Report of a working visit to the Bundesverwaltungsgericht in Leipzig

by Professor P.J.J. van Buuren

from 25 October to 5 November 2010
I  Introduction

In my capacity as a member of the Administrative Jurisdiction Division of the Dutch Council of State I visited the Bundesverwaltungsgericht (Federal Administrative Court) in Leipzig from 25 October to 5 November 2010 as part of the exchange programme of the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union. The purpose of the visit was to participate as intensively as possible in the work of our German sister organisation by attending case hearings both in chambers and in open court, studying case files and holding discussions with judges and others on subjects I thought were important. Section III contains a day-to-day account of my activities during the exchange. In section II below I draw a number of conclusions and make some general observations.

II  General conclusions and observations

1. My visit to the Bundesverwaltungsgericht (BVerwG) from 25 October to 5 November was useful and very instructive. Initially, however, I had to adjust to the idea that, unlike the practice at the Council of State, there was no ready-made programme for me at the BVerwG. A visiting judge is assigned to a Senat (panel of judges) and is expected to take part in its activities as far as possible. The problem was that as a visitor I had no idea beforehand of what activities would take place in that fortnight. It was my misfortune that by chance no oral hearings were scheduled for the 4th Senat for the two weeks of my visit. An interesting hearing had been planned, but this had been postponed a few weeks before my arrival at the request of one of the parties. It was also unfortunate that the presiding judge of the 4th Senat could be present for only four days of my visit although he considered it to be his responsibility to explain things to me and to provide me with information, case documents and so forth. In the 4th Senat I was only able to attend one hearing in chambers, which concerned a decision to grant leave for Revision (review) after all. This meant I had to find other ways of occupying my time. I did this by taking part in the activities of the 7th Senat and 2nd Senat as well. I was also given the opportunity by members of the 4th Senat to study interesting files containing case opinions. The members of the BVerwG were always prepared to take the time to answer my questions on the cases and many other questions of a legal or organisational nature.
Nonetheless, a programme of activities might have been useful because I could then have made even more effective use of the comparatively short time available to me.

2. A Senat of the BVerwG stands alone in more than one respect. The six justices of the 4th Senat and their two research assistants work closely and intensively together. As each Senat is authorised to hear specific cases, it does not need, in principle, to consult with other Senate before giving judgment. The BVerwG’s burden of coordination is much less than that of the Council of State. Although each Senat makes frequent references to case law it seems from the judgments I studied that these references are exclusively to its own decided cases. This is noteworthy in the sense that some overlaps exist with fields of law entrusted to other Senate. In principle, the Senat that first considers a legal issue is also the Senat that decides the matter. Sometimes informal consultation takes place spontaneously with colleagues sitting in other Senate on interpretation of the law, but there is no formal framework for consultation and no fixed procedure. Other Senate are expected to respect and follow the decision. If a Senat does not wish to do so, for example because it considers the judgment of the other Senat to be incorrect, a ruling by the Große Senat (Great Senate) is required. Where the issue concerns Verfahrensrecht (procedural rules of administrative law) there is a greater risk that one Senat may ‘get in the way’ of another. In such cases consultation takes place informally. In the event of a jurisdictional dispute between two Senate, the issue is resolved, if necessary, at a meeting of the Presidium (this does not meet at regular intervals).

Members of the 4th Senat do not often transfer to another Senat. The 4th is an example of a Senat that is quite ‘popular’, as a good many justices are interested in construction law and related issues. Its members therefore tend to remain in its ranks for a long time. And Senat presidents transfer even more infrequently. It follows that justices form part of the same relatively small working unit for a long time. This also has disadvantages. A Senat has a relatively limited field of work (some are more limited than others), and in due course some members may wish to try something else. Socially, too, the members of a Senat tend to mix mostly with their immediate colleagues. For example, they lunch together and, to some extent, even take coffee breaks together. Occasionally they are joined by justices of other Senate, when the conversation mainly concerns topical legal issues.

3. The manner of working also differs considerably in various respects from that of the Administrative Jurisdiction Division of the Council of State. Cases are analysed in depth and at length, and much is written by the justices themselves. My impression was that there is an
ethos of hard work (sometimes justices work until very late in the evening or even into the night). Although the doors of the justices' own individual offices are always closed, they are open in a metaphorical sense. The only meetings held are the lengthy consultations in chambers. When the justices meet in chambers they discuss a case (or sometimes more than one case) for as long as necessary. Although the pressure of work can be great, this is not noticeable during these discussions. Coordinating committees or special committees of the kind that exist at the Council of State (e.g. committees on administrative procedure, damages and European law) are unknown here. Likewise, there are no unit coordinators in Leipzig, nor are they necessary.

III  Day-to-day account of my activities

Day 1, 25 October 2010

I was received by Justice Maidowski, who showed me the office I had been assigned as Gastrichter and then took me on a tour of the BVerwG’s building, pointing out many different aspects of relevance to the functioning of the court. Afterwards I had a lengthy meeting with Professor Rubel, the presiding judge of the 4th Senat of the BVerwG, to which I would be assigned during my stay in Leipzig. Professor Rubel explained the procedures of the Senat and also the difference between two types of court ruling – Beschluss and Urteil. I signed a non-disclosure undertaking drawn up by the Präsidentin (President of the BVerwG) for a Gastrichter, which is apparently required by law. I am attaching the letter sent by the Präsidentin about this non-disclosure undertaking to the presiding judges of the Senate.

