Identification of the participant

Nationality: Polish
Functions: judge of the Supreme Administrative Court, President of the Regional Administrative Court in
Length of service: 17 years as a judge of the Supreme Administrative Court

Identification of the exchange
Hosting jurisdiction/institution: Judicial Office for England and Wales
City: London
Country: United Kingdom
Dates of the exchange: 6-18 November 2011
SUMMARY

ANNEX
GUIDELINES FOR DRAFTING THE REPORT

I- Programme of the exchange

Institutions you have visited, hearings, seminars/conferences you have attended, judges/prosecutors and other judicial staff you have met…

The aim here is not to detail each of the activities but to give an overview of the contents of the exchange.

If you have received a programme from the hosting institution, please provide a copy.

A.

I had an opportunity to observe the judges in action at the following courts:

The Supreme Court of the United Kingdom
The Royal Courts of Justice - Court of Appeal (Civil Division) –
The Royal Courts of Justice - High Court of Justice Queen’s Bench Division Administrative Court
First Tier Immigration and Asylum Chamber
Upper Tribunal Immigration and Asylum Chamber

B.

I had an opportunity to attend extremely thought-provoking and inspiring lectures delivered by:

Jonathan Sumption QC, recently appointed judge to the Supreme Court: Judicial and Political Decision Making: The Uncertain Boundary. (The Honourable Society of Lincoln’s Inn)

Master Reader Rodney Stewart Smith: How’s That? - Judges, umpires, appeals, reviews and referrals, (The Honourable Society of the Middle Temple Inn)

Rt. Hon. Lord Walker, Justice of The Supreme Court: The indefinite Article 8 (Thomas More Lecture, The Honourable Society of Lincoln’s Inn),

Dr Hugo Storey, Senior Immigration Judge, Asylum and Immigration Tribunal: Armed Conflict and Refugee Law: Are Courts Getting It Right? (lecture delivered at Institute of Advanced Legal Studies within the framework of the International Refugee Law seminar series)
C.
I also attended a one day conference “Securing Fairness and Redress: Administrative Justice at Risk” held by the Administrative Justice and Tribunals Council (AJTC) and in the evening I met judges who took part at an annual conference of the Asylum Support Tribunal.

D.
I took part in the regular weekly Monday meeting of the judges of the Upper Immigration Tribunal. Such meetings create an opportunity for judges to exchange views and discuss the legal novelties. During the meeting, I was given an opportunity to share Polish experience in reviewing administrative acts. I also gave a talk on the subject "Support for the asylum seekers and refugees in Poland" during the annual meeting of the members of the Asylum Support Tribunal.

II- The hosting institution

Brief description of the hosting institution, its role within the court organisation of the host country, how it is functioning…

A system of the administrative jurisdiction in the United Kingdom is complex and many different judicial authorities from the different perspectives are involved in the judicial review of the administrative acts (including the Supreme Court). It should also be noted that the system of tribunals and administrative courts has been recently reformed and these reforms have not been fully completed yet.

The essential core of the administrative jurisdiction is the two-tier tribunal structure established by the Tribunals Courts and Enforcement Act 2007, under a Senior President of Tribunals (Lord Justice Carnwath). The First Tier Tribunal (FTT) is composed of specialised Chambers, such as: (a) War Pensions and Armed Forces Compensation, (b) Social Entitlement Chamber, (c) Health, Education and Social Care Chamber, (d) General Regulatory Chamber, (e) Tax Chamber, (f) Immigration and Asylum Chamber, (g) Land, Property and Housing Chamber, (h) Employment Tribunal.

The upper tier is the Upper Tribunal (UT). The Upper Tribunal is formed by the (a) Administrative Appeals Chamber, (b) Tax and Chancery Chamber, (c) Immigration and Asylum Chamber, (d) Lands Chamber, (e) Employment Appeals Tribunal. It is noticeable that there are fewer upper than first instance authorities. It is because that the Administrative Appeals Chamber and the Tax and Chancery Chamber has jurisdictions over more than one first instance tribunals. Generally, appeals to the Upper Tribunal are on points of law only, and require permission of either the FTT or the UT. In addition, some of the Upper Chambers exercise first instance jurisdictions in specified matters. Appeals from the Upper Tribunal may be made with permission, on issues of general importance, to the Court of Appeal and thence in exceptional cases to the Supreme Court.
On matters not within the scope of the tribunal system, judicial review jurisdiction, if permission (a leave) is granted, is exercised by the High Court (a division of the High Court- Administrative Court), with appeals (with permission) to the Court of Appeal, or in exceptional situations by the Supreme Court.

III- The law of the host country

With regard to the activities you took part in during the exchange, please develop one aspect of the host country’s national law that you were particularly interested in.

