

HFD 2020 ref. 12

Whether the content and presentation of the advice and instructions of a public authority mean that they can be appealed.

The Supreme Administrative Court issued the following judgment on 6 March 2020 (case No 5893-18).

Background

1. In varying circumstances and to varying degrees, public authorities express how an individual is expected to act in certain situations. This may give rise to the question of whether a position taken by a public authority constitutes a decision that is subject to review. A position taken by a public authority can be appealed where its content has a demonstrable effect on the person concerned, irrespective of how that position is classified. This case concerns whether a public authority's position that was communicated as guidance is considered a decision that can be appealed.

2. Where landowners carry out logging operations, they must take the safeguarding of nature conservation into account and prevent or limit damage to e.g. sensitive environments. With some exceptions, the owners of forest land are obliged to notify the Swedish Forest Agency of a planned logging operation. This is done by means of a notification of logging in which the landowner should provide information on what they plan to do in relation to the logging operation to safeguard nature conservation interests. A logging operation may be initiated no earlier than six weeks after the Swedish Forest Agency has been notified.

3. By way of this six-week time period, the Swedish Forest Agency is afforded the opportunity to consider whether certain measures should be prohibited or whether the landowner should be ordered to take certain measures necessary to meet the requirements set out in the applicable regulations.

4. Where the Swedish Forest Agency considers that no intervention is required, it need not take any action. However, the Swedish Forest Agency will often provide guidance that specifies the measures and concessions necessary for the landowner to meet the regulatory requirements.

5. In this case, the Swedish Forest Agency was notified of an upcoming logging operation. The authority subsequently provided guidance in which the landowner was urged to ensure that no damage would occur near watercourses, retain certain protective zones and vegetation, as well as refrain from preclearing undergrowth. The instructions included in the guidance largely corresponded to the measures that, according to the notification of logging, the landowner

intended to take to safeguard nature conservation interests. The landowner was also informed that the Swedish Forest Agency may issue orders or prohibitions if the regulatory requirements are not met.

6. The association Skydda Skogen submitted an appeal to the Gothenburg Administrative Court, requesting that the guidance be set aside and that the Court decide that the measures that the landowner intended to take were not permitted. Skydda Skogen submitted that there were endangered plant and animal species in the relevant area and that a logging operation would contravene the regulations on biodiversity.

7. The Administrative Court considered that the guidance only contained information regarding the concessions the landowner should make in relation to the logging operation, and that the landowner was not obliged to follow this guidance. Thus, the guidance did not constitute a decision subject to review and was therefore rejected.

8. Skydda Skogen appealed the Administrative Court's decision to reject the appeal to the Gothenburg Administrative Court of Appeal and submitted that the guidance constituted a decision in respect of the application of various regulations and had sufficient consequences to render it a decision that can be appealed. In addition, it submitted that the Aarhus Convention (the convention on access to information, public participation in decision-making and access to justice on environmental issues) requires that acts and omissions that are claimed to be contrary to national environmental law must be subject to judicial review by a court of law. Moreover, there is a presumption that decisions based on European Union law must be subject to judicial review by a court of law.

9. The Administrative Court of Appeal concluded that the guidance had the direct consequence of affording the forest owner a right to carry out logging operations and therefore it is a decision that can be appealed. Moreover, the alleged consequences on the environment is considered to render the decision subject to judicial review by a court of law in accordance with the Aarhus Convention. The case was therefore referred back to the Administrative Court for further processing.

Forms of order sought etc.

10. *The Swedish Forest Agency* requests that the Administrative Court of Appeal judgment be set aside and that the Administrative Court's decision to reject the appeal be upheld. It also submits the following.

11. The guidance does not afford the forest owner a right to carry out logging operations; it merely provides information to the forest owner regarding the legal requirements. The guidance cannot therefore be considered an administrative decision. In any case, it does not have sufficient consequences to render it a decision that can be appealed. Neither does the guidance have sufficient consequences on nature conservation to give rise to a right to judicial review by a court of law.

12. *Skydda Skogen* considers that the appeal should be rejected and submits the following.

13. It is clear that guidance in which the supervisory authority expresses its understanding of the legal requirements in a specific

situation is intended to be binding and therefore has sufficient consequences to render it a decision that can be appealed.

14. Further, the guidance provided impacts the environment, which is a public interest protected by the Aarhus Convention. The case-law on whether a decision is subject to review must therefore be interpreted in a way that meets the requirements of the Aarhus Convention. Therefore, it must be possible for an environmental organisation to appeal against the guidance.

