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The Protection of Legitimate Expectations in Administrative Law and EU Law

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Answers to Questionnaire: Sweden

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The protection of Legitimate Expectations in Administrative Law and EU Law – report by the Swedish Supreme Administrative Court

Introductory remarks

The principle of legitimate expectation is not regulated in Swedish law. However, a variant of the principle is well recognized in the legal practice of administrative courts, first and foremost as a principle concerning the legal force of favorable administrative decisions (*gynnande besluts rättskraft*). This implies that the principle as it is recognized in Sweden is quite different from how it is interpreted and handled within EU-law. For this reason we have decided to structure our answer as a brief description of the principle as it is expressed in Swedish law, rather than providing an answer to each of the questions in the questionnaire. We still hope that our answer will be helpful.

The principle of legitimate expectations in Swedish law

As already mentioned, a principle of legitimate expectations cannot be found in Swedish legislation. Nor is it in Sweden traditionally considered as one of the general principles of administrative law. It is mainly considered to be a principle within EU-law and does not limit or determine the actions and the capacity of the Swedish legislator or the public authorities outside the area of EU-law (for an example of application of the principle within the field of EU-law, see the Supreme Administrative Courts case 3148-14, decided on the 25th of January 2016 concerning the unions agricultural policies).

The closest Swedish national law comes to the principle of legitimate expectations are two constitutional prohibitions regarding retroactive legislation and, as noted above, the administrative law principle concerning the legal force of favorable administrative decisions.

Retroactive legislation

Swedish law lacks a general prohibition concerning retroactive legislation. A constitutional limitation on the legislative power is however stated in the Constitution according to which: 1) no one may be sentenced to a penalty or a penal sanction for an act which was not subject to a penal sanction at the time it was committed, 2) no taxes or charges due to the State may be imposed except inasmuch as this follows from provisions which were in force when the circumstances arose which occasioned the liability for the tax or charge.

With those two exceptions, no principle of legitimate expectations binds the legislative bodies from acting in their legislative capacity. Retroactive effects of a new legislation are consequently not generally prohibited. On the contrary, case law from the Supreme Administrative Court has acknowledged the main principle that the applicable law in a case is the one in force when the adjudication takes place.[1] This presumption can be rebutted by explicit regulation in transitional provisions to the legislation or by an interpretation of the preparatory works of the legislation in question.

However, the Supreme Administrative Court has modified the extent of this main principle by referring to EU- law and the principles of proportionality, legal certainty or security and legitimate expectations.[2] This reference to general principles of union law was made even though the case did not concern union law as such. The Supreme Administrative Court found that under the given circumstances it was not reasonable to enforce legislation on environmental responsibility retroactively to the disadvantage of a private party. The Court especially took notice of the fact that the legislator had not expressed a wish for such ret-

[1] RÅ 1988 ref. 132
[2] RÅ 1996 ref. 57

roactive application in transitional provisions or in the preparatory works of the legislation.

The legal force of favorable administrative decisions

The principle concerning the legal force of favorable administrative decisions implies that a favorable decision of this kind may not be changed or revoked after the individual has received notice of the decision. This applies even if the decision later is found to be incorrect or even in contravention of law. The legal security of the individual is paramount, over and above general public interests.

The principle is not written in statutory law but is as a well-accepted principle of administrative law established by case-law. The application of the principle is characterized by a lack of discretionary assessments and considerations of other interests such as social and economic impact. The most important argument in Sweden for upholding this strict approach to when a favorable administrative decision can be reviewed or changed has to do with the legal security of the individual. The individual must be able to trust the decisions of the authorities and act accordingly. In this way, the prohibition to change favorable administrative decisions is a procedural safeguard and part of the administrative rule of law. A strict approach in this issue also disciplines the public authorities to strive for accurate and exact decisions in all their duties, which of course promotes good governance and trust in public authorities.

It is of importance to acknowledge the fact that the principle concerning legal force of favorable administrative decisions does not apply to every kind of act taken by public authorities in Sweden. Of great importance is the distinction between legally binding decisions and other declarations from the authorities. The definition of a legally binding decision is that it is an act which in itself pertains to decide rights or obligations for the recipient or recipients, and which also in accordance with the legislation has this intended effect. A crucial issue is that the act is a part of an exercise of public authority, leading up to the decision. From such legally binding decisions one must separate suggestions, opinions and statements from different authorities that are without legal effects, as well as ad-

vice and pure information. Expressions of the latter kind are not considered as administrative decisions in this matter and consequently have no particular legal force.

