COUNCIL OF EUROPE
COMMITTEE OF MINISTERS

Recommendation Rec(2004)20
of the Committee of Ministers to member states
on judicial review of administrative acts

(Adopted by the Committee of Ministers on 15 December 2004
at the 909th meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15 *b* of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve greater unity among its members;

Recalling Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms which provides that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" and the relevant case-law on administrative disputes of the European Court of Human Rights;

Considering that effective judicial review of administrative acts to protect the rights and interests of individuals is an essential element of the system of protection of human rights;

Having in mind that a balance should be struck between the legitimate interests of all parties with a view to providing for the procedure without delay and for efficient and effective public administration;

Taking into account the results of the monitoring of member states' observance of their commitments on the subject of "functioning of the judicial system" and of the decision taken by the Ministers' Deputies at their 693rd meeting on 12 January 2000 on the possibility and scope of judicial review of administrative decisions;

In the light of the conclusions of the First Conference of the Presidents of Supreme Administrative Courts in Europe, which had as its theme "The possibility and scope of the judicial control of administrative decisions in member states", which took place in Strasbourg on 7 and 8 October 2002;

Taking into account the legal instruments of the Council of Europe in the field of administrative law, and in particular Resolution (77) 31 on the protection of the individual in relation to the acts of administrative authorities;

Bearing in mind Recommendation No. R (94) 12 on the independence, efficiency and role of judges;

Recalling Recommendation Rec(2003)16 on execution of administrative and judicial decisions in the field of administrative law;

Seeking to strengthen the rule of law and human rights, which are fundamental values of the legal systems of Council of Europe member states;

Seeking to ensure effective access to judicial review of administrative acts;

Convinced that other methods of control of administrative acts, which may include internal appeal to the administrative authorities and control by the ombudsman institution as well as appeal to alternatives to litigation, set out in Recommendation Rec(2001)9 on alternatives to litigation between administrative authorities and private parties, are useful for improving the functioning of jurisdictions and for the effective protection of everyone's rights,

Recommends that the governments of member states apply, in their national legal system and in practice, the principles set out below:

A. Definitions

For the purposes of this Recommendation,

1. By “administrative acts” are meant:

a. legal acts – both individual and normative – and physical acts of the administration taken in the exercise of public authority which may affect the rights or interests of natural or legal persons;

b. situations of refusal to act or an omission to do so in cases where the administrative authority is under an obligation to implement a procedure following a request.

2. By “judicial review” is meant the examination and determination by a tribunal of the lawfulness of an administrative act and the adoption of appropriate measures, with the exception of review by a constitutional court.

B. Principles

1. The scope of judicial review

a. All administrative acts should be subject to judicial review. Such review may be direct or by way of exception.

b. The tribunal should be able to review any violation of the law, including lack of competence, procedural impropriety and abuse of power.

2. Access to judicial review

a. Judicial review should be available at least to natural and legal persons in respect of administrative acts that directly affect their rights or interests. Member states are encouraged to examine whether access to judicial review should not also be opened to associations or other persons and bodies empowered to protect collective or community interests.

b. Natural and legal persons may be required to exhaust remedies provided by national law before having recourse to judicial review. The length of the procedure for seeking such remedies should not be excessive.

c. Natural and legal persons should be allowed a reasonable period of time in which to commence judicial review proceedings.

d. The cost of access to judicial review should not be such as to discourage applications. Legal aid should be available to persons lacking the necessary financial resources where the interests of justice require it.

3. An independent and impartial tribunal

a. Judicial review should be conducted by a tribunal established by law whose independence and impartiality are guaranteed in accordance with the terms of Recommendation No. R (94) 12.

b. The tribunal may be an administrative tribunal or part of the ordinary court system.

4. The right to a fair hearing

a. The time within which the tribunal takes its decision should be reasonable in the light of the complexity of each case and of the procedural steps or postponements attributable to the parties, while respecting the adversary principle.

b. There should be equality of arms between the parties to the proceedings. Each party should be given an opportunity to present his or her case without being placed at a disadvantage.

c. Unless national law provides for exceptions in important cases, the administrative authority should make available to the tribunal the documents and information relevant to the case.

d. The proceedings should be adversarial in nature. All evidence admitted by the tribunal should in principle be made available to the parties with a view to adversarial argument.

e. The tribunal should be in a position to examine all of the legal and factual issues relevant to the case presented by the parties.

f. The proceedings should be public, other than in exceptional circumstances.

g. Judgment should be pronounced in public.

h. Reasons should be given for the judgment. Tribunals should indicate with sufficient clarity the grounds on which they base their decisions. Although it is not necessary for a tribunal to deal with every point raised in argument, a submission that would, if accepted, be decisive for the outcome of the case requires a specific and express response.

i. The decision of the tribunal that reviews an administrative act should, at least in important cases, be subject to appeal to a higher tribunal, unless the case is directly referred to a higher tribunal in accordance with the national legislation.

5. The effectiveness of judicial review

a. If a tribunal finds that an administrative act is unlawful, it should have the powers necessary to redress the situation so that it is in accordance with the law. In particular, it should be competent at least to quash the administrative decision and if necessary to refer the case back to the administrative authority to take a new decision that complies with the judgment. It should also be competent to require of the administrative authority, where appropriate, the performance of a duty.

b. The tribunal should also have jurisdiction to award costs of the proceedings and compensation in appropriate cases.

c. The necessary powers to ensure effective execution of the tribunal's judgment should be available in accordance with Recommendation Rec(2003)16.

d. The tribunal should be competent to grant provisional measures of protection pending the outcome of the proceedings.