Grounds for the decision

The case

15. This case concerns whether the guidance provided by the Swedish Forest Agency is a decision that can be appealed.

Legal regulation etc.

16. According to Section 14 of the Swedish Forestry Act (1979:429) and as prescribed by regulations issued by the Government or the authority designated by the Government, an owner of productive woodland must notify the Swedish Forest Agency of logging and forest fuel extraction to be carried out on their land.

17. Under Section 15 of the Swedish Forestry Ordinance (1993:1096), the Swedish Forest Agency must, with some exceptions, be notified of a planned logging operation. That notification must include the landowner's intentions in relation to the logging operation to ensure forest regeneration and safeguard the interests of nature conservation and cultural heritage conservation. Pursuant to Section 15b, a logging operation may be initiated no earlier than six weeks after that notification.

18. Under Section 35, first paragraph of the Forestry Act, the Swedish Forest Agency may issue any orders and prohibitions necessary to ensure compliance with that Act or regulations issued pursuant to that Act.

19. Section 40, first paragraph of the Forestry Act states that under that Act or provisions issued pursuant to that Act, the Swedish Forest Agency's decision may be appealed to an administrative court.

Assessment of the Supreme Administrative Court

Bases for the review

20. Barring a few exceptions that are not relevant in this case, there is no need to obtain permission to carry out logging operations. However, a landowner must notify the Swedish Forest Agency at least six weeks before initiating a logging operation. The purpose of the notification of logging is to allow the Swedish Forest Agency, as the supervisory authority, to act if the planned logging operation is believed to be contrary to various environmental requirements or nature

conservation.

21. The Swedish Environmental Code is applied alongside the Forestry Act but takes precedence in some cases. This is the case, for example, with the Swedish Environmental Code provisions on habitat protection areas, and with regulations on the protection of plant and animal species issued pursuant to that Code. This type of decision, which as a rule is a significant intervention, is subject to judicial review by the Land and Environment Court.

22. However, this case concerns the Swedish Forest Agency's responsibility to determine whether a logging operation meets the requirements set out in the Forestry Act and any associated regulations, in addition to their obligation to observe the rules set out in the Swedish Environmental Code. If the requirements are not met, the Agency may issue orders or prohibitions in relation to certain measures. However, such decisions may not substantially obstruct current land management (cf. Section 30, third paragraph of the Forestry Act). Those decisions are subject to judicial review by an administrative court (Section 40, first paragraph, of the Forestry Act).

23. In this case, the Swedish Forest Agency did not issue any such decisions. Instead, it decided to provide guidance including advice and instructions on what is required pursuant to the Forestry Act and associated regulations.

24. The Aarhus Convention establishes certain basic requirements for public participation in environmental issues and contains several provisions on public access to justice. Article 9(3) provides that where they meet any criteria laid down in national law, members of the public must have access to administrative or judicial review procedures to challenge acts and omissions by individuals and authorities that contravene provisions of national environmental law. In this context, 'national environmental law' means provisions that are in some way related to the environment (HFD 2014 ref. 8).

25. Article 9(3) applies to an authority's acts or omissions where the relevant provisions of national environmental law, including applicable EU environmental law, include binding provisions applicable to that authority's actions. The authority must therefore have a duty to act in a specific way (cf. Government Bill 2004/05:65, p. 93).

26. The Swedish Forest Agency is not obliged to decide on permits for logging in the woodland related to this case. Nor is it obliged, in any particular circumstances, to issue any prohibitions or orders under the Forestry Act or regulations issued pursuant to that Act. Since no requirement to take any specific measures can be derived from the relevant legislation, the provisions of the Aarhus Convention do not apply to the position taken by the Swedish Forest Agency in the guidance provided to the landowner.

27. Therefore, the examination in this case concerns the position taken by the Swedish Forest Agency in the guidance provided to the landowner and whether it is subject to judicial review by an administrative court.

Is the guidance provided by the Swedish Forest Agency a decision that can be appealed?

28. To give rise to a right to judicial review by an administrative court, the position taken must be considered an administrative decision and that decision must have sufficient consequences to render it a decision that can be appealed.

29. The latter consideration pertains to whether the nature of the decision is such that it can be contested. If the decision can be appealed, this also applies in relation to persons other than those to whom the decision is addressed. Which recipients have a right of appeal is a separate matter (HFD 2019 ref. 21, point 34).