Exceptions – the interest of the public takes precedence

In the case-law of the Supreme Administrative Court there are three instances when the legal force of a favorable administrative decision may be not be upheld. These are when 1) the decision contains a revocation provision; 2) imperative security reasons require modification or revocation; 3) the individual has obtained the decision by providing false information. The first two exceptions are not dependent on whether or not the individual was of good faith or had acted in good conduct. Neither is the legal force of the favorable decision reliant on if the decision is lawful or not and it makes no difference if the recipient is a legal or a natural person. Furthermore, the acting or the eventual passivity of the authority in question has no impact over the assessment on whether the decision should stand or not.

When it comes to security reasons for revoking a favorable decision it must of course be very important and urgent reasons, such as protection life and health of people. An often used example is that a permission to hunt in a certain forest can be revoked if the responsible authority finds out that a sport-event is held in the same forest at the same time. A revocation of a decision must also be in proportion to the interests of the individual and if, for example, a partial revocation is possible, this option is to be preferred. Regarding revocation because of false information, both giving false information and withholding important circumstances can lead to revoked decisions.

In addition to the exceptions presented above, Supreme Administrative Court case-law also provides an exception that applies specifically to favorable non time-limited decisions concerning economical support in every-day life for persons with disabilities according to the Social Services Act (2001:453) or according to The Act Concerning Support and Service for Person with Certain Func-

tional Impairments (1993:387).[3] When a decision according to these laws is without any limitation in time, one could argue that the authorities are bound to give the support for all eternity in accordance with the main principle of favorable decisions. However, the Supreme Administrative Court has stated that the need to reconsider a favorable decision is more prominent when it comes to continuous support. The reason for reconsideration in these cases is usually not an incorrect application of law in the original decision but rather changes in the conditions concerning the need for support etc. Therefore, the reason for reconsideration may be so strong, for example if the need for support has substantially changed, that a definite prohibition to revoke the decision should not be maintained.

In a recent judgment the Supreme Administrative Court (case 5399-14, decided on the 9th of February 2016) found that the fact that a municipal authority had provided a service to a handicapped person for 6 years without any legal obligation to do so did not mean that the person had a legitimate expectation to receive the service in the future.

Corrections because of apparent inaccuracies

The authorities are allowed to make certain corrections of administrative decisions in accordance with the Swedish Administrative Act. In article 26 it is regulated that public authorities may correct a decision containing an apparent inaccuracy because of a slip of the pen/typing errors, a computational mistake or the like.

In addition, the public authorities are obligated to change decisions containing apparent inaccuracies because of new circumstances or for other reasons (article 27). The requirements for making such a change are that it can be done rapidly, simply and without disadvantage to an individual. The purpose of the regulation is to avoid unnecessary court appeals and to simplify the administrative procedure.

[3] RÅ 2000 ref. 16

References to case-law of the European Court of Human Rights

Even if the principle of legitimate expectations is not commonly referred to in Swedish case law, references are sometimes made when the Convention for the Protection of Human rights and Fundamental Freedoms (The Convention of Human rights) is applicable.

One example is that of the case "Barsebäck"[4], in which a company had received a permit to operate a nuclear power plant. In 1998, after special legislation on the issue of decommission of nuclear power in Sweden, the Government decided that Barsebäck must shut down one of its two reactors before end of June the same year. The owners applied for judicial review and stated inter alia that the decision was in conflict with the prohibition on retroactive legislation and the principle of legitimate expectations. The Supreme Administrative Court noted that both Swedish national law and the Convention of Human rights lack regulations prohibiting retroactive legislation in general. However, the court found that a certain protection of this kind has developed in case law from Swedish administrative courts, the European Court of Human Rights and the European Court of Justice. The Supreme Administrative Court also made references to the acknowledgement of the principle of legitimate expectations within international law. However, in this specific case, the Court could not find any violations of these principles.

[4] RÅ 1999 ref. 76