

## **The Finnish Report**

by Justice *Mika Seppälä* and Referendary Counsellor *Tuire Taina*, Supreme Administrative Court

### **1) Mandate of the court review techno-scientific matters**

- a) Parties concerned bring all relevant information e.g. expert opinions to support their appeal. The decision-making authority and supervising environmental authorities have right to give an opinion including expert opinions. The court has right, or even a duty, whenever it is necessary, to ask for an expert opinion of authorities and research institutes on its own motion. Judges have right to assess appeals and opinions using their own knowledge and understanding. Expert judges in Vaasa Administrative Court and in the Supreme Administrative Court (SAC) assess the materials in the case file on the basis of their own expertise.
- b) There are no formal restrictions as to the data which can be used in decision-making by the Court (so called free assessment of evidence). All kinds of scientific references are taken into account, but it goes without saying that information shall be evaluated critically. All soft law material and case law and practice from other countries are also taken into consideration when necessary. Normally this kind of data has influence on the reasoning part of the court decision, as background elements.
- c) Courts including the SAC can fully investigate scientific questions and assess if the scientific information referred to is relevant, credible and sufficient. Administrative courts and the Supreme Administrative Court have a reformatory competence e.g. to amend and alter the decision, including permit conditions, or to quash the decision. Of course, the judgement depends on claims of the appellants.
- d) It is possible to use geospatial information (including unofficial information from Google earth etc. or official data from real estate register) also ex officio, but when information has impact on the conclusions of the Court the data has to be delivered to parties concerned before the information is added in file. Information is utilized whenever it is useful and available. In cases concerning administrative enforcement measures this kind of information can be helpful in finding out whether the violation is still going on or not. The aim is to guarantee a judgment which is based on correct and up-to-date information.

### **2) When do you gather expert advice?**

- a) The distinction between scientific and legal questions is normally not necessary. Even the SAC shall assess also facts, not only law, when making its decision. As a matter of fact, in the field of environmental law a clear distinction between law and facts can seldom be made. Especially when interpreting vague legal norms and expressions, the factual situation, in essence, defines the context of interpretation and application of law. Sometimes a legally binding norm can be detailed and precise, but the problem might be how to apply it into real life circumstances.
- b) Normally the scientific information needed is not gathered in a specific way. In any environmental case the facts shall be settled by the court, which presupposes gathering of evidence, but usually there is already plenty of scientific evidence in the case file when a case comes to SAC. E.g. according to the Environmental Protection Act some plans have to be taken into account ex officio. E.g. water management plans based on national legislation transposing the Water Policy Framework Directive and their water quality information are taken into account when the court assesses the impacts of an activity.

- c) Judges have full competence to investigate scientific data *ex officio*, but of course the focus is on what is relevant and in line with the claims. The principle of ban on *reformatio in peius* is, of course, respected, which means that sometimes the whole scientific ground of a decision is not under assessment. To ensure a contradictory procedure all pieces of evidence gathered *ex officio* must be communicated to the parties if they are to be used as grounds for the court's decision.

### 3) Rules of expert appointment

- a) A member of an administrative court, other than a legally trained member, who participates in the consideration of cases on the basis of the Water Act (587/2011) and the Environmental Protection Act (527/2014), shall have an appropriate Master's degree in technology or in the natural sciences. In addition, he or she shall be familiar with the duties falling within the scope of the applicable legislation. The qualification for the environmental expert justice at the Supreme Administrative Court is an appropriate Master's degree in technology or in the natural sciences. In addition, he or she shall be familiar with the duties falling within the scope of the applicable legislation.

The President of the Republic appoints all (permanent) judges, including expert judges at Vaasa Administrative Court, but also part-time environmental expert Justices serving at the SAC. The term of office for the last-mentioned expert judges is five years, but it is in practice always renewed if the person in question is ready to continue as expert judge and has not exceeded the mandatory age for retirement. During their term, they have a similar right to remain in office as lawyer judges.

Judges are working in chambers and in SAC environmental cases are handled in one specific chamber (chamber I). Judges of the environmental chamber are normally involved in any kind of environmental cases. Referendaries have sometimes focus on specific branches of cases (e.g. industrial branch, water management etc). The expert judges are assigned beforehand for specific session days (covering half a year, based on the schedule of these experts working only part-time at the Court) and it is up to the referendaries preparing the cases for those days to see if their expertise matches the case. If the case is exceptionally complex and it is self-evident that a very specific expertise is needed to this case, it is possible for the referendary, after consultation with the President of the chamber and the reporting judge, to bring the case to a session where the expert judges who are most specialized to relevant topics of the case are present (needless to say: unless there is no bias or inability). The expert judges can be disqualified based on the same rules concerning impartiality as other members of court.

