REPORT ON A WORKING VISIT TO THE GERMAN FEDERAL ADMINISTRATIVE COURT IN LEIPZIG

2 - 13 December 2013

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1. Introduction

The newspaper *Süddeutsche Zeitung* once joked that, in Germany, you even need the court’s permission to start a revolution. This witticism neatly encapsulates my experiences at the German Federal Administrative Court (*Bundesverwaltungsgericht*; Bverw) in Leipzig. Compared with the Administrative Jurisdiction Division (‘the Division’) of the Council of State in the Netherlands, the German administrative courts seem to scrutinise the actions of the administrative authorities more closely. There are historical reasons for this attitude. ‘You need to remember’, I was told ‘that Germans have lived through two dictatorships in the recent past: the national socialist regime and the communist regime in East Germany.’ This has led to the creation of an elaborate system of legal protection against the administrative authorities in which, unlike in the Netherlands, checks on the compatibility of their actions with the constitution play a prominent role. In addition, the German administrative courts seem to adopt a more proactive stance than their Dutch counterparts. They seem as it were to take control of the dispute from the parties. As one of the judges put it, you can’t let a citizen be the victim of a bad lawyer. The Bverw has, it is true, set limits on the courts’ activities, but these limits are such that they are not likely to be exceeded in a hurry. Important in this regard is a judgment given by the Bverw on 17 April 2002 in which it held as follows:

‘42 Finally, the senate feels compelled to offer some clarification on the scrutiny role performed by the administrative courts. The present case is characterised not least by the fact that the higher administrative court rejected all the applicant’s objections, but subsequently, based on an *ex proprio motu* examination, nevertheless considered that it had discovered shortcomings that would render the bye-law invalid.

43 The Federal Administrative Court has occasionally cautioned that courts deciding questions of fact should not seek out shortcomings “as it were, unasked” (...) This advice is not intended to put in question the legal validity of principle of *ex proprio motu* examination laid down in § 86 paragraph 1 of the code of administrative procedure, but rather to point out that an appropriate application of this principle must take into account the separation of powers and considerations of procedural economy. It is not possible to lay down in abstract and general terms what will be appropriate in an individual case, as ultimately this hinges on finding the right balance between the executive and the judiciary (*cf.* Ossenbühl, 70th birthday festschrift in honour of Konrad Redeker, p 55 ff). Consequently, the idea of legal protection should always be at the forefront of the court’s deliberations. An “unsolicited”
search for mistakes that loses sight of the plaintiff’s or applicant’s actual desire for legal protection is, in cases of doubt, inappropriate. [...] 

44 In individual cases the court will need to proceed intuitively in how it goes about seeking potential errors.[...] 

It is clear from this that the German administrative courts have no role outside the sphere of legal protection. But what does this mean in practice? My visit to Leipzig gave me a chance to take a look behind the scenes at the highest administrative court in Germany. I followed the proceedings of the first and tenth senates in particular, which deal with aliens cases. I also attended sessions of the second and ninth senates. Senate members were always willing to enlighten me about the various facets of working at the Bverwg and the court’s functioning. Besides the Bverwg, I also attended a session of the constitutional court of the federal state of Saxony, which is situated opposite the Bverwg. Below I give an account of my visit.

2. The first and tenth senates (aliens cases) 

2.1 Composition

The composition of the first and tenth senates is almost identical. They are both presided over by the president (Präsidentin) of the Bverwg, Ms Eckertz-Höfer, and Prof. Berlit respectively. The members of the two senates are Prof. Dörig, Prof. Kraft, Ms Fricke and Dr Maidowski. After the retirement of Ms Eckertz-Höfer at the end of January, there will formally be a single senate for aliens cases.

Both senates are supported by two legal officers. These officers hold positions elsewhere (e.g. judge at a higher or other administrative court) and are seconded for between two and three years. This means that in contrast to the Division, which sits in continually changing compositions and has a sizeable support organisation, the Bverwg works in very small teams in each area of administrative jurisdiction.

