REPORT ON THE EXCHANGE AND SUMMARY

Identification of the participant

Name: Pilving
First name: Ivo
Nationality: Estonia
Country of exchange: Germany

REPORT

Identification of the participant

Nationality: Estonia
Functions: Judge
Length of service: since 2011

Identification of the exchange

Hosting jurisdiction/institution: Federal Administrative Court
City: Leipzig
Country: Germany
Dates of the exchange: 27.10.-07.11.2014

SUMMARY

I visited the Federal Administrative Court of Germany (Bundesverwaltungsgericht – BVerwG) in Leipzig in October and November 2014 within the framework of the ACA Judge Exchange Programme. The purpose of the visit was to acquaint myself with the organisation of work and administrative court procedure rules of the BVerwG, especially in the areas of environmental and planning law.
Apart from peculiarities arising from the federal organisation and vastness of Germany, the fundamental principles of the work of the Supreme Court of Estonia and BVerwG are relatively similar. Both courts only deal with legal matters (as a rule).

A major part of the two weeks spent in Leipzig constituted the examination of written materials of court cases, participation in deliberations and hearings and conversations with colleagues. I examined three cases in more detail that were related to the determination of flight routes, allocation of allowances to companies and conditions for establishment in the EU of Turkish employees and their family members in accordance with the Association Agreement.

I consider the visit beneficial and successful.

I- Programme of the exchange

I visited the Federal Administrative Court of Germany (Bundesverwaltungsgericht – BVerwG) in Leipzig during the period from 27 October to 7 November.

The purpose of the visit was to acquaint myself with the procedural rules of the work of administrative courts and practical organisation of work thereof. I primarily examined the materials of matters being heard (opinions of clerks and reporting judges, contested court decisions, earlier case law and comments), observed open hearings and deliberations of the panel. I had a meeting with the Vice President of BVerwG and numerous conversations with the presiding judges and judges of Senates of BVerwG. We talked about the organisation of work of Senates, legal regulation of administrative court procedure and substantive law.

As I expressed my desire to find out more about the German construction and environmental law, I thoroughly observed the work of Fourth Senate specialised in construction matters, but I also participated in hearings and deliberations of the First and Seventh Senate (environmental and immigration law).

II- The hosting institution

The Federal Administrative Court is the highest court of the Federal Republic of Germany hearing administrative matters. The court primarily reviews appeals against decisions of Higher Administrative Courts of states by way of revision. As an additional function, the Federal Administrative Court adjudicates appeals in some types of matters as the court of first instance, e.g. in connection with plans of major infrastructure objects.

Appeals can only be filed with the Leipzig court by way of revision on points of law. The revision court is bound by the facts established by lower courts, unless the facts have been established by breaching the procedural rules. BVerwG cannot establish new facts – if these are relevant to the adjudication of the matter, the matter has to be referred back
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to previous instances. The basis for declaring the revision acceptable can be either a fundamental importance of the matter, divergence of a lower court from the case law of higher courts or a material procedural error. As a federal court, BVerwG only verifies the application of federal law (also the EU law within this meaning) as well as legislation concerning administrative procedure of states, which overlap the Federal Administrative Procedure Act.

55 judges work for BVerwG and they are divided between ten Senates. The Leipzig court adjudicates a total of 1,300-1,500 matters per year. To hear a matter on the merits, the Higher Administrative Court of a state or the Senate (consisting of 3 members) of BVerwG has to grant a leave. Granting and the refusal to grant the leave is briefly reasoned.

A Senate consists of five to seven judges and one research assistant. The chair of the senate is the presiding judge in any and all matters. Accepted matters are adjudicated in the panel consisting of five judges after an open hearing, as a rule (see also IV.3 below).

III- The law of the host country

The purpose of my visit was to examine the general organisation of work of BVerwG as well as the application of procedural rules in adjudicating disputes related to construction and environmental law. I was especially interested in procedural problems associated with the right of action and extent of judicial review in environmental and planning matters. In Estonia the Supreme Court has also had to clarify the extent of judicial review in matters where one can have recourse to the courts on other bases than to protect one’s own rights (see also IV.1 below).

Two disputes over the determination of flight routes in the Berlin Brandenburg Airport provided a good opportunity to study the problem. In the first case the appellant was a municipality located near the airport and in the second case the appellant was an environmental organisation.