It is a matter of principle that in order to appeal a claimant is required to obtain a permission to appeal. In the administrative cases a decision on the request for granting permission is taken at first on the papers (by a single judge). There is generally also a possibility of challenging a refusal at a hearing. I observed such hearings in the Court of Appeal, High Court of Justice Queen’s Bench Division (Administrative Court), and in the Upper Tribunal (Immigration and Asylum Chamber). In immigration cases permission of the judge to appeal is also required in “certified cases”. The “certified decision” means that the agency (the Home Secretary authority) that took the decision, considers an application as manifestly unfounded or there are other legally recognized grounds for not allowing the appeal (for example, in immigration cases if an application is made by the overstayed applicant).

1. In the Court of Appeal I observed two cases:
   a. An application for permission to appeal by an unsuccessful asylum claimant. The applicant was to be deported from the UK and deportation was already arranged for him to return to Afghanistan on a chartered flight. The applicant presented fresh evidence (medical evidence) that resulted in a fresh application for asylum. The claim was rejected by the Secretary of State for the Home Department and this decision was unsuccessfully appealed to the High Court. The deportation order was stayed by the Court of Appeal pending the outcome of the Appellant’s application for permission to appeal.
   
   b. An application for permission to appeal the order concerning the disclosure of sensitive documents. The substantive proceedings concerned a claim by the Respondent (Serious Organised Crime Agency) for a recovery order against the credit balance held at a bank account in London. The Respondent contended that the Applicant had been engaged in serious large scale crime.

   In the both cases decisions on leave were not taken.

2. In the High Court of Justice Queen’s Bench Division (Administrative Court) I observed hearings concerning mainly the renewed applications for judicial review. A judge considered whether permission for judicial review should be granted. The judge’s decisions on the renewed applications were taken
immediately after the hearing in the courtroom. The procedure was short and it seems to me that mostly it lasted not longer than 30 minutes in every case. It should be explained that the initial applications for judicial review in all the respective cases were decided without holding hearings (on papers). Although the hearing in every case was short, the gist of the claim and the grounds of the appeal were always presented orally and considered by a judge. Most of the cases were immigration. A judge considered whether the appeal was arguable and not manifestly unfounded. It was interesting to note that the scope of the judicial scrutiny was rather wide since a judge examined proportionality and exercised balancing test in one of the cases under article 8 ECHR. In this particular case the claimant sought permission to challenge the decision of the Secretary of State refusing her protection under art. 8 ECHR (application for leave to remain). The claimant was married the UK citizen and the marriage was genuine. The interference in the family life was considered proportionate. The refusal was mainly justified by the facts that at the moment of marriage she was an over-stayer (her visa had expired), and during the procedure she submitted false bank documents. It was also suggested that the applicant on her return may apply for entry visa (entry clearance). In another case based on Article 8 ECHR that I observed, permission was granted mainly due to the applicant’s long stay in the UK (20 years). There were 10 cases listed on the renewed application for permission for judicial review on one of the days I observed.

It was interesting for me to note that a judge of the Administrative Court (i.e. a division of the High Court) takes a decision on the permission to apply for judicial review in the appeals that fall not only within the jurisdiction of that court (the Administrative Court) but also on review of the Upper Tribunal (principally, in immigration or asylum cases). (I was told that this is because at the moment the Upper Tribunal’s judicial review jurisdiction is limited by statute, but it is expected that this will be changed in the near future.) The other interesting feature of the procedure was the fact that all the cases were listed at the same hour. The hearing begun in the courtroom filled with the claimants and their lawyers. As soon as the applications for permissions were decided they were able to leave the courtroom. Observing the variety of immigration cases and people’s fates that they reflect it seems clear beyond doubt that the UK is a country of destination for many people from all over the world who are trying at all cost and using all possible legal and illegal means to settle here or at least to stay for some time and find better life.

IV - The comparative law aspect in your exchange

What main similarities and differences could you observe between your own country and your host country in terms of organisation and judicial practice, substantial law...? Please develop.

In the Immigration and Asylum Chamber (First Tier Tribunal). I observed visa entry cases and a deportation case. There was a case concerning a third country national who wanted to be joined by his family member (wife). Refusal of the visa entry was made by the UK Embassy officer and his decision was challenged at the Tribunal. In another similar case (a refusal of visa to a family member) an appeal was brought by the sponsor, resident in the UK. In the deportation case a party invoked a risk to life if
returned home to one of the Muslim countries. She was a married woman who had become pregnant by another man in the UK. Returning her back, it was said, would put her at life risk from her husband because of adultery.