We discussed the legal concept of the Bebauungsplan, which is comparable to the Dutch bestemmingsplan (land-use plan). One of the subjects I asked him about was the BVerwG’s experience of cases involving the Habitats Directive. In his Senat this subject does not play a major role (except in cases concerning Planfeststellungsbeschlüsse which are assigned to two other Senate). This is because under German law the only question that needs to be addressed when reviewing a Bebauungsplan is whether there is at least one way in which the plan can be implemented that is in conformity with the requirements of the Habitats Directive. This is generally the case. The question of whether the specific building plan complies with the requirements need be considered only when deciding whether to grant planning permission. As I understand it, the Bebauungsplan does not play such a decisive
role in whether planning permission is granted as the *bestemmingsplan* does in the Netherlands.\(^1\)

I was handed a file that happened to be in his office at that moment. This concerned *Beschwerden* (grounds for objection) against a *Bebauungsplan* of the town of Sehnde. In the context of a *Normenkontrollverfahren* (review of legality) the *Niedersächsischen Oberverwaltungsgericht* (OVG / Higher Administrative Court of Lower Saxony) gave judgment on 18 February 2010 on the grounds on which the *Antragstellers* (claimants) had challenged the municipal *Bebauungsplan*. In brief, the facts were as follows. The claimants, Mr and Mrs Drews, had challenged the *Bebauungsplan* in so far as this made specific provision for a footpath, designated with an ‘F’, beside their house and garage. In fact, the narrow strip of land on which the footpath was planned formed part of their garden (and that of their neighbours). The strip of land contained a sewer. The Drews and their neighbours had been allowed to use the land by the Sewerage Authority, apparently free of charge. The Drews had built a sunken garage, whose roof was therefore relatively low in relation to ground level. On the roof was a terrace. As the footpath would pass close to this roof terrace, the claimants alleged that it would infringe their right to privacy and quiet. They feared, among other things, that passers-by would be able to ‘look up their skirts’ and that the footpath would be used as a cycle path.

In its lengthy judgment (20 pages) the OVG held that the complaint was unfounded. According to the OVG, the local authority had weighed the competing interests correctly and arrived at a logical conclusion. A factor of particular importance was that the local authority had a major interest in constructing the footpath since this would form a shortcut between a new residential neighbourhood and the existing town centre. What was striking about the OVG’s judgment was the detailed reasoning based on the case law of the BVerwG and some literature. The judgment relied strongly on a previous judgment given on an application for an interim remedy. The grounds for the judgment can be summarised by the following keywords.

The OVG had not granted leave for *Revision* (review). This meant that no direct application for *Revision* could be made. The claimants/appellants were therefore obliged to lodge *Beschwerden* (grounds of appeal) to the BVerwG against the decision not to grant leave to

\(^1\) This would appear to be borne out by the fact that the *Bebauungsplänen* that I saw contained far fewer regulations than a Dutch *bestemmingsplan* and that in general the uses also seem to be much less detailed.
submit an application for Revision. This is possible on a limited number of grounds, which are listed exhaustively in the Verwaltungsgerichtsordnung (VwGO / Code of Administrative Court Procedure). Only if one or more Beschwerden are held to be well-founded can an application for Revision be made.

The Drews’ Rechtsanwalt (lawyer) had lodged detailed Beschwerden (seven pages). According to the judgment I studied, Revision would not be allowed. The Beschluss (decision) was brief (three pages), which was understandable in view of the grounds on which a Beschwerde can be held to be well-founded. None of the grounds for allowing a Revision applied in this case. The Beschluss was given by three justices. One drafted the decision and the other two had proposed a few changes to the wording. The presiding judge of the 4th Senat, who is involved in all cases that come before it, was the last to see the draft.

Mr Drews had died while this case was pending before the BVerwG. The application was therefore stated on the cover sheet to be filed in the name of 1. Mrs Drews and 2. the heirs of Mr Drews (i.e. Mrs Drews and two children of their marriage, who were mentioned by name). After the lawyer had given notice of Mr Drews’ death, the BVerwG inquired through the lawyer about the identity of his successors in title and requested submission of a certificate of inheritance.

I would note that in this relatively simple case the OVG gave judgment after about 18 months and that the BVerwG took a further eight months to rule that no Revision would be allowed. In total, therefore, more than two years had elapsed after publication of the Bebauungsplan.