30. The activities of public authorities in relation to individuals tend to be divided into case management, which results in an administrative decision, and practical activities, which do not result in a decision but simply entail certain activities being carried out or practical measures being taken.

31. As indicated above, a permit is not required to carry out the logging operations relevant to this case. What is required of the landowner is that they must notify the Swedish Forest Agency of a planned logging operation and observe the six-week time period set out in the Forestry Ordinance. The guidance did not, as the Administrative Court of Appeal seems to suggest, afford the forest owner a right to carry out logging operations.

32. In addition to information on the Swedish Forest Agency's powers, the guidance specifies the measures that the Agency considers necessary in order for the landowner to meet the requirements aimed at safeguarding nature conservation interests set out in the Forestry Act and associated regulations. The initial question is whether guidance containing such advice and instructions should be considered an administrative decision or whether it should be considered part of the authority's practical activities.

33. The determining factor in whether a position taken by an authority should be considered an administrative decision is whether that position includes a statement by which the authority seeks to influence the actions of administrative bodies or individuals – i.e. whether it is intended to be binding. It is therefore the purpose and content of the statement that determines whether it is considered an administrative decision, irrespective of its presentation.

34. The standards set in the relevant case-law for a position taken by an authority to be considered an administrative decision are quite low and, in some cases, it is only implied that they were so considered (cf. e.g. RÅ 2010 ref. 29, RÅ 2010 ref. 72 and HFD 2019 ref. 17).

35. In light of the above and since the guidance was not provided in accordance with the Swedish Forest Agency's general service obligation but as a result of a legal requirement to notify the authority of a planned logging operation, the Supreme Administrative Court considers the guidance binding to such a degree that it constitutes an administrative decision.

36. The subsequent question is whether the decision can be appealed.

37. The purpose of the appeal procedure is to give the party impacted by the consequences of a decision an opportunity to have that decision set aside or amended, i.e. to have the unwanted consequences of that decision eliminated. As a result, only decisions that have, or are intended to have, a demonstrable effect on the individual concerned can be appealed. The direct consequences on the individual concerned therefore determine whether a decision can be appealed (see HFD 2018 ref. 23 and the case-law cited therein).

38. Administrative decisions generally have varying consequences to varying degrees for the individual concerned. Two requirements should be met for a decision containing advice and instructions to have sufficient consequences to render it a decision that can be appealed.

39. Firstly, the relevant advice and instructions must in themselves – if followed – be sufficiently invasive. It must therefore be a matter of somewhat defined impact (HFD 2019 ref. 21, point 36).

40. Secondly, the advice and instructions must have been presented in such a way that they are intended to be interpreted as binding and therefore presumed to have repercussions based on the conditions stated. The presentation of the advice and instructions must therefore create the impression for those concerned that an intervention is intended in that specific case and that they are obliged to act accordingly (cf. e.g., RÅ 2004 ref. 8 and prop. 2016/17:180 p. 253).

41. In the relevant guidance, the Swedish Forest Agency specifies the measures and concessions necessary to meet the requirements set out in the Forestry Act and associated regulations. The landowner is urged to ensure that no damage occurs near watercourses, retain certain protective zones, refrain from preclearing undergrowth, etc. In addition, the Swedish Forest Agency notes that it may issue orders and prohibitions if the legal requirements are not met.

42. The Supreme Administrative Court considers that the advice and instructions provided by the Swedish Forest Agency in its guidance are certainly sufficiently invasive for a decision to be appealable. However, they cannot be considered to have been presented in such a way that the intention was for them to be binding.

The guidance clearly expresses the authority's understanding of the measures and concessions necessary for the landowner to meet the legal requirements. The guidance must be interpreted to mean that the landowner may also safeguard nature conservation interests in ways other than those specified.

43. Therefore, the guidance does not constitute a decision that can be appealed. The judgment of the Administrative Court of Appeal should therefore be set aside and the Administrative Court's decision to reject the appeal be upheld.

Decision of the Supreme Administrative Court

The Supreme Administrative Court sets aside the judgment of the Administrative Court of Appeal and the Administrative Court's decision to reject the appeal is upheld.

Justices of the Supreme Administrative Court *Jermsten, Ståhl, Saldén Enérus, von Essen* and *Anderson* participated in the decision. Registrar Erik Hannus presented the case.