My first comparative remark is that a judicial review over a refusal of an entry visa by the Consult (Embassy) is permitted in Polish law only if the claimant is a family member of the EU national. Therefore a judicial review against refusal of an entry visa would not be permitted in these cases. As to the procedure I must say that I was impressed by the quality and a wide range of information given by the judge. The scope of information provided to the parties present in the courtroom is far wider from that expected in a Polish court. It is interesting to note that equally informed by a judge were the claimants represented by lawyers. While talking with the judges after the hearings on the merit of the cases I was fully in agreement with the decisions to be taken in these cases by the judge.

**V- The European aspect of your exchange**

Did you have the opportunity to observe the implementation or references to Community instruments, the European Convention of Human Rights, ...? Please develop.

In the Supreme Court I observed a court hearing in the case of Rabone & Another (Appellants) v Pennine Care NHS Trust (Respondent) on appeal from the Court of Appeal Civil Division (England and Wales). In the case there were interventions from Inquest, Justice, Liberty and Mind, who broadly speaking, was supportive to the submissions made by the Appellants. In the case the Appellants’ daughter who was voluntarily admitted to the Respondent’s hospital on her request was given a period of home leave, during which she committed suicide. The decision to agree to the request for home leave was negligent. Had medical staff refused to agree to the request, and had the appellant’s daughter insisted on leaving the hospital, she should have been assessed under the Mental Health Act 1983 and would likely have been detained. The Appellants claimed damages for breach of Article 2 ECHR and her father brought a claim on behalf of her estate in negligence. The parties settled the negligence claim. In this case the Appellants claimed damages under the Human Rights Act 1998 for acts by a public authority, namely the Respondent Trust, in contravention of Article 2 of the European Convention on Human Rights. The profound legal question is whether Article 2 ECHR imposes an obligation on the state to take preventative operational measures to protect a voluntary mental patient (the so-called informal patient) against a “real and immediate” risk of suicide. The judgment of the Court is expected at the end of the year.

The two day visit to the Supreme Court allowed me to observe how the lawyers make submissions and build up their arguments. My first impression is the length of time allocated to the case. Such a case in my country most likely would not last in the courtroom longer then an hour since it is expected to present in a written form all arguments. In the case I observed, an allocated time for the counsel of the Appellants
was 5 hours and reply 1,75 hours and for the counsel of the Respondent was 5, 25 hours. For the Interveners 0,75 hours plus 0,25 hours for reply. I quote these figures from a “pre trial arrangement sheet”. It should be said that the allocated time was strictly observed and supervised by the presiding Lord. The lawyers supported their submissions with the references to case law (both national and European). I must say that jurisprudence of the Strasbourg court was presented extremely thoroughly with the greatest diligence and exactness. The case on which the lawyer wanted to rely on was always considered in the courtroom with its special individual characteristics, and “superficiality” is the last word that could be used while describing the lawyers’ submissions. It is also important to note that a judge often requires from a lawyer clarification or asks questions. I should also say that judges, unlike lawyers, do not wear robes and wigs. Quality and extensiveness of the lawyer’s arguments certainly are of enormous help for judges who do not have to do so much research of jurisprudence on their own. It shows a practical difference from my experience since basically a research of jurisprudence and the European case law is on the judges shoulders in my country as it requires the old Roman principle “Iura novit curia”. I am very grateful to the Court administration for preparing my individual bundles (case files) - 9 volumes (over 3000 pages) that allowed me to follow the hearing, since often repeated words spoken by the counsel to the bench were: “ volume number..., tap number..., page number...”.

Finally, two further observations.
In the Supreme Court each Justice is permitted to write a separate judgment, and they often do, although they may also concur in a single judgment, and drafts are generally exchanged between them. A high degree of individual effort in the case of each judge must be acknowledged, since each member of the court is expected to work on the case separately before deciding whether to give a separate judgment. By contrast, in my system it is the rapporteur judge who usually works the hardest on the case. My last but not least observation is that in Poland, and as far as I know also in some other European countries, there is not an equivalent of the UK Human Rights Act, that constitutes a separate legal grounds for claiming damages for a breach of the Convention on Human Rights. The Convention is a vivid instrument and it is a subject matter of the interpretation by both national and the Strasbourg Court. It will be interesting to observe the evolution of the UK’s interpretation of the Convention and its impact on the Strasbourg court, although one could expect only one way: from Strasbourg to London.

VI- The benefits of the exchange
What were the benefits of your exchange? How can these benefits be useful in your judicial practice? Do you think your colleagues could benefit of the knowledge you acquired during your exchange? How?

I took a note of the several interesting features of the UK system and also the way judges act. Most of my observations I have included in the paragraphs above. I will certainly take an opportunity to share my knowledge with my colleagues.
VII- Suggestions

In your opinion, what aspects of the Exchange Programme could be improved? How?

I am fully satisfied and very grateful for time devoted to me by all judges I had an opportunity to meet. I am also very grateful for the planning and help at the prepartory stage of my visit which also required a lot of effort from the judicial staff.