**Day 2, 26 October**

I spent a large part of the day preparing for the proceedings that would be held in chambers on 27 October in case BVerwG 4 CN 4.09. It seems likely that this will be the only hearing of a case that I will be able to attend in the 4th Senat during my visit. An oral hearing of another case which was planned for next week has been postponed. Fortunately, it proved possible to have the hearing in chambers brought forward a day so that I will have the opportunity on the Thursday to attend an oral hearing of a case involving the Bundesimmissionsschutzgesetz (BlmSchG / Federal Emissions Control Act). The case concerns an environmental permit for a broiler chicken farm. For this purpose I got in touch with Dr W. Sailer (presiding judge of the 7th Senat). Through him I obtained copies
of the court documents in this case. Unfortunately I missed the Vorberatung (preparatory meeting in chambers) as I was trying to contact Dr Sailer at that very moment.

During a meeting with Professor Rubel I obtained more information about how a Senat allocates cases among its members. Before the start of the year, a work plan is drawn up on the basis of the composition of the Senat and how many cases each of the justices can handle. If a justice has to deal with a very large case (e.g. a case concerning Berlin airport), this is taken into account in the annual plan. As a result, whenever a case of a particular kind is received it is always known which justices will be assigned to it. This depends solely on the serial number given to the case when it is first received and is to this extent a matter of chance. It is also immediately known who will be the rapporteur (i.e. the author of a Gutachten) and second rapporteur (the author of a Mitgutachten). In this way no one (not even the presiding judge of the Senat) can influence the composition of the court that will hear a case. In Germany this is considered to be an essential safeguard for the independence of the courts. In consequence, a relatively new and as yet inexperienced justice may be assigned to act as rapporteur in a complicated case. However, this disadvantage is accepted as the price of the safeguard.

In the afternoon I visited a museum in the building of the BVerwG which documents the history of the Reichsgerichtshof (Imperial Court), as well as that of the BVerwG itself. Although I knew something of the unhappy role played by the Reichsgerichtshof in the Nazi era, this became much clearer to me as a result of my visit to the museum.

In the evening I attended a lecture organised by the Leipzichter Juristenverein and given by Professor Monika Harms, Generalbundesanwältin (Attorney General), in the Großer Sitzungssaal of the BVerwG. The subject of her lecture was her own role as Attorney General.

**Day 3, 27 October**

The main event today was the meeting in chambers to consider case BVerG 4 CN 4.09. In this case the parties had waived their right to an oral hearing. The purpose of the meeting was to consider an Antrag (application) for leave to appeal by way of Revision. An application was necessary in this case because the Verwaltungsgerichtshof (VerwGH / Higher Administrative Court) of Baden-Württemberg had failed to allow Revision of its
Beschluss of 2 November 2009. Beschwerden (grounds of appeal) had been filed by the claimant against the failure to permit Revision of the Beschluss of the Higher Administrative Court. The grounds of appeal against a failure to permit Revision are limited. They are the same grounds on which the VerwGH (Higher Administrative Court) could have granted leave (§124 Abs. 2 VwGO). In brief, these grounds are serious doubt about the correctness of the decision, special difficulties of a factual or legal nature, a decision that is not in keeping with the precedents of a higher court and a procedural error that may have influenced the outcome. If one of the Beschwerden is held to be well founded, the normal Revision procedure is continued.

In fact, the possibility of obtaining leave to apply for Revision even at this stage means that there are many ways of challenging the correctness of a judgment of the VerwGH before the BVerwG. This was evident from the present case. The Federal Building Code (§3 Abs. 3 BauGB) states that when an administrative authority announces that a draft plan has been deposited for inspection and that interested parties may lodge Einwendungen (representations) it must also give notice of the fact that under the Code of Administrative Court Procedure (§47 Abs. 2a VwGO) an appeal brought by an interested party will be declared to be inadmissible soweit (insofar as) it is based on Einwendungen that were not lodged (or not lodged in time), but could have been lodged by the interested party in the representations stage (cf. section 6:13 of the Dutch General Administrative Law Act). The problem is that the Act in which §3 Abs 3 BauGB was amended in this way also introduced §47 Abs. 2a VwGO. Here, however, it used the word nur (only) rather than soweit (by amendment the word soweit was changed into nur). The need to use the same wording in §3 Abs. 3 BauGB as in §47 Abs. 2a VwGO was overlooked on this occasion.

The claimants in this case (Aldi and a subsidiary of Aldi) had not made any Einwendungen in the representations stage. On appeal, they argued that the notice that the draft plan had been deposited for inspection was wrong because the local authority had used the text of §47 Abs. 2a VwGO rather than that of §3 Abs. 3 BauGB. According to the claimants, this was a procedural error that could materially affect the outcome. The VerwGH (Higher Administrative Court) of Baden-Württemberg dismissed the appeal. Although the subsequent proceedings before the BVerwG concerned the issue of whether Revision should be

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2 Abs / Absatz = paragraph.
3 This seemingly straightforward case concerns a Normenkontrollverfahren (review of legality), because a Bebauungsplan (just as a bestemmingsplan in the Netherlands) is deemed to be a generally binding regulation. But this has no bearing on the approach and outcome here.
4 Or, more precisely, Antrag because this concerned a Normenkontrollverfahren.
permitted, the BVerwG nonetheless also considered the substantive objections to the Beschluss of the VerwGH. The BVerwG agreed with the VerwGH that soweit and nur had rather different meanings. Nur would allow a claimant to put forward all grounds of appeal provided that there was one argument that had been raised previously. Soweit excluded all grounds of appeal that an interested party could have raised at an earlier stage. But what was decisive in this case was that the mistake in the information provided about the right of appeal could not have caused confusion in the minds of the claimants. They must, after all, have understood soweit as meaning that they would have to make representations in order to be able to appeal at a later stage. This was not altered by the fact that they were able to decide for tactical reasons to keep some arguments in reserve for the appeal stage, nor was this an effect intended by the legislator.

