How Our Courts Decide: The Decision-Making Processes of Supreme Administrative Courts

Presentation of General Report
ACA Europe Seminar, Dublin Castle
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Mr. Justice Frank Clarke, Chief Justice of Ireland
Introduction
Introduction

Focus of Report & Seminar

• **Focus of General Report** - processes followed by our national Supreme Administrative Courts, Councils of State or other institutions with supreme jurisdiction in administrative law in reaching their decisions.

• **Seminar** - compare and discuss processes, and the similarities and differences between them, to better understand how institutions decide.

• **Twenty-eight responses**— Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, The Netherlands, Norway, Poland, Portugal, Serbia, the Slovak Republic, Slovenia, Spain, Sweden, Switzerland and the United Kingdom.
Introduction

Trends

- **Universal trends** – increasing caseload and measures adopted to cope with this; increasing research support and reliance on this support; an ability to raise points ex officio in at least some circumstances; judgment in the name of the institution rather than any one judge.

- **Diversity of practice** - Differences in number of judges, sharp differences in the number of cases, nature of courts and legal systems – general supreme courts, specialised administrative courts and several others, use and importance of oral hearings, use of dissenting judgments.

- Reliance on conventions or customary practice to govern even matters very central to the decision-making process, e.g. length of oral and written submissions.
Introduction

Seminar & Report Structure

• **Seminar** - extent and various uses of research support in decision making; how different roles within the court are allocated, and their significance; and the deliberation of the court and dissenting opinions.

Introduction
Methodological Challenges

• Language differences.

• Questions understood in different way by different jurisdictions which may influence the answer provided.

• Difficulty in comparing data/trends across jurisdictions when figures relate to different timeframes/years and different categories of cases.
1. Structure of Institutions
Structure of Institutions
Nature & Function

• **Nature** – Vast majority deal exclusively with administrative law matters.

• Jurisdiction in all areas of law - Cyprus, Ireland, Norway, the Slovak Republic, Slovenia, Spain, Switzerland, UK;

• **Functions** – vary across 28 jurisdictions surveyed. E.g. in Belgium, France, Greece, Italy and The Netherlands the Supreme Administrative Courts also have an advisory function; Supreme Court of Cyprus acts as Supreme Council of Judicature dealing with judicial appointments, promotions and discipline and is also the Electoral Court; Supreme Court of Ireland is final court of appeal with two first instance functions.
2. Caseload
Caseload
Number of Judges

• **Number of judges** varies considerably.

• **Lowest** are Cyprus (13); UK (12); Ireland (8); Luxembourg (5); Malta (2 magistrates preside over Administrative Review Tribunal) and Serbia (panel of 3 judges).

• **Highest** in Greece (168), France (118), Poland (107), Bulgaria (97) and Italy (96).
Caseload
Number of Cases Received

• Considerable variation in no. of cases received each year.

• **Highest** - Poland (nearly 18,000 average per year during 2013-2017); Bulgaria (15,670 per year on average); the Netherlands (13,350 on average in 2017 and 2018); Slovakia (12,000 average per year); France (9,864 received in litigation section in 2017).

• **Lowest** - Malta (average of 100 cases per year); UK (228 applications for permission to appeal in 2017 and 2018); Ireland (234 incoming cases – including applications for leave to appeal in 2017); Luxembourg (246 appeal proceedings instituted in 2017 and 2018).
Caseload
Number of Cases Adjudicated

• Variation in average **number of cases adjudicated** each year.

• **Highest** - Bulgaria (22,000 per year on average); Poland (nearly 16,000 resolved per year during 2013-2017); Slovakia (14,000 per year on average); the Netherlands (13,200 on average per in year in 2017 and 2018); France (approx. 10,139 in 2017).