The flight routes determined by the European Aviation Safety Agency cause unacceptably loud noise in the surroundings. According to the position of BVerwG as expressed in the press release of 12 November 2014, this is a legitimate decision of the agency. The European Aviation Safety Agency has preferred a solution where the noise level affecting people is higher, but where the number of persons concerned is the smallest. BVerwG found that the discretionary decision was legitimate. The Natura sites located close to the airport are not considerable influenced by the air traffic.
In addition to the matter of the flight routes, I examined in detail a matter that consisted of a dispute over the allocation of allowances and a matter concerning the right of a Turkish child to reside in the EU in accordance with the EEC-Turkey Association Agreement.

IV- The comparative law aspect in your exchange

1. Estonia has transposed several principles of administrative court procedure from the German law. The types of appeals, right of action and extent of judicial review, the principle of investigation, etc., are similar. The distinctions primarily arise from the different size of the two countries and different structure of the court systems.

In Estonia the Supreme Court deals with the administrative, civil and criminal matters as well as the constitutional review. In Estonia the competence of administrative courts is much more extensive than in Germany. For instance, administrative courts in Germany do not hear tax and social disputes or matters of public procurements and state liability. Unlike in Estonian administrative courts, administrative legislation of general application (regulations) can also be contested in German administrative courts, but since the definition of legislation of specific application is broader in Estonia, for example spatial plans are still placed within the competence of the administrative courts in Estonia.

In Germany it is possible to have recourse directly to the Higher Administrative Court of a state or even to the Federal Administrative Court in some type of actions. It is impossible in Estonia. First, an appeal always has to be filed with the administrative court in Estonia.

2. Like in Germany, as a rule, a person can only file an appeal with the administrative court in Estonia to protect their own subjective rights. Arising from the Aarhus Convention and Directive 2003/35/EC, a broader right of action must be guaranteed to environmental organisations. This issue was, among other things, topical in a dispute over flight routes. Germany and Estonia have regulated the right of action of environmental organisations in a different manner. In Estonia environmental organisations have an extended right of action for any and all administrative acts issued in the sphere of the protection of the environment (subsection 292 (1) of the Code of Administrative Court Procedure). However, in Germany environmental organisations can only contest specific decisions exactly defined in legislation (§ 1 of Umweltrechtsbehelfsgesetz (Environmental Appeals Act) and § 64 of Bundesnaturschutzgesetz (Federal Nature Conservation Act)).

The environmental organisation that filed an appeal in the matter of flight routes had no right of action under the Umweltrechtsbehelfsgesetz, as the environmental impact assessment is not necessary to determine flight routes. The court also noted in the press
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release that the appellant cannot demand the protection of such areas that are defined as "quiet areas" in the action plans of local government authorities within the meaning of Article 8 of Directive 2002/49/EC. The organisation could only require a narrow judicial review in this matter to the extent pertaining to the protection of Natura sites. As there was no impact on Natura sites, the appeal was not satisfied.

In Estonia an environmental organisation similar to the appellant in the matter of flight routes would probably have had an unlimited right of action to contest the judgment on the determination of flight routes as well as the judgment related to the environment. The Estonian court should thereby verify the assertions related to the Natura sites and other environmental aspects. So far the Supreme Court has not directly explained the extent of judicial review for environmental organisations, but the court has done that in connection with the appeals of interests citizens in environmental matters and with *actio popularis* in planning matters (cf. Supreme Court 3-3-1-87-11, pp. 13, 28-30; 3-3-1-84-08, pp. 11, 15).

3. Apart from the aspect of differentiating federal and state law, the prerequisites for the grant of a leave for a matter are very similar in the Supreme Court and BVerwG (see II above). The Supreme Court also only verifies the application of law in Estonia – the matter must be processed due to the legal error of the court or fundamental importance of the dispute. Deviation (divergence) from the case law of the Supreme Court is not an independent basis for granting a leave in Estonia, but it is practically covered by a legal error, if the Supreme Court sticks to its earlier case law in preliminary procedure. The procedure for granting the leave for a matter is different in Estonia and in Germany. A leave can only be granted by the Supreme Court in Estonia. In Germany the leave can be granted by a lower court and even by the court of first instance under certain conditions. If the Supreme Court refuses to accept a matter, the ruling is never substantiated. However, brief reasons for the existence or absence of the basis for revision are submitted in Leipzig. At the same time, filters similar to the system of leave in Germany are also applied in courts of states and therefore it is impossible to apply for the leave from BVerwG in several matters.