It was interesting to see from the inside how the BVerwG set to work in what was essentially a fairly straightforward case. First, a research assistant (a judge seconded from a VerwG) drafted a 13-page Vorgutachten (preliminary opinion). The next step was for a Berichterstatter (rapporteur) to prepare a Gutachten (opinion). On this occasion, the opinion was in the form of an 8-page draft Beschluss, which, as I understand, is not very common. The opinion drafted by the rapporteur differed from the preliminary report on points of detail. Afterwards, the Mitberichterstatter (co-rapporteur) prepared comments in the form of amendments to the text of the rapporteur. These comments also included references to other, fairly recent decisions of the 4th Senat, which had not been mentioned in either the preliminary opinion or the opinion. Finally, the file was shown to the other three members of the Senat.

Five (!) justices were present at the meeting in chambers. The meeting was also attended by the author of the preliminary opinion. The question was once again examined from all angles and the discussions lasted for about an hour. At the end the presiding judge drew conclusions, on the basis of which the rapporteur would draw up a post-chambers draft decision. Naturally, the draft would then be circulated among the other four justices.

In the afternoon I studied a case that would be dealt with by the 7th Senat on the Thursday. Later I walked with Professor Rubel to the Schumann-Haus where the Verein von Neugierige Richter (a club consisting of BVerwG justices) had booked a tour, preceded by a talk about Robert and Clara Schumann and the four years they had lived in Leipzig (1840-1844).
Day 4, 28 October

In the morning I attended the oral hearing of case BVerwG 7 C 2.10 by the 7th Senat. This was basically a simple problem that could – if I’m not mistaken – equally well occur in the Netherlands. The claimant had taken over a business that had an old environmental permit entitling it to keep 40,000 laying hens. He wished to switch to keeping 40,000 broilers. He had by this time stopped keeping laying hens. He notified the competent authority, which then responded positively as no harmful consequences to the environment were to be expected. The significance of the notification was that the claimant did not require a new permit under the BlmschG (Federal Emissions Control Act) for the switch. The notification itself was sufficient. However, planning permission was required for the switch (as I understand it, also for the change of use under building law). For some reason there were delays in granting permission and the date on which the environmental permit would not have been utilised for three years was getting closer. An explanation for the delay could have been that it was clear that the environmental permit for the laying hen farm should never have been granted because (even by the standards applied at the time when the permit was granted) the farm was located immediately adjacent to an acid-sensitive area of carr peat known as the Niedermoor. Under §18 Abs. 3 BlmschG, the application could be extended on request for a period of three years ‘aus wichtigen Gründen, wenn hierdurch der Zweck des Gesetzes nicht gefährdet werd’ (on serious grounds if this would not frustrate the purpose of the law). An application for extension was filed in time but refused. On 9 August 2007, the Verwaltungsgericht held at first instance that §18 Abs. 3 BlmschG was not applicable in this case.

On appeal, the Oberverwaltungsgericht Bayern (OGV / Higher Administrative Court of Bayern) held in its Urteil of 29 May 2009 that the appeal was unfounded. The OVG upheld the ruling of the lower court, but also went on to deal with the claimant’s submission that the acceptance of the notification by the competent authority meant that it had been substantively established that the switch was acceptable and complied with the object of the BlmschG (i.e. environmental protection) and that, on the balance of interests, there was therefore no ground for refusing extension. The claimant’s interest was clear: a new environmental permit for 40,000 broilers could not be granted and, if it was necessary to extend the old permit after acceptance of the notification, the planning permission could not be refused on account of environmental objections (the Konzentrationswirkung of the old permit under the BlmschG therefore still had this effect).
The OVG (Higher Administrative Court) did not share the opinion of the claimant. It held, in brief, that the acceptance of the notification had no material significance.

This last ruling was upheld by the BVerwG in the Revision proceedings. Acceptance of the notification meant simply that the poultry farm could make the switch without applying for a new permit. But the acceptance did not mean that, under substantive law, keeping 40,000 broilers at that location was also responsible practice. An argument in this connection was that the competent authority could not be expected to make a substantive assessment in such a short period (i.e. the one month in which it had to decide whether or not to accept notification).

Once again, five justices took part in this oral hearing. The presiding judge was the only one of the justices present to speak at the hearing, although the Berichterstatter gave a brief summary of the facts at the start of the hearing. Afterwards counsel were given the opportunity to briefly address the court (compulsory legal representation of parties!). One of the lawyers who addressed the court was the counsel for the Naturschutzverein (the Nature Conservation Association) which owned the Niedermoor.

