constitutional Court: to what extent can the various types of constitutional provisions be invoked by individuals?

In principle, all the constitutional provisions ganting individual rights can always be invoked by individuals. Prima facie unfounded references may trigger a very general reply only, whereas more serious arguments based on constitutionally guaranteed basic rights may give rise to a detailed reasoning by the Court. It is easier for an individual to invoke provisions formulated as granting rights to individuals, as distinct from provisions rather addressed to the legislator, but the border line is tenuous.

3.3. Does your Court have direct competence to deal with social groups in conflict (possibly mediated by individuals as claimants/applicants)?

The principle in Finnish administrative law and procedure is that only persons directly affected by a decision or, in the field of environmental law, largely also those who may be affected, have standing to institute proceedings. Thus there is no actio popularis. However, the legality of many decisions rendered by the authorities of municipalities can be challenged by any member of the municipality regardless of whether he or she is personally affected by the decision. This so-called municipal appeal is tied to stricter conditions than ordinary appeal and it is, in principle, of a purely cassatory nature, i.e. the Court can either uphold or quash the decision but cannot modify it (unlike in many other cases). In a way, the strict requirement of being personally affected has been loosened also in the field of environmental law in so far as certain environmental associations have been granted locus standi as promoters of the public interest. Sometimes social groups may de facto be involved through the mediation of an individual/individuals. In a recent case already mentioned (KHO 2014:1) a non-registered association, the aim of which is to work for the legalization of the personal use of cannabis, could have the refusal of its registration dealt with by our Court after the chairman of the non-registered association, who had sought registration, appealed against the negative decision of the registration authorities. The Court held that there was not any more (unlike in 1994 when different stand had been taken) a pressing social need for denying the registration and therefore quashed the decision of the authority and sent the case back to it for registration.

3.4. How does your Court settle social conflicts, when such cases are brought before it (e.g. by annulling legal provisions or by not applying them when they contradict the principle of equality and non-discrimination)?

We have no power to annul legal provisions. However, according to Section 106 of the Constitution, if in a matter tried by a court of law, "the application of an act would be in evident conflict with the Constitution, the court of law shall give primacy to the provision of the Constitution." This provision does not entitle the court to annul the provision in question but rather makes it incumbent on the court not to apply the provision in the concrete case at issue. The application of Section 106 typically arises in connection with the constitutional provisions on fundamental rights. More often than not, however, fundamental

rights or human rights serve as guidance for the interpretation of ordinary laws which must be interpreted in a fundamental rights/human rights friendly manner, In other words, from among several possible interpretations the Court then chooses the one which is best compatible with fundamental rights and human rights (including the principle of non-discrimination).

3.5. Can your Court act preventively to avoid social conflict, e.g. by providing a specific interpretation which has to be applied by all state bodies?

We have no general competence to act preventively in the sense that we could give binding prelimary rulings on the interpretation of certain legal provisions before a concrete dispute regarding such an interpretation has arisen. In the field of taxation, however, an organ called Central Board of Taxation can issue an advance ruling on the tax consequences of a planned economic transaction. Such rulings are binding, and decisions by the Central Board of Taxation can be appealed to our Court directly, i.e. unlike in most cases with no necessity of appealing first to the regional administrative court, and without need to get a leave to appeal.

The Court can in practice often act preventively also in that a precedent given on an early dispute brought to the Court through the ordinary channels may prevent the problem from reaching larger dimensions, since the authorities normally follow the precedents of the Court in their subsequent activities. Decisions intended to have precedent value are published as so-called Yearbook decisions. Until recently they were literally included in a printed yearbook, which could consist of several volumes. Nowadays they are published only electronically. In 2013 some 200 (a record number) out of the totality of 4300 decisions rendered were published as so-called Yearbook decisions.

3.6. Has your Court ever encountered difficulties in applying these tools?

We have encountered no particular difficulties in applying those tools which, as indicated, are not very far-reaching in the first place.

3.7. Are there limitations in the access to your Court (for example only by State powers), which prevent it from settling social conflicts?

No, any individual affected by an administrative decision in a way defined by the law can bring the case to the Court. There is no situation in which only state powers (or other public authorities) could have access to the Court; quite the contrary, there are many situations in which only the individual(s) or private legal person(s) affected by the decision can initiate proceedings before the court.

Typical examples: Decision KHO 2008:25 provides an example of the application of Section 106 of the Constitution (Primacy of the Constitution). A civil servant's position within the authority was changed by a decision which could not be appealed against, the law explicitly prohibiting right of appeal. The Court held that the individual's position was changed in a way which entitled her to have the legality of the decision reviewed by a court in accordance with Article 21 of the Constitution. The Court gave precedence to the constitutional provision, refrained from applying the provision of the ordinary law excluding the right of appeal and examined the person's grievances on the merits, thus guaranteeing her access to court in accordance with the Constitution and international human rights treaties.

The case KHO 2014:1 (Cannabis Association) is an example of fundamental rights/human rights friendly interpretation. The provision applied by the registration auhority allowing the refusal of registration by reference to "good morals" (or the like) was not in "evident conflict" with the Constitution. Even so, when

construed in light of the constitutionally guaranteed fundamental rights, which in turn were interpreted in light of the case-law of the European Court of Human Rights, the provision in question could be given an interpretation which led to the registration of the association in question.

4. The role of constitutional justice in social integration

4.1. Does your Constitution enable your Court to act effectively in settling or avoiding social conflict?

It is not the task of our Court to settle social conflict but to decide appeals on the basis of law, in other words, to decide whether an administrative act/decision has been legal or not. Indirectly the Court's activity may be conducive to settling a social conflict, if the reasoning of the court makes a decision of the public power more comprehensible and thereby at least somehow acceptable even to the losing party.

4.2. Does your Court de facto act as "social mediator", or/and has such a role been attributed to it?

No such role has been explicitly attributed to our Court. Thus, it is not the task of the Court to try to achieve friendly settlement between the disputing parties but rather to decide the case brought before it on the basis of the applicable law.

4.3. Have there been cases, when social actors, political parties could not find any agreement, they would 'send' the issue to your Court which had to find a 'legal' solution, which normally should have been found in the political arena?

Strictly speaking, there have been no such cases and it is hardly conceivable that such cases could arise. See, however, the following "typical" example ("typical" in inverted commas because the example is, after all, not very typical).

Typical examples are difficult to give for reasons indicated by the answers to questions 4.1.-4.3. A case which may disclose certain features of the kind of situation referred to in question 4.3. can, however, be mentioned. In the decision KHO 2013:90 the issue was the publicity of certain documents related to an arrangement between the Governments of Greece and Finland, which in turn was a part of a complicated EU aid package granted to Greece. The Finnish Minister of Finance and her Greek counterpart signed a document in connection with certain guarantees Finland was given by Greece as a part of the EU operation. The whole issue was politically highly controversial. Among others, the chairperson of the Parliamentary Group of an opposition party, relying on the Finnish legislation on publicity of documents, requested the relevant ministry to grant her access to the above-mentioned document signed by the Ministers and to certain related documents labelled as secret by the Ministry. The latter refused. The Supreme Administrative Court held that the agreement and certain other documents at issue were public and ordered the Ministry to give them to the appellant. She could claim standing before the Court as any citizen willing to have access to such documents could have, but in a way she de facto probably put forward views shared by many other opposition politicians and her own party. It should be mentioned that similarly a number other persons, including journalists,were granted access to the documents in question.