The Court's power to amend the authority's decision on appeal

- The Finnish system and its practice by the Administrative Courts

Introduction

To begin with, appeals under Finnish law need to be separated into two basic categories: the administrative appeal and the municipal appeal. The law providing the competence for the decision-making prescribes which type of appeal a decision is subject to. Typically, decisions taken by governmental authorities, as well as by municipal authorities in matters where discretion is more strictly regulated by lex specialis, are subject to administrative appeal. By contrast, decisions taken by municipalities under the competence provided by their self-governance are subject to municipal appeal, the right to which belongs in addition to parties also to all members of the municipality.

With respect to the topic of this presentation, there is an important distinction between the two types of appeal: the administrative appeal is reformatory, while the municipal appeal is cassatory. Environmental matters are typically subject to administrative appeal, although some of important matters, such as zoning decisions, are instead reviewed on the basis of municipal appeal. To provide some general context, on average less than 10 percent of the appeals lodged with the administrative courts are municipal appeals.

The present-day Administrative Procedure Act of 1996 does not specifically address the powers of the court to amend the appealed decision, but the reformatory nature of the administrative appeal can be observed for example in Section 23 on the form and content of the appeal, according to which the appeal shall indicate the parts of the decision that are challenged and the amendments demanded to it. The historical background of the power to reform decisions lies in the time before the predecessors of the administrative courts, the county administrative courts, were completely separated from the state administration. The county administrative courts instead performed a function in between internal and judicial review, and were thus competent to review both the legality and the expediency of the appealed decision. Indeed, in principle even this dimension of review still remains with the administrative appeal today, but it is more or less a dead letter.

So in theory, the Finnish administrative courts have quite far-reaching powers to reconsider the matter at hand and amend the appealed decision if need be, but in this regard the courts of today exercise considerable self-restraint. It could perhaps be assessed that the instrument has been adapted to the new setting of the independent administrative courts and the more definite division of powers, and is now employed for purposes of process economy or possibly to ensure the effective realisation of subjective rights. Therefore, some matters, in which amendments are typically made, are those where the law leaves the decision-making authority with little or no discretion of its own or where the call for the realisation of the appellant's rights is immediate. Another example is the adjustment of administrative sanctions. However, the principal rule is that amendments are made in situations where the decision would be found unlawful as such, but the amendment saves it from being quashed or returned for reconsideration.

Next, a number of brief case studies will be presented to provide examples of amendments made to decisions in environmental matters:

Case 1: Establishment of a Nature Reserve

An appeal had been lodged by an NGO with the Administrative Court of Turku against a decision taken by the Regional Environment Centre to establish a Nature Reserve on the basis of an old national programme for the protection of bird waters. Inclusion in the programme has empowered the Centre to establish the Reserve on private land and water without the consent of the landowners. However, part of the grounds for the protection was the implementation of special conservation measures under the Birds Directive, since the area of the Reserve was included in the Natura 2000 network as a Special Protection Area (SPA) under said Directive. Among other things, the NGO contested the laid-down protection provisions, which declared it permissible to fell and remove trees. Although the Reserve had been established primarily to protect the bird waters, there were also a number of bird species (esp. Black Woodpecker and Grey-headed Woodpecker, listed in Annex I of the Birds Directive) habiting forests within the site and which were listed as basis for designation of the area as SPA.

The Court found the above-mentioned feature of the protection provisions problematic with regard to ensure the protection of the habitat of the Annex I species. The Court especially noted that the Forest Act is not applied in Nature Reserves and thus felling trees does not even require a forest use declaration. To eliminate the contradiction with the Birds Directive, the Court amended the protection provisions, making it permissible to fell and remove trees *in accordance with a plan separately approved by the Regional Environment Centre*.

Case 2: Permit for a motorcycle course

The municipal board for environmental matters had granted a one-year trial permit for an off-road Enduro motorcycle course. Several permit conditions were listed in the board's decision, and the permit was to be reviewed on the basis of a new application after the trial period. The decision was appealed to the Administrative Court of Helsinki by several persons residing in the vicinity of the planned motorcycle course. They contested the legality of the decision on several grounds, including the unreasonable harm caused to the neighbours in form of noise and the risk posed by the course to the ground water.

The applicant for the permit had presented test-results regarding the noise effects of the course to the municipal board. The Court reviewed these results and found them reliable and sufficient for granting the permit. Because of the trial nature of the permit, however, the Court added a condition to the permit, according to which more detailed noise measurements were to be made in coordination with the municipal authority during the trial period for the purpose of the board's review of the permit. The Court further found that the board had correctly assessed the risk posed to the ground water as being negligible. But because the course was partially located on classified ground water area, the Court amended a permit condition requiring notification in case of oil pollution to include also the requirement of having necessary equipment for the prevention of ground water pollution available at the site. It bears mentioning, that the presenter of the case would have returned the matter to the municipal board for re-handling and reconsideration of the permit conditions.

Case 3: Setting the boundaries for a water beetle habitat

The Regional Environment Centre had taken a decision to set the boundaries of a site hosting *Macroplea pubipennis*, a species of underwater beetle under Strict Protection under national law (and also listed in Annex II of the Habitats Directive). The habitat of the beetle is protected directly by the Nature Conservation Act, but the protection takes effect only after the Centre has set the boundaries of the site.

The decision was appealed to the Administrative Court of Helsinki by land and water owners, who objected to the protection on many points, one being that the boundaries had at some points been set to include also land areas. The Court, after hearing a statement from the Finnish Environment Institute (a governmental research institute), found that there were no biological grounds to include land area in the designated habitat of the water beetle. The Court overturned the decision to the parts that had set boundaries for the habitat up on fast land. Returning this part of the matter to the Environment Centre, the Court stated that the boundaries must be set along the waterside.

Discussion

To conclude, some brief thoughts and considerations are provided for discussion:

- The presented cases include the amending decision of the Finnish administrative courts. What sort of decision would/could your court take in the cases?

- Courts in some countries may not be able to amend decisions, but may be competent to overturn a decision together with detailed guidance or forthright obligations regarding how to re-decide the matter. Especially with regard to the latter, how significant is the contrast to an amendment? Looking especially at Case 3, also the possibility to set aside only part of the appealed decision in principal provides for powers of amendment. Is your court competent to do this?

- Apparently, the trend in many European legal systems is now towards extending the courts' powers in this type of manner. Have you noticed this trend in environmental or other matters, and is it desirable?

Emil Waris
Administrative Court of Turku

Patrik Stenbäck
Administrative Court of Helsinki