• **Lowest** - Malta (100 per year on average); the UK (199 applications for permission to appeal and 85 final appeals in 2017/18); Luxembourg (256 in 2017/2018); Ireland (275 cases including leave applications in 2017).
3. Internal Organisation
Internal Organisation
Chambers/Divisions

- **Chambers/Divisions**: five reported no chambers or divisions: Ireland, Lithuania, Luxembourg, Malta and the UK;
- Use of **panels** in Ireland and the UK;
- **Number** of chambers/divisions and no. of judges in each varies widely;
- E.g. Supreme Administrative Court of Austria has 22 panels of five justices with one justice presiding. Supreme Administrative Court of Finland has three chambers with between seven to nine justices serving. In the Netherlands, the Council of State has three chambers: the Special Planning Chamber with 25 judges; the Migration Chamber with 16 judges and the General Chamber with 38 judges.
Internal Organisation

Specialisation

• **Specialisation** – 8 indicated no particular areas of specialisation by chamber/division: Ireland, Italy, Latvia, Luxembourg, Malta, Norway, Sweden and the UK.

• Lithuania - judges specialise in certain areas (i.e. competition law, environmental law, social security law) but no separate chambers/divisions.

• Diversity in approach where specialisation by chamber/division.

• E.g. In Croatia, very wide range of specialisation, for example, two chambers which specialise in health insurance, retirement, social protection, rights of disabled persons, asylum, rights of foreigners.

• Portugal has two sections, the administrative litigation section and the fiscal litigation section.

• Poland has three specialist chambers.
Movement of judges between chambers and divisions possible in 20 of the jurisdictions (Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Germany, Greece, Hungary, Italy, the Netherlands, Norway, Poland, Portugal, the Slovak Republic, Spain, Sweden and Switzerland);

Manner in which the movement determined varies.

Common practice across significant number of the jurisdictions is that the President/Vice President or other senior person at the court determines this issue.

Ten jurisdictions surveyed indicated not possible for judges to be assigned to more than one chamber at a time: Bulgaria, France, Greece, Italy, Norway, Poland, Slovak Republic, Spain, Sweden and Switzerland.
Internal Organisation
Number of Judges assigned to Average Case

- No. of judges assigned to consider average case: panel of three in ten jurisdictions (e.g. Hungary and Switzerland).

- Panels of five are the norm in nine jurisdictions: (e.g. Germany and Ireland)

- No. of judges assigned to decide a case can vary in all of the jurisdictions except for the Czech Republic, Italy and Luxembourg.

- Factors that determine no. of judges assigned to decide varies. E.g. In Belgium, the number of judges assigned to a case is determined by the President of Chambers based on the Co-ordinated Laws of the Council of State.

- Importance of the matter at issue is significant in certain jurisdictions. E.g. In the Netherlands between one and three judges assigned, depending on the complexity of the case.
Internal Organisation

Elevation of Cases

• Elevation of certain cases to plenary session/grand chamber/enlarged composition in 22 of 28 jurisdictions surveyed (Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Germany, Greece, Hungary, Italy, Latvia, the Netherlands, Norway, Poland, Portugal, Serbia, Spain, the Slovak Republic, Sweden and Switzerland).

• Generally factors leading to elevation included: to ensure coherence in the development of the jurisprudence; when a particular chamber / panel departs from a previously adopted interpretation of the law; when important and / or complex issues are raised; and other specific factors that may be prescribed in legislation or the rules governing the procedures to be applied in a particular Supreme Administrative Court / Council of State.
Internal Organisation
Assignment of Additional Roles to Judges

- **Assignment of certain additional roles to judges** (e.g. rapporteur, case manager etc.) relating to a specific case reported in 26 jurisdictions (Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Luxembourg, the Netherlands, Norway, Poland, Portugal, Serbia, the Slovak Republic, Slovenia, Spain, Sweden, Switzerland and the UK);

- Categories included: chairing or presiding over the panel hearing and adjudicating on a case; rapporteur / judge-rapporteur / reporting judge and case management judge.

- In twenty jurisdictions a rapporteur / judge-rapporteur / reporting judge is appointed to a case. In Germany, there is a rapporteur and a co-rapporteur for each case. In some cases there may also be a pre-rapporteur.
Internal Organisation

Rapporteur

• In 20 jurisdictions a rapporteur / judge-rapporteur / reporting judge is appointed to a case. In Germany, there is a rapporteur and a co-rapporteur for each case. In some cases there may also be a pre-rapporteur.