- b) The party has no right to challenge the assignment of an expert judge, except on basis of bias, lack of impartiality etc (which is very rare in practice).
- c) In the Court session (deliberation between the Court members, the procedure is in the vast majority of cases only in writing at SAC) the judges assess in every case if the scientific information and data is accurate and relevant. And if that is not the case, the result of the judgment may be different than it has been in lower court. The expert judges are equal members of the court and can independently define the scope of the scientific evidence they deem to be relevant. Sometimes the expert judges can raise up new scientific questions in the sessions that can be difficult in the light of principles of *reformatio in peius* and fair trial (contradictory procedure). In these cases, the comments of expert judges may either have to be omitted (set aside) or they may lead to asking for new comments of the authorities and parties.

### d) Evidentiary issues: standard and burden of proof

- a) In administrative procedure (environmental cases) there is no specific standard of proof and the court can freely consider all the evidence present in the case file. The court shall also assess when it considers having obtained enough materials to decide on the case on a reliable basis.
- b) Despite the so-called adversarial principle (investigating ex officio if the material of the case suffices), parties are obliged to give some evidence to support their claims. Normally, in the environmental permit cases, it is applicant's duty to give the requisite evidence and information to make sure that the acceptable level harmful effects on the environment is not exceeded so that the permit can be granted. If facts of the case are not clear or information is missing, the precautionary principle is applied by the court. For example when the project can cause harmful impacts on a Natura 2000 site, the so called Waddenzee (Case C-127/02) principle is followed to assess the impacts on the environment (...no reasonable scientific doubt remains as to the absence of such effects...).

e) **Rules of evaluating expert evidence: standard (intensity) of review**

- a) Every judge must independently assess which piece of competing evidence is more convincing as a whole. Normally cases are not black and white, and the specific circumstances of the case must be taken into consideration. In many cases the intent of legislation applied has relevance. Thus, in some cases the maxim in dubio pro natura or the precautionary principle can be applied to weighing and balancing of the evidence.
- b) The courts do not review scientific assessments systematically. A starting point normally is that domestic expert authorities' opinions can be considered reliable and unbiased. However, the Courts are not deferential to scrutinize and take a stance on the evidence. If the parties produce relevant expert evidence contradicting the authorities' opinions, it goes without saying that the Court shall evaluate closely what is the most probable line of evidence.
- c) Since the principle of free evaluation of evidence is applied in courts there is in general no need to have such limitation or standard of review to scrutinize the assessments provided.

f) **The role of science and technology in the courtroom – an overall assessment**

- a) A typical feature in environmental cases is that the incompleteness of information and different interpretations by experts concerning long term and cumulative effects make the decisions extremely challenging. The decisions are based on non-historical information and the future impacts of activities are difficult to forecast. In many other cases (e.g planning and building) the uncertainty is not such a burdensome element as in the field of pollution control.
- b) In Finland there are expert judges both in the regional administrative court of Vaasa and the Supreme Administrative Court, and the balance between judicial and scientific expertise is good. The expert judges' role in assessing the scientific information and making it understandable for lawyer judges is significant. In Finland the judges deciding environmental cases are often specialized and experienced in environmental law issues and typically have a background for this field of law from administration, universities or other courts.
- c) It is crucial that facts of cases are based on scientific accurate information. This also promotes uniform application of EU law. There are no formal obstacles in the Finnish legislation concerning assessment of evidence or the reformatory competence of the Courts which would hamper uniform application of EU law.
- d) It would be useful if the judges would in the future have better knowledge on environmental issues and – national, EU and international – environmental law. The judges could have extra courses or

even a second university degree on natural sciences (or technology) or experience with the environmental administration/industry in practice. All capacity building designed for the judges can be seen useful, but developing new legal tests is not a realistic way of improving the judgements considering the variety of environmental cases and scientific evidence.

**g) Case study**

- a) As a matter of fact, this case is quite similar to a real case decided by the SAC during 2018. Hence, the answer is based on the experiences from that case. When deciding on the case, the court was composed of five (lawyer) judges, two expert judges and a referendary counsellor. Since it was clear from the beginning that this would be a complicated and tricky case, it was assigned to two expert judges based on their expertise of effects on nature and of groundwater modelling, so as to complement each other's expertise. One of them was a natural scientist in limnology and the other one was a technical expert on hydrology. The applicant of the permit for the artificial groundwater production plant had already provided the authorities with a lot of different scientific studies and the appellants had referred to an expert opinion and other studies concerning similar types of plants in other locations in Finland. This was a typical case where the court had to choose between competing pieces of expert evidence.

After the first session SAC decided to have an on-site inspection and an oral hearing where the parties had a chance to hear expert witnesses and present documents. One crucial issue in the case was to assess the groundwater model and its limitations. Another important factor was to analyze the possible effects of the artificial groundwater production plant on different Natura 2000 habitats in the areas of impact and the vulnerability of these habitats especially for changes in hydrology. Due to the location of the plant and its distance from different protected habitats and the differences in the vulnerability of the habitats to changes in hydrology, the uncertainties of the groundwater model were a bigger problem for certain areas than others.

The expert judges had a central role in picking up all the relevant information from the vast amount of different scientific studies and background information and making it understandable for the other members of the court. It was still up to the members of the court to individually assess the relevance and meaning of the information and the role of the precautionary principle.