4. As to the organisation of work of BVerwG in comparison with the Supreme Court, the major difference is the greater role of judges of Leipzig in preparing matters. Approximately two clerks per judge work in the Chambers of the Supreme Court. They write opinions on court matters and assist judges in preparing draft judgments. In Leipzig opinions in accepted matters are always written by two judges (reporting judge and fellow reporting judge). The opinion of a clerk (research assistant) is only added in extremely fundamental matters. The draft judgment is always prepared by the reporting judge.
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It seems that due to the high specialisation and development of the long-term case law, most of the judgments are made on the basis of consensus in BVerwG. The change in the case law is rare. I have got the impression that the Supreme Court has more dissenting opinions in fundamental matters and more matters are decided by a majority vote.

V- The European aspect of your exchange

Any and all issues that I examined in Leipzig had a direct or indirect connection with EU law.

In the matter of a Turkish child, the dispute concerned the interpretation and application or Article 13 of the EEC-Turkey Association Agreement. The Court of Justice has explained that Article 13 prohibits Member States from establishing new restrictive conditions for establishment in a Member State of Turkish employees. BVerwG considered that the claim for applying for a residence permit for Turkish children who could establish in Germany without a residence permit under the earlier regulation also constitutes such a condition. However, the child’s appeal for establishment of the right to stay without a permit was not satisfied. The clause under which, as an exception, restrictive conditions may be established for working in the event of an urgent public interest was decisive (press release of 6 November 2014, 1 C 4.14).

In matters of flight routes Directive 2003/35/EC that grants environmental organisations the right of action had to be primarily considered. In essence, it was important in the dispute whether the EU law required the environmental impact assessment in determining of the flight route. The European Commission has handled the same matter in the infringement procedure against Germany. The lower court also indicated that the contested route was not addressed in assessing the environmental impact upon planning the airport. The state court also found that Directive 2011/92/EU does not impose an obligation to perform an additional environmental impact assessment in determining flight routes (Higher Administrative Court of Berlin-Brandenburg, ZUR 2013, 678 (679 jj)). Such an obligation is only applicable upon establishing an airport or reconstructing the facilities thereof (cf. judgment of the Court of Justice in case no. C-275/09: Brussels Hoofdstedelijk Gewest and others). An environmental organisation that filed the appeal also relied on Article 8(1)(b) of Directive 2002/49/EC in the matter. According to this the action plans of noise reduction must also protect quiet areas against an increase in noise (see for this assertion IV.2 above).

A dispute over the allowances was primarily associated with the German law that transposed Directive 2003/87/EC.
VI- **Good Practice within the host jurisdiction.**

Estonia has already transposed several principles of the German administrative court procedure. However, upon compiling legislation a different choice has been deliberately made in several issues. Various solutions of and approaches to legal orders often lead to the same final result and one solution need not be worse than the other. The transposition of good solutions is hindered by the small size of Estonia, e.g. the specialisation of judges at the level applied in Leipzig cannot be implemented in such a small court.

Estonia should definitely consider the possibility of contesting regulations in the administrative court in the near future in the example of Germany. The regulation of the Estonian administrative court procedure and opinions of courts have been criticised in connection with the issue that the differentiation of administrative acts that can be contested in administrative courts and regulations to be reviewed within the constitutional review procedure is complicated. The subordination of both instruments to the same judicial branch would help to decrease the legal vagueness.

The style and objectives of holding court hearings are slightly different in German administrative courts, incl. in BVerwG, and Estonian administrative courts. In Germany the court declares its opinions relatively freely to participants in the proceedings to enable the participants in the proceedings to submit their objections efficiently and to improve the quality of court judgments.

It must also be mentioned that the decisions of German courts are very easily electronically accessible and can be found on the basis of keywords and full text search (JURIS database).

VII- **The benefits of the exchange**

My purpose was to understand the internal organisation of work of BVerwG and the content of several rules regulating the administrative court procedure better. It makes it possible to use the German case law and special literature more easily as a source of inspiration in developing the case law and court procedure rules. I certainly do not refer to the automatic transposition of German solutions. A comparison with the law of the other country and with different positions of lawyers of that country provides a broader overview of various possible solutions to the problems and their positive and negative sides.
VIII- Suggestions

I was very satisfied with the organisation of the exchange programme on the side of both ACA and BVerwG. I cannot point to any omissions in the exchange programme.

However, if possible, I would recommend making the time frames of participating in the exchange programme a little more flexible so the exchange can also take place in the year following the acceptance of the request. If the decision is made only in the summer and the visit must be completed within the remaining months of the year, the planning of the visit can be rather complicated.