• Ten jurisdictions reported that the role of the rapporteur / judge-rapporteur / reporting judge includes preparing a draft ruling or judgment: Austria, Belgium, Bulgaria, Czech Republic, France, Germany, Luxembourg, Portugal, the Slovak Republic and Sweden.
Internal Organisation
Role of Chief Justice, President & Advocate General

- **Significance of the role of Chief Justice or President** in determining certain matters varies significantly;

- **Position of Advocate General** in Belgium and The Netherlands.

- Auditorat (Advocate General’s Office) in Belgian Conseil d’État - auditors assess the dossiers submitted to the administrative litigation section, participate in assessment of the case and draft a report. Certain investigatory powers. May hear parties, make any onsite findings, designate experts and determine their role.

- Six respondents with distinctive positions, e.g. Cyprus (Legal Officer) and Luxembourg (Government Representative)
4. Research & Administrative Assistance
Research & Administrative Assistance

Overview

• All 28 enjoy a measure of research and administrative support except Malta where no administrative assistance provided.
• Diverse arrangements.
• E.g. Slovak Republic, assistants (26) and officials (8) from the Department of Documentation, Analytics and Comparatistics provide legal research assistance.
• In Switzerland, the Federal Supreme Court has clerks (90 FTEs), a documentation department (approximately 12 documentalists), an administrative unit (the general secretariat) and an IT department.
• In the UK, research assistance is provided mainly by eight judicial assistants to the judges.
Research & Administrative Assistance

Pooled Research Support or Individually Assigned?

• 15 jurisdictions indicated that research support was assigned to individual judges to some degree.
• Extent varies.
• **Norway** - each *appeal* is assigned a designated law clerk.
• **Latvia** - Judges’ Assistants usually assigned to individual judges and Legal Research Counsel (senior advisers) assigned to specific cases corresponding to their field of specialisation.
• **Spain** – No lawyers are assigned to individual judges unless the President of Chamber so directs.
• 17 of 28 jurisdictions have a Research and Documentation or similar body and Bulgaria considering establishing such a body.

• Examples include: the High Administrative Court of Croatia’s Department for following jurisprudence of the CJEU and ECtHR and Department for following own case law; the Czech Republic’s Department of Research and Documentation; three Legal Research Counsel in the Division of Case Law in Latvia; and a Knowledge Unit in The Netherlands.
Research & Administrative Assistance
Specific support provided by assistants/réferendaires

• Support provided by assistants/réferendaires and their qualifications and experience varies greatly.

• 14 jurisdictions indicated that the following assistance is provided, albeit with some provisos:
  a) Preparation of pre-hearing documents, such as a memorandum to assist the judge prior to the hearing of a case;
  b) Undertaking legal research to assist a judge to make a decision in a case;
  c) Discussing aspects of a case with a judge orally or in writing;
  d) Consideration and evaluation of the relevant law;
  e) Undertaking comparative law analysis;
  f) Drafting sections of judgments;
  g) Putting forward a suggested or preliminary decision for judge(s) to consider.
5. Oral Hearings
Oral Hearings
Frequency and Importance

- **Practice** varies.

- 9 institutions have oral hearings in all or almost all cases: Ireland, Italy, the United Kingdom, Malta, Luxembourg, Cyprus, Bulgaria, Poland and Germany.

- Belgium, Greece, Hungary, and Serbia – hearings in 80%-90% of cases.

- 11 countries have none or very few (less than 5% of cases).

- Oral hearing in 50% of cases before the French Conseil d’État.

- **Importance** also varies – 10 described as “important, vital, or influential” to outcome; 5 said there is equal importance in respect of oral and written and only considered hearings to be of low importance.
Oral Hearings

Time limits

• No formal time limits for conduct of oral hearings in majority of jurisdictions.

• However, presiding judge informally keeps the submissions to a reasonable time or convention or tradition of brevity in submissions.

• Specific time limits in place for appellants and respondents in Cyprus and Portugal.

• 5 jurisdictions set time limits for hearing of each case before the hearing (Ireland, Latvia, Norway, Spain, UK).

• 2 jurisdictions (Ireland and The Netherlands) have an uninterrupted period for parties to present.

• Lack of judicial interruption in several jurisdictions while very interventionist judges in several others.
Oral Hearings

Other features

• Generally some rule confining the subject matter of oral hearings to party’s written submission to at least some degree.