The presiding judge then raised the legal issues, outlined the differences of opinion and recounted what the Senat had decided in previous judgments relevant to the present case. This proved the value of the preparatory meeting in chambers. Counsel were then allowed to address the court again and to comment on what the presiding judge had said and on each other’s submissions. The hearing lasted about an hour. There were no written summaries of oral pleadings (or in any event none was lodged). The atmosphere was fairly relaxed, notwithstanding the fact that five robed justices were present.

At the end of the hearing the presiding judge inquired whether the lawyers (all of whom had travelled some distance) had to leave soon. As this proved not to be the case, he announced that judgment would be given in 45 minutes’ time! The meeting in chambers could be brief as the case had already been discussed at length in the preparatory meeting in chambers by reference to a Vorgutachten (prepared by a research assistant), a Gutachten and a Mitgutachten. The oral hearing had not produced any important new views. At the end of the meeting in chambers, the presiding judge summarised the grounds that he would communicate to the parties. Judgment was given in the courtroom (with those present
Standing). Afterwards the grounds were explained to the parties (with those present now seated). Naturally, the judgment and the grounds would also be recorded at length in writing and then sent to the parties, but this could take a few weeks.

In the afternoon I attended a hearing held by the 2nd Senat concerning three joined applications for Revision. What they had in common was that the claimants (two air force instructors and one police instructor) did not receive a monthly allowance to which they believed they were entitled. Another common factor was that the allowances related to flying a helicopter. In other respects, however, there were many differences: different allowance schemes and different jobs. Moreover, the police instructor flew with the trainees whereas the other two instructors remained on the ground training maintenance staff (who did fly on the helicopters). The benefits of joining the cases did not become apparent to me. The procedure was more or less comparable to that of the 7th Senat. Once again the presiding judge spoke alone, on behalf of the five justices, after a brief summary of the facts by the Berichterstatter. As there were four or five lawyers all of whom addressed the court, this hearing too took about an hour. When the hearing ended at about 15.30 the presiding judge announced that the judgment could be collected from the front desk from around 17.00 or that the parties could telephone to learn the result. Evidently, parties in such cases are barely given an opportunity to say that they would like to be present in person when judgment is given.

I had a final conversation with Professor Rubel, who unfortunately (for me) works at home on Fridays (and teaches at a university) and will be away all of next week. He had gone to great lengths to acquaint me with the work of his Senat and had answered my many questions.

We discussed two final points. First, continuing education is not compulsory for members of the judiciary in Germany. This is a matter that is left to the discretion of the individual judges. There are two Richteracademien, one in Berlin and the other in Trier. Judges are glad to make use of the possibility of attending courses (lasting a week or sometimes longer) funded by the State at these training institutions. In principle, they can also attend symposiums and other forms of training.

Second, the administrative courts can also declare Bebauungspläne to be partially void (a Normkontrollverfahren does not result in the avoidance of a plan but in a ruling declaring the plan to be void). However, the BVerwG is more reluctant to declare a plan void than
Chamber I of the Dutch Council of State. As the BVerwG tends to attach more importance to a plan’s overall coherence, this could result in either the entire plan or a larger part of it being declared void. Another factor to be taken into consideration is whether, after part of a plan has been declared void, the remainder is thought to be something that the local authority would not have wished. In order to avoid burdening the local authority with the possible consequences of an unwanted plan, the scope of the declaration is widened. I think that this is a principle that we should consider adopting.

**Day 5, 29 October**

The Intranet and internet connections were down for maintenance from 14.00. However, many of the justices had already left as they live elsewhere in Germany (some a long way away) and work at home on Fridays. They are also able to log in from home.

I received from Justice Philips an interesting construction law case on which she wished to hear my views before formulating her *Gutachten*. During the coffee break I was once again questioned about the law and practice in the Netherlands. Many of the questions concerned environmental law, including statutory take-back schemes for electrical equipment (on which there are, to my knowledge, no statutory rules or decided cases in the Netherlands) and general procedural law (ex tunc or ex nunc) and different procedural rules in asylum cases. I made various appointments for the following week and spent the rest of the time on this report and reading up on the cases.

**Day 6, 1 November**

I spent the first day of the second week studying two entirely different cases that will be discussed tomorrow.

**Day 7, 2 November**

I attended the *Vorberatung* (preparatory meeting in chambers) of the 2nd *Senat* on an interesting but complex case involving public service law due to be heard orally on Thursday 4 November (*BVerwG 2 C 16.09*). This case concerned a matter of principle on which the BVerwG might possibly depart from the line taken in its own previous judgments. Application for *Revision* had been made by the President of a *Landesgericht* (Regional Court), who was
challenging not only a refusal to appoint him as President of the Oberlandesgericht (Higher Regional Court), but also the appointment of another person (the President of a Landessozialgericht / Higher Social Court) to the position in question. An appeal of this kind by a high-ranking judicial officer is an extremely rare event in Germany as it is here. The case had also attracted considerable publicity some years ago.