2.2 The Firas Ajam case – preparations

The oral proceedings in this case were scheduled for 10 December 2013. The background to the case was as follows. On 1 July 2011, the statutory minimum length of time that a
foreign national must be married to his/her spouse before he or she may claim a right of residence that is not dependent on that marriage was raised from two to three years. The complainant, who came from Syria, entered Germany with a residence permit for study purposes in 2000, which was extended for the last time up to March 2009. On 4 March 2009 the complainant married a German citizen and was granted a residence permit for the purpose of residence with his spouse which, after being extended, was valid until 12 May 2012. The couple divorced in May 2011. In September the complainant applied for a residence permit that was not dependent on his marriage. The Stuttgart municipal authorities turned down his application because his marriage had not lasted at least three years. The municipal authorities argued that the rules in force until June 2011, under which the minimum duration was two years, did not apply to the complainant. The administrative court upheld the decision given by the municipal authorities. A ‘leapfrog appeal’ (Sprungrevision) from this judgment was allowed. The legal question the Bverwg had to address was whether the old law or the new law applied in a case such as this, where the marriage lasted two years, and the divorce took place before – but the application was made after – the new law came into force.

The following documents were drawn up for the preliminary discussion (Vorberatung) on 3 December 2013:

- A 35-page preliminary opinion (Vorgutachten) by the legal officer Dr Lau.
- An 18-page opinion (Gutachten) by the rapporteur (Berichterstatter) in this case, Dr Maidowski and a three-page additional opinion (Mitgutachten) by the co-rapporteur Prof. Dörig.
- A five-page note (Vermerk) by Ms Fricke.

By way of comparison, I asked one of the staff at the aliens chamber of the Division to draw up a memorandum setting out the solution under Dutch law. The memorandum consisted of one page! That said, it is only fair to point out that the problem as it arises under German law cannot occur in a Dutch context because of differences in the relevant statutory provisions.

Both the preliminary opinion and the opinion concluded that the Stuttgart municipal authorities were right to conclude that the new law applied and that there were no grounds in terms of legal certainty for concluding that a transitional arrangement should have been made.
In this regard Dr Maidowski’s opinion pointed out that, according to the BverwG’s case law, an assessment must be made as to whether application of the new law breached a legitimate expectation on the part of the complainant. It did not. Neither in general terms, because in principle nobody is entitled to expect that the law in force will remain unchanged, nor in concrete terms, since the complainant could have known that a change was in the pipeline, since the draft legislation raising the minimum duration of a marriage had already been published in January 2011 and the debate about measures to prevent sham marriages had attracted a great deal of media attention. Moreover, since the complainant’s marriage broke down before the change came into force, he could have made use of the old law by immediately applying for a right of residence independent of his marriage. Prof. Dörig, the co-rapporteur, concurred with the conclusion reached by Dr Lau and Dr Maidowski. A problem could arise if an existing right were infringed upon. That was not the case here, however. A claim only arose in this case if an application was made. The claim therefore only arose on 12 September 2011, when the complainant submitted his application. By then the new law was in force.

In her note, Ms Fricke considered whether the old law should apply by way of exception in certain transitional cases in connection with article 6, paragraph 1 of the German constitution, under which the state has a duty to protect and promote marriage. Of course this provision does not place a duty on the legislator to create an independent right of residence after the dissolution of a marriage, but if the legislator does or did create such a right, it must consider the consequences of article 6 of the constitution in its formulation. Could the announcement of an increase in the minimum duration act as an incentive to end a marriage that is already under strain sooner rather than later to make use of the more favourable existing rules? If so, does it not follow from the state’s duty to actually promote marriage that transitional arrangements are required?

None of the parties raised this point. The question therefore arises as to whether it should be examined by the court *ex proprio motu*. In this case it could be argued that it should. If the regulation were to be non-binding because it was incompatible with the constitution it would be unfortunate if its application or non-application would depend on whether its non-binding nature were invoked. It should be borne in mind that decisions against which no application for review is made also become final and unappealable even if they are based on a non-binding regulation.
The preliminary discussion involved an extensive exchange of views based on the documents referred to above.

2.3 The oral proceedings and the decision

The oral proceedings took place on 10 December, starting at 10:00. The most striking difference with proceedings at the Division is that the presiding judge (Vorsitzender Rechter) gives a far clearer indication of which way the judgment is tending. The Bverwg is quite open about its provisional position. In this way the parties are aware what elements the Bverwg currently sees as being decisive and hence know what they have to respond to, so that a meaningful exchange of views can take place.

The hearing started with Dr Maidowski, as rapporteur, restating briefly what the case was about. Then the presiding judge, Ms Eckertz-Höfer, reviewed the points that had also been covered in the preliminary discussion and gave the parties the opportunity to respond to the views she presented. She gave a detailed account of the issue identified in connection with article 6 of the constitution, indicating that the Bverwg had not quite finished examining this point (in other words, its members were not yet in full agreement).

This is a very interesting approach in my view. As a party, you know exactly where you stand. Of course, it takes tremendous skill to get settled case law modified even subtly, let alone changed altogether. The Bverwg’s approach makes this patently clear.