• 13 have a clear restriction in this respect; 8 have at least some restriction and 3 (Austria, Spain and Sweden) have no such rule, but oral hearings rare in these courts.

• Diversity of views in respect of recusal of judges for opinion expressed at oral hearing.

• Unusual feature of Luxembourg Court – in approximately 15% of cases on-site visits conducted in order to “formulate a definitive opinion of the intricacies of the case as well the determining factors which caused the dispute between the parties.”
6. Written Submissions
Written Submissions
Length

• 10-20 pages is most common length (10 jurisdictions).
• 5-10 pages is next most common (7 jurisdictions).
• Extreme positions in others: 0 to 5 pages in Malta and Sweden; 20-30 pages in Ireland, Italy and Switzerland; 30-40 pages in Germany, Portugal and the UK.
• However, significant variation in many jurisdictions.
• Very few jurisdictions (Ireland, Spain and Italy in some types of cases) have maximum length.
• Mechanisms to aid with lengthy submissions in place in some jurisdictions, e.g. summary of submissions required in Greece and Latvia where submissions are long.
• 11 jurisdictions do not allow further submissions after oral hearing; 7 allow in exceptional cases and 10 do generally permit it.
7. Consideration of the Case
By an overwhelming margin, respondent institutions may raise points of law of their own motion or ex officio (23 having such capacity in substantial set of circumstances).

Range of practices, e.g. in Germany it is not only allowable but obligatory to assess the case ex officio and raise relevant points of law; in Sweden, Court is limited only by the facts of the case and not by any setting out of legal arguments by the parties.

Procedure in some jurisdictions (e.g. France and Norway) to notify parties of intention to raise a point ex officio and give them an opportunity to engage with it.

3 of the five jurisdictions without ability to raise points ex officio suggested some ability to raise points in exceptional or extreme circumstances.

Only 2 states (Serbia and the Slovak Republic) where scope of case entirely set by plaintiff.
Consideration of the Case

Language

• 21 respondent countries functionally monolingual.

• 6 multilingual to some degree, though this does not in all cases mean deliberation multi-lingual or accommodates all languages used by the institution.

• 4 courts reported multi-lingual elements that do not necessarily affect deliberation (Cyprus, Finland, Ireland and Malta).

• 3 jurisdictions (Belgium, Luxembourg and Switzerland) with multi-lingual elements that factor into deliberation. E.g. Switzerland requires briefs to be submitted in an official language (German, French, Italian or Rumantsch grischun) and proceedings are conducted and judgment rendered in the language of the judgment under appeal. Deliberation generally takes place with each judge speaking whichever official language is his or her mother tongue.
Consideration of the Case
Pre-hearing deliberation

• Majority of jurisdictions have some kind of pre-hearing deliberation.
• 19 have some formal or informal deliberation in advance of hearings – most (11) have some fairly regular, formal meeting for this purpose and rest have more informal discussions.
• Some extensive, e.g. Hungary holds such deliberation in all cases.
• Some practices other than deliberation, e.g. informal discussions between judges in Italy.
• 9 jurisdictions (Belgium, Bulgaria, Croatia, Czech Republic, Greece, Malta, Norway, Portugal and Serbia) reported no such deliberations at all.
Consideration of the Case
Main Deliberation (Post-Hearing)

• Great variety in practices.

• Many jurisdictions (e.g. Germany) reported that the matter is largely governed by practice, tradition or convention rather than rigid rules.

• Most jurisdictions have meetings where deliberations and votes take place immediately after a hearing (France, Germany, Ireland) or after some time has passed for preparation of provisional opinions.

• Deliberations often complimented by exchange of written material.

• Some jurisdictions (e.g. Switzerland) rely primarily on written communication in many cases.

• Several jurisdictions (e.g. Austria, France, Germany, Portugal, Serbia, Spain, Switzerland) have the rapporteur’s presentation of the case or draft judgment as the focal point of deliberation.
Consideration of the Case

Votes

• Voting usually by majority at the end of deliberations, by oral declaration or show of hands.

• Common for consensus-based decision-making to render formal votes unnecessary, e.g. France, Luxembourg and The Netherlands.