The appointments committee (which was of varied composition) had decided by the smallest possible majority of the votes cast to recommend to the justice minister of the state concerned that not the claimant but his rival should be appointed. Moreover, two of the judges on the committee abstained from voting. They had been against the motion, but decided to abstain because they had been called before the junior justice minister shortly before. Under German law, it is possible to have the outcome of a job application procedure (Wettbewerbung) of this kind reviewed in expedited proceedings by the VerwG, with a right of appeal to the OVG. According to the case law of the Bundesverfassungsgericht (BVerfG / Federal Constitutional Court), a judgment given in expedited proceedings must be of the same quality as a judgment in a hearing on the merits. Moreover, the appointment of the chosen candidate must be deferred until the VerwG and OVG have given their rulings. If recourse to the courts succeeds, the appointment cannot be made (in any event for the time being). If the application fails, the appointment can proceed.

The claimant in this case had informed the justice minister that if the result went against him he would appeal to the BVerfG. The VerwG and the OVG dismissed the claimant’s applications. The justice minister did not await the possible intervention of the BVerfG, but instead appointed the candidate of his choice immediately after receiving the judgment of the OVG. The claimant appealed against this decision to the VerwG and also applied to the BVerfG. The BVerfG held that the claimant’s rights had been infringed since the justice minister (who was on notice that the claimant would apply to the BVerfG) should have awaited the outcome of these proceedings.

The claimant’s appeal in the principal action was held to be unfounded by the VerwG and the OVG. A factor that played a role in this connection was that under German law it was inferred from the principle of Ambtsstabilität (stability of the civil service) that an appointment could not be successfully challenged by a third party (no Anfechtungsklage). Nor did the Verpflichtungsklage (argument that there was an obligation to appoint the claimant) succeed. As regards the Feststellungsklage (argument that the treatment of the claimant had been
unlawful) the OVG held (if I understand it correctly) that the claimant had an insufficient interest in the proceedings.

In a detailed Gutachten (57 pages) the Berichterstatter raised the question of whether case law indicating that no appeal was possible against the appointment of a third party (rival candidate) should be abandoned in cases such as this one, namely where the administrative authority had not fulfilled its obligation to wait until judgment had been given, if necessary at three levels of jurisdiction (VerwG, OVG and BVerfG), on whether the appointment procedure had been conducted lawfully. An exception could be made here to the principle that should otherwise be upheld, namely that a disappointed competitor could not appeal against the appointment of a rival because of the principle of Ambtsstabilität. However, as the President of the Oberlandesgericht had been unable to take account of this new case law, the appointment should perhaps not be quashed (ex nunc) in this case if the BVerwG were willing to depart from its own case law. To this extent, the judgment of the BVerwG in this case should then be a prospective ruling only (i.e. apply only to future cases). The Berichterstatter also argued, by the way, that the claimant should possibly be able to succeed with his Feststellungsklage. His provisional view was therefore that the application for Revision should perhaps succeed.

The various aspects of the case were discussed in depth by all present at the meeting. The rapporteur explained the case at length (for almost an hour). On this occasion, the preparatory meeting in chambers lasted three hours.

After lunch I was given, as arranged beforehand, a tour of the library (12 staff).

Afterwards I had a discussion with a justice of the 4th Senat about a matter on which she wished to hear my opinion. A Syriac Orthodox congregation had built a church (with planning permission) on a site designated for industrial use and located at the heart of an industrial estate. Although the planning permission had been granted under some form of exemption (provided for in the Bebauungsplan) for Kirchliche Anlagen (church amenities), it seems safe to assume that the power of exemption should not have been exercised since – if I understood it correctly – the building of a church was quite out of keeping with an area designated in its entirety for industrial use. However, the planning permission had been legally valid for a long time.
The church now wished to use an area under the building as a mausoleum. An important consideration was that this would be a small mausoleum in which no more than ten priests of the church would be buried over the course of years. The mausoleum would be accessible only from the outside. Planning permission was once again required not only for the building modifications but also for the change of use. A permit under the burial and cremation legislation was also required. Another factor of importance was that the expression some ‘use’ within the meaning of the permit would involve the holding of fairly regular prayer meetings for the congregation at the mausoleum (after the Saturday service).

The question that now arose was whether planning permission could be granted or whether it should be held that a mausoleum too was not appropriate in an industrial estate. We discussed the Vorgutachten drafted by a research assistant and the Gutachten drafted by a justice of the Senat. Once again this opinion contained detailed and lengthy analyses.

I answered that my view would be that the planning permission granted to the church was so well established that it could no longer be challenged and that it included the normal uses to which a church, including the churchyard, could be put, for example weddings and funerals. Against this background I would think, as I explained to her, that the interests of this religious community in having this mausoleum should be weighed against any objections that firms in the vicinity might have. As far as I had been able to establish, the local authority had not weighed these competing interests and had also not properly checked how often the area outside the mausoleum would be used for prayers and by how many people. It remained a difficult case.