On the other hand the court has to demonstrate that it is keeping an open mind and is prepared to incorporate new perspectives provided by the parties into its deliberations.

The hearing, Ms Eckertz-Höfer’s last, was brought to a close by her at 10.50. It was followed by a meeting in judges’ chambers about the decision, which was due to be handed down in public on the afternoon of the same day. The meeting also discussed the press release due to be issued later that day.

The court decided that the requirement that a marriage last at least three years must also apply to people who would have been eligible for a right of residence independent of their marriage under the old law but only submitted an application after the new law came into
force. This did not contravene the prohibition on retrospective legislation nor the principle of protection of legitimate expectations. The press release indicated that the hardship clause offered a possible solution in problematic cases, such as the situation described above where application of the higher minimum duration might be incompatible with article 6 of the constitution.

It is odd from a Dutch perspective that the court’s decision is made public before the judgment has been set down in writing. Although the thorough preparation of the case before the hearing means that the likelihood of something being found during the process of drafting the decision that alters the outcome is very small, it cannot be ruled out entirely. It is precisely because of this risk that this practice, which used to be adopted in the Netherlands occasionally, has been discontinued here.

2.4 Miscellaneous

I had discussions with a number of colleagues about specific matters of aliens law and more general subjects, some of which are outlined below.

The credibility of claims to have been converted or to follow a particular faith

Inner convictions cannot be determined in the same way as physical acts and events. You can only look at the outside and draw conclusions about someone’s inner convictions from that. The Bverwg’s case law requires that many factors be taken into account in doing so. For example, the mere fact that someone does not attend a mosque does not necessarily justify the conclusion that he is not a believing Muslim. There might be good reasons why he has opted not to go to the mosque. It is important to recognise this fact.

The alien’s account should also be convincing. This does not mean that he must have an answer to everything. If a person of humble origins cannot give an answer to the question of why he believes, this may in fact be an indication that his claim to follow the faith in question is credible. By contrast, if someone can answer this question, but seems to be parroting an answer learned by heart, this may warrant the conclusion that his claim to follow the faith in question is not credible. In Germany the courts do not find it difficult to substitute their view of the credibility of an account for that of the administrative authorities. This is another
example of the German administrative courts closely scrutinising the actions of the authorities.

**Application of article 1F of the Refugee Convention**

The scope of application by the Bverwg of article 1F of the Refugee Convention is broad, based on the reasoning that support for accepting refugees would be eroded if criminals were admitted as refugees. Hence, a single case manslaughter is sufficient to deny refugee status. In certain circumstances, however, a person denied refugee status on the basis of article 1F might be able to claim subsidiary protection. It is therefore clear that the applicability of article 1F has different implications under German than under Dutch law. Under Dutch law the applicability of article 1F means that no residence permit of any kind, including on the grounds of subsidiary protection, may be granted.

To date there is no Bverwg case law on the question that has arisen in the Netherlands as to whether article 1F can be invoked against a person guilty of female genital mutilation.

**The intensity of the immigration debate**

In Germany, just as in the Netherlands, the debate on immigration – and, by extension, on the administration of justice in the area of aliens law – is heated.

**ECtHR case law**

The Bverwg also wrestles with the problem that it is not always clear where ECtHR case law should lead in a specific case. A tried-and-tested method is for the court to show in its judgment that it has taken account of all the relevant ECtHR case law in its deliberations simply by mentioning them in its judgement and then reaching a decision. This approach has proved to be ‘Strasbourg-proof’.

**How the court operates**

The Division delivers more than 8,000 judgments a year in aliens law cases, while the Bverwg hands down a few dozen judgments in this field. The Aliens Chamber of the Division comprises 11.2 State Councillors (in FTE terms) supported 96.8 (FTE) Officers (2013 figures). The aliens senate of the Bverwg consists, as noted above, of six judges and two
legal officers. These quantitative data alone would indicate that there are substantial differences in the way the highest courts that hear aliens cases operate in the Netherlands and Germany. And there are. At the Division, the bulk of the preparatory work must be left to support staff. It would be inconceivable for the State Councillors themselves to write the judgments. Their role is to make decisions and perform checks. By contrast, the judges at the Bverwg do virtually everything themselves. From the point of view of judicial lawmaking, the Bverwg’s setup and the working method it entails may be preferable. Without a heavy caseload of the kind borne by the Division, a number of authoritative judges in the field of administrative law can concentrate on answering a limited number of legal questions. Whether the three-tier German system is more efficient, however, is another question.