• Common for voting to stand to some degree on the order of seniority, with the junior judge expressing his or her opinion first, and the other judges following in order of seniority (Finland, Greece, Hungary, Ireland, Poland, Slovak Republic, Spain, Sweden, UK).

• Not always, e.g. in France, any member of the court can speak in any order and in Austria (though rapporteur votes first and the President last) judges in order of the longest serving to the most junior.
8. The Decision
The Decision
Authorship and dissents

- **Authorship** - Judgments overwhelmingly in name of the institutions.
- Only in 2 common law jurisdictions – Ireland and the UK – are judgments in the name of judicial author. Majority opinion reflected in one judgment where possible.
- Judgment in name of institution often signed by all judges or President of Court or Panel. In such jurisdictions, judge-rapporteur generally writes judgment with comments from judges and assistance from assistants.
- **Dissents** – existence roughly evenly split. 15 jurisdictions allow for a separate judgment. Varies from single dissenting opinion (Norway) to every judge being allowed express concurring or dissenting view (e.g. Ireland, Sweden, UK).
- 10 do not allow any form of concurrence or dissent.
- Some exceptional - e.g. Hungary permits dissents but not publicly accessible.
The Decision
Judgment/Order Distinction

• Judgments generally in writing and record of judgment entered onto an IT system or uploaded to website of the institution.

• Public pronouncement of judgment in some jurisdictions (e.g. Greece, Ireland, Slovak Republic, the UK).

• Strict division in 16 of 28 jurisdictions between judgment or statement of reasons and order, i.e. operative part of ruling.

• Either separate documents or division in document.

• 11 reported no division.

• Some less firm e.g. No distinction in general in Italy but in some cases determination needed quickly so statement of reasons follows later.
9. Timeframes
Timeframes
Length of time to decide cases

• Average time varies with a very wide range.
• One month from the date of hearing in Bulgaria; 2.5 months in Malta, 4 months in Austria and Luxembourg.
• 72 months in Cyprus, 48 months in Greece, 26 months in Belgium and 25.5 months in Ireland.
• Some (e.g. Cyprus and Ireland) either have or plan to introduce reform to reduce timeframes.
• Average time is 15.5 months (although longer timeframes inflate this).
• Many cite significant variation in timeframes depending on subject matter, associated case load, complexity of case etc.
Timeframes

Mandatory timeframes

• Despite focus on increasing expediency, very few jurisdictions (4) have mandatory timeframes: 45 day limit in Italy to issue decision after deliberation; 20 working days after hearing of case in Lithuania.

• Bulgaria has strictest timeframe of 1 month and reports challenges meeting this.

• Self-imposed or conventional timeframes in certain jurisdictions, e.g. attempt to solve ordinary applications within 2 years in French Conseil d’État.

• Some specific requirements or measures, e.g. provision in Ireland for matter to be listed before judge every 2 months after hearing until judgment delivered.

• Overall requirement of expediency under ECtHR jurisprudence.
Timeframes
Mandatory timeframes in certain cases

• 21 jurisdictions reported mandatory timeframes for certain types of cases.
• Commonly:
  • Elections, voting, referendum cases;
  • Review of detention;
  • Public procurement;
  • Preliminary ruling on constitutionality;
  • Certain immigration matters.
• Limits vary from immediate judgment (e.g. Norway in administrative detention cases) to 48 hours (e.g. electoral disputes in Serbia).
10. Reform
Reform
Features and developments

• **Reform for increasing speed of process in many countries** – e.g. reforms in procedural rules or workings of court to increase efficiency (e.g. in Croatia, Greece, Italy, Latvia, Poland).

• **Reform in acceptance of appellate cases** – Following establishment of Court of Appeal, Ireland deals almost exclusively with points of law of exceptional public importance and operation of new jurisdiction over first few years led to recent review and introduction of new procedures.

• **Hearing reform** – Bulgaria in midst of significant reform, moving from open to closed sessions as default for oral hearings.

• **Major restructuring** – Major overhaul of administrative court system in Hungary to take effect in January 2020. Profound changes including change to name of institution, seat, nature and function. Creation of Supreme Administrative Court rather than existing Department of the Curia.