We then went on to discuss a major case that she was dealing with in her capacity as rapporteur (at first and sole instance) concerning the Planfeststellungsverfahren (land-use planning procedure) for Berlin’s Schönefeld Airport. The case had already been before the BVerwG in 2004, when the court had given important rulings on such matters as noise standards and opening hours. Now an appeal had been lodged against the remedial order and was being opposed by some 50 parties. As the Federal Government was not so enamoured of the decisions taken by the BVerwG in 2004, which it had also made in other cases concerning airfields, the coalition had adopted a policy programme stating that the standards would be changed by law in order to allow more night-time flights. Government reactions of this kind are rather familiar to me, as a Dutch judge.
Day 8, 3 November

Today was less busy. As not only the presiding judge of the 4th Senat but also some other justices were absent for various reasons things were quieter during the coffee break and lunch.

I spent part of the day studying a file concerning Revision of a judgment on appeal refusing planning permission. The VerwG had held that an application for judicial review was unfounded at first instance and the applicant’s appeal also failed. The case concerned a fresh attempt by a professional fisherman, who operated a marina on the Ammersee as a secondary source of income, to have the plan for the marina modified so that he could expand his activities there. He wished to enlarge the jetties and be able to keep boats on dry land.

The background was that although the BauGB (Federal Building Code) requires assessment of an application for planning permission for building in an outlying area as defined in the relevant Flachennutzungsplan (land-use plan) and that the basic rule is that such an application may be refused if it is contrary to the plan, the Code also contains various provisions that allow departures from the plan for certain building applications (§35 Abs. 1 – 6 BauGB). These provisions are not explicitly formulated as powers of derogation and the need to assess competing interests is instead partly already laid down in the law. For example, certain ‘privileged’ structures and changes of use are possible (even if they are contrary to the Flachennutzungsplan) unless they cannot be reconciled (entgegen stehen) with the public interest in a specific case. Applications for planning permission for other buildings and changes of use can be granted only if they are not to the detriment (Beeinträchtungen) of the public interest. Such detriment would exist, for example, where the application conflicts with the Flachennutzungsplan (other grounds for refusal include the BlmschG (Federal Emissions Control Act)). However, §35 Abs. 4 provides that applications for planning permission for the buildings and changes of use specified therein cannot ‘entgegengehalten werden kann’ (be opposed) on the grounds that they are contrary to the Flachennutzungsplan. The building plan for the jetties is covered by the cases provided for in Abs. 4.

The VGH Bayern (Higher Administrative Court of Bayern) had interpreted the paragraphs of §35 BauGB in conjunction with each other as meaning that although the
Flachennutzungsplan could not indeed form the basis for refusing a planning permission under Abs. 4 if there is only a detriment (nur ein Beeintrachtung) to the public interest, this did not alter the fact that an application might (or must) be refused if it could not be reconciled with the public interest; that was the case here because there was a serious clash with the interests protected in the Flachennutzungsplan.

This view had been challenged by means of a tightly argued case based, among other things, on the history of the legislation. It was submitted that §35 Abs. 4 should be read in such a way that the Flachennutzungsplan could not form the basis for granting the application, even by means of circuitous reasoning (but, as I understand it, other interests may be). As yet there was no case law of the BVerwG on this subject (this was not surprising as §35 Abs. 4 was radically changed just over ten years ago).

I studied this file not so much on account of its content as to see how a German planning permission file is structured and what a Flachennutzungsplan looks like in practice. In brief, this file did not look much different from a file of the Administrative Jurisdiction Division of the Dutch Council of State. The only noteworthy difference was that it contained much more photocopied case law and literature, with highlighting, neatly presented in a large file compiled by a research assistant for the justices. The entire case file, including the planning permission file, was over 50 cm thick. What struck me about the Flachennutzungsplan was that the map looked fairly detailed. Indeed, at first sight, it looked no less detailed than a Dutch land-use plan for an outlying area.

In the evening I was a guest at a dinner hosted by Mrs Eckertz-Höfer, the President of the Bundesverwaltungsgericht, in an excellent restaurant. A fellow guest was Justice Maidowski. One of the topics of conversation was my impressions so far of the differences between the careers of judges in Germany and the Netherlands. I remarked that I did not really see any major differences. However, in the early years of their career administrative court judges in Germany are required to spend more time than their Dutch counterparts working outside the court in an administrative authority or as a research assistant at one of the highest courts (including the BVerwG and the BVerfG). In Germany attorneys are not recruited to the ranks of the BVerwG. The explanation I received from various sources was that the pay differentials are too great. I explained that the differentials were great in the Netherlands as well (at least in the case of the people we wished to attract), but that fortunately there were always attorneys willing to make the transition.
**Day 9, 4 November**

This was the day of the oral hearing of the appeal by the President of a *Landesgericht* (Regional Court) against the appointment of a colleague to a position for which he himself had applied (see also Day 7). This interested third party did not appear (and was also not represented) at the hearing. As usual, after the opening words of the presiding judge, the rapporteur began by giving a fairly detailed explanation of the case, summarising not only the facts but also the parties’ submissions.