3. The ninth senate

The role of the ninth senate is to hear disputes that the Bverwg adjudicates at first and last instance. These relate in particular to major infrastructural decisions.

On 11 December I attended the first part of the two-day hearing of an application for review lodged by Friends of the Earth Germany (Bund für Umwelt und Naturschutz Deutschland) against a planning decision of 20 December 2010 concerning the building of part of the A14 between Colbitz and Dolle. The A14 runs from Magdeburg to Schwerin. This case related to a stretch of road of some 15km.

The rapporteur produced an 111-page opinion and a 23-page additional opinion for this case. It was clear that these cases place a heavy burden on judicial capacity. Dr Bier, the presiding judge of the ninth senate, told me that a case such as this one occupied a judge, fulfilling the role of rapporteur, for four months, not including another two months spent working on the judgment. This means that the Bverwg can only hear a limited number of cases of this kind each year.

Here too, the hearing started with the rapporteur stating briefly what the case was about, before the presiding judge took charge of the proceedings. In the course of the four hours that I attended the session, the presiding judge spoke for, I would estimate, about half the time. Dr Bier told me he spent two weeks preparing for this case. There seemed to be an expert (Sachverständiger) present in the room for each species of animal and plant that was under threat. The experts outnumbered the parties at the hearing.
The standard by which the experts of the administrative authority are assessed is whether their opinions are vertretbar, i.e. tenable. As long as they are, the administrative authority may base its decision on them. My impression is that the Bverwg handles this kind of case with even greater precision than the Division’s spatial planning chamber. Judgments by the Bverwg on this kind of case at first and last instance must, as Dr Bier indicated, be exemplary, since otherwise the Bverwg would be unable to credibly correct shortcomings in judgments on such decisions by the lower administrative courts.

4. The second senate

A specifically German problem was at issue in cases heard by the second senate on 12 December. As a consequence of German unification, the salaries of East German civil servants had to be brought into line with those earned by West German civil servants. Since an immediate adjustment to bring salaries up to West German levels was considered too expensive, it was decided to adjust salaries gradually. This was justified on the grounds that the cost of living in the East was lower than in the West. This is by its nature a transitional problem. Initially this question was regulated at federal level, but on 1 November 2008 competence to legislate on civil service pay was transferred to the individual states (Länder).

The cases being heard on 12 December concerned whether the state of Saxony could adjust civil servants’ salaries in stages. Civil servants on the lower pay scales were awarded equal pay from 1 January 2008, but those on higher pay scales were only treated likewise from 1 January 2010. Here too, the constitution plays an important role. According to the Bverwg’s case law, it follows from article 33, paragraphs 2 and 5 of the constitution that there must be an appropriate difference in remuneration between the various categories of civil servant. The rules as they applied in Saxony deviated from this principle because one of their consequences was that, for a period of two years, civil servants in scale A 10 earned no more than those in scale A 9.

In spite of this, the Bverwg’s ruling, announced the same day, was that the Saxon rules could be considered to be compatible with the constitution. This judgment rested on the particular, exceptional situation in which the legislator of the state of Saxony was placed in 2008 towards the end of the transformation process under which German unity was restored. The legislator of Saxony was allowed to continue to apply the rules established at
federal level until the end of the transitional period indicated in the federal rules. So it seems that, in Germany too, the constitution’s bark is sometimes worse than its bite.

5. The constitutional court of Saxony

Each state of the German federal republic has its own constitution, and hence its own constitutional court. On Friday 13 December I attended a session at the constitutional court of Saxony.

The dispute concerned the relocation of the seat of Saxony's court of audit. The court of audit argued that while the state legislator was free to determine the seat of the state’s organs, it had to carry out proper consultations before doing so, something it had allegedly failed to do in this instance. I don’t know what the outcome of the case was, but I could hazard a guess.

6. Closing remarks

My visit to Leipzig has kindled my enthusiasm for taking another critical look at the way we work. It certainly provides encouragement to continue to pursue energetically the Division’s endeavours to pay more attention to those cases that are important in terms of judicial lawmaking.
A brief word of thanks

I would like to put on record my heartfelt gratitude to the members of the first and tenth senates who welcomed me so very warmly in their midst. I would also like to thank Ms Eckertz-Höfer, Ms Held-Daab, Prof. Dörig, Prof. Kraft and Dr Maidowski for their contribution in making my leisure hours in Leipzig so enjoyable too. My wife and I have especially fond memories of being shown round the Nikolaïkirche and the Federal Administrative Court itself by Dr Maidowski.