Afterwards the presiding judge took over and stated that the *Senat* was not inclined to allow the various formal grounds of appeal and defences. Indeed, these were barely touched upon during the remainder of the proceedings. The presiding judge then explained, subject to a clear proviso, how the court (departing from the two judgments a lower level of jurisdiction and from the *Senat’s* own existing case law) proposed to conclude from the case law of the BVerfG that in this case the claimant’s appeal against the appointment of a third party was possible. The reasoning was that before the appointment was made on the recommendation of the appointments committee the *Auswahl* (choice) by the competent authority should be capable of being reviewed (after the appointment such review would be pointless, mainly because of the basic rule that once another candidate has been appointed the decision can no longer be challenged). The losing candidate can initiate a thorough review of the decision by means of an *Eilverfahren* (expedited procedure) at first instance and on appeal, and if necessary with a subsequent right of recourse to the BVerfG. If the *Eilverfahren* is to have any value, the actual appointment of the chosen candidate should be postponed not only until the matter has been reviewed at first instance and on appeal but also – and this is new – until after any recourse to the BVerfG (this still left open the question of how much time the losing candidate must be allowed for this purpose). The presiding judge also indicated that the court would, in principle, be inclined to attach consequences to any infringement of this procedure (note that this is all judge-made law) by in future setting aside the appointment in cases of this kind. But, as the presiding judge went on to state, the court still had doubts as to whether (according to this line of thinking) the appointment should be set aside in this case as well. It could, after all, be argued that the person appointed was under no obligation to take into account developments in the case law of the *Senat*. This would mean that the full consequences of this development would become relevant only in future cases. An overruling was therefore one of the possible outcomes of these proceedings.
Afterwards, other issues were considered such as the important question of whether the justice minister had sufficient grounds for preferring the chosen candidate to the claimant. One factor was whether the minister was entitled to employ the argument that the Sozialgericht, of which the appointed justice was president, had succeeded in substantially increasing its case turnover. It was, after all, debatable whether this was due to the efforts of the president of the court or of other people. The hearing lasted almost three hours, during which time the lawyers representing the parties (the state justice minister had sent two lawyers and two civil servants) were given the opportunity to comment at length on the line of reasoning taken by the presiding judge. At the end of the hearing the presiding judge announced that judgment would be given at 15.00.

After lunch the Senat met in chambers. Once again there was a lengthy exchange of views. It was eventually decided that in the present case the appointment of the interested third party should be set aside. He would then, formally, return to his former position (as president of a Sozialgericht). The idea that had been aired during the hearing, namely that the position of the interested third party might deserve protection as he was perhaps entitled to rely on the decision (in which case the new line adopted by the Senat would apply only to the setting aside of future appointments) was therefore ultimately not adopted. At the end of the meeting in chambers, the Urteil (operative part of the judgement) was formulated by the members of the court. It was also decided that in order to obviate misunderstandings the Aufhebung quashing the appointment should take effect only on the day after the written judgment was forwarded (and therefore not from the moment of the announcement of the Urteil today).

The members of the court went on to discuss a press release, a draft of which had already been prepared by the rapporteur. This press release was published immediately after the delivery of the Urteil and is attached as an annexe to this report. Judgment was given at 15.15 and the reasons for the decision were briefly explained by the presiding judge. The judgment will become available in writing in about six weeks’ time.

After delivery of the judgment, I had a meeting with the head of the research department (Dr Butz). The term ‘research department’ is something of a misnomer since it is essentially a documentation department that is also responsible for the library. In the evening I attended a lecture given by a professor of the Law Faculty of Leipzig University on developments in copyright.
Day 10, 5 November 2010

I had a meeting with Mr Sprengler (Leiter der Geschäftsstelle / office manager). He explained that for the court administrative records they used GO§A, a software program specially developed for the BVerwG and the Bundesfinanzgericht (Federal Finance Court). I gained the impression that its capabilities were about the same as those of the system used by our Administrative Jurisdiction Division. But GO§A also has a linked electronic file into which all the documents and attachments relating to a case are scanned. These documents can then be printed at the touch of a button. To test it out, I looked at the e-file of the public service case I had attended the previous day and found that it did indeed contain, for example, all the Gutachten together with the attachments (together amounting to a few hundred pages). The justices can consult these documents online and also download them (although they seldom do). Little actual use is yet made of the e-files in the sense that a file or draft is circulated electronically.

Lawyers and, in principle, private citizens too can send a notice of appeal and other documents electronically to the BVerwG. The electronic correspondence is routed through an electronic court mailbox. A special program can be downloaded for this purpose. The user must then obtain an electronic signature card from a trusted party. This means that electronic correspondence is rather complicated and, above all, expensive for the user. This is why relatively little use is made of it (other than by the large law firms). Electronic messages can be transferred directly to GO§A.

It is important to note that in Germany the lower courts in each state can each have their own system (the state decides this itself). This is hampering the further development of e-correspondence as it is essential for the BVerG’s system to be compatible with that of the lower courts in order to avoid the necessity of entering the data twice. Consultations with the largest state (North Rhine-Westphalia) are already at an advanced stage.

I spent the rest of the time before my departure in the library gathering literature and case reports on topics of interest to me. Around lunchtime I took my leave of a number of colleagues.