REPORT ON THE EXCHANGE AND SUMMARY

Identification of the participant

Name: Değirmenci
First name: Asiye
Nationality: Turkish
Country of exchange: Germany

REPORT

Identification of the participant

Nationality: Turkish
Functions: Public Reporter
Length of service: 20-years of experience

Identification of the exchange

Hosting jurisdiction/institution: Bundesverwaltungsgericht (BVerwG)
City: Leipzig
Country: Germany

SUMMARY

I have been to Bundesverwaltungsgericht (BVerwG), the highest court in the administrative jurisdiction of the Federal Republic of Germany within the scope of ACA-Europa's judge exchange programme between November 9th and 20th, 2015. During this period of time, I have participated into meetings and I attended the hearings of First Chamber that has competence to examine cases regarding asylum, foreigners and associations and Second
Chambers that is entitled to review public officials’ cases. The judge, responsible for foreign affairs in BVerwG, informed me about the German judicial organisation, administrative courts and the court's task in detail. BVerwG has general competence to handle disputes as chambers in administrative judiciary and its competence is limited to only legal control. In every single chambers academic personnel is employed. I observed that the fundamental tasks of BVerwG are to ensure consistency of judicial decisions and to develop them. Functioning as a court of BVerwG rejects over 90% of appeals. This condition is seen as a good outcome for the administrative judiciary. An important part of decisions is made public through writing press releases. Decisions are compatible with the European Court of Justice and the European Court of Human Rights case law. In the ReNEUAL-Symposium (www.reneual.eu) held on 5 and 6 November 2015, a German draft for European Code of Administrative Procedure is presented and discussed in BVerwG. There is a specialized administrative jurisdiction in Germany. In contradistinction to Turkish system, judges among ordinary citizens participate in judging.

In addition, working for a certain period of work in administration provides affirmative legal point of view to administrative judges. Despite dissimilarity of Turkish centralized and German federal administration and administrative judicial structure, similar procedural rules are followed in a general sense.

I am very pleased to have information about the German administrative judiciary.

REPORT REGARDING EXCHANGE IN THE BVerwG (FEDERAL ADMINISTRATIVE COURT)

I- The schedule of the exchange programme

I was very happy to be allowed to participate, within the framework of the ACA judge exchange system, as a guest judge in this programme involving the Federal Administrative Court. The judge, Prof. Dr K., who is responsible for overseas affairs associated with the Federal Administrative Court, received me in a gracious and cordial manner. During the two-week long programme, he was, in his capacity as my judicial point of contact, very cordial and helpful.
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My visit began with a tour of the Federal Administrative Court. I viewed the large courtroom, other courtrooms and the consultation rooms. A small museum commemorating the Supreme Court of the German Reich has been set up for visitors. A function commemorating the 120th anniversary of the construction of the building of the Supreme Court of the German Reich (this is the historical building that currently houses the Federal Administrative Court) took place on 29 and 30 October. One of the symbolic figures of the constitutional state is the subdued lion that has an iron ring running through its mouth. This symbolises the fact that the power of the state is arrested by the law. This representation can be found on many doors in court buildings. Mr K. then provided me with a detailed description of the structure and segmentation of the German judiciaries, the administrative jurisdiction, the appeal stages and the tasks of the Federal Administrative Court. A schedule had been prepared for the duration of my visit. The schedule has been enclosed herewith.

I participated in the meetings and preliminary consultations conducted by the 1st senate (which is responsible for asylum law, aliens law and law of associations) between 9 and 20 November, along with the meetings and preliminary consultations conducted by the 2nd senate (which is responsible for civil service law). I had my own room, along with a computer that was connected to the Internet. To prepare for the preliminary consultations and meetings in which I participated, I read the files associated with the respective cases and the reports associated with the meetings that had been drawn up by the judges in their capacity as rapporteurs. Apart from that, I also talked to the academic employee of the 2nd senate about her work. She is a judge at the administrative court, and has been delegated to the Federal Administrative Court for a period of two years. At the Federal Administrative Court, she assists one of the senates in her capacity as an academic employee. Apart from that, the librarian gave me a tour of the library. The library contains 240,000 books, along with modern technical material. Finally, during the joint lunches, I had the opportunity to get to know my German colleagues, including the president, as well as the other non-judicial personnel.

II- The host organisation

Federalism plays an important role in Germany. The Federal Republic of Germany consists of 16 states (federal states), which have their own state governments and state parliaments.
In the Federal Republic of Germany, there are five types of jurisdictions (ordinary jurisdiction, employment jurisdiction, administrative jurisdiction, social jurisdiction and financial jurisdiction) and five high courts (the Federal Supreme Court, the German Federal Labour Court, the Federal Administrative Court, the Federal Social Court and the Federal Finance Court). The regional courts are below this level. The Federal Constitutional Court is enormously important.

In the Federal Republic of Germany, the administrative jurisdiction is currently made up of 52 administrative courts, 15 higher administrative courts and one Federal Administrative Court.

1- The administrative courts (VG) are typically the courts of first instance, and they thoroughly examine the cases from the factual and legal points of view. The rulings are delivered either by a single judge or the chamber, which are associated with three professional judges and two honorary judges.

2- The administrative appeals tribunals (OVG) or Higher Administrative Courts (VGH) of the states are primarily the courts of second instance. Within the framework of appeal proceedings, they assess the rulings of the administrative courts that are being disputed. In addition to this, they serve as appeals boards vis-à-vis the decisions made by the administrative courts within the framework of provisional legal protection, and decisions regarding legal aid. They also serve as legal authorities and factual authorities. With regard to the first instance, they are, among other things, responsible for judicial review proceedings in which, for example, development plans of local authorities are examined upon request. They make their decisions in their capacity as a senate. Like the administrative courts, they are made up of three professional judges and two honorary judges (this can vary according to state law).

3- The Federal Administrative Court (BVerwG) is the highest administrative court in the Federal Republic of Germany for public law disputes that have nothing to do with constitutional law, and it basically serves as the court of last resort in the third instance. Its main task is to make decisions, in its capacity as the appellate body,
The Federal Administrative Court was set up in 1952. The Federal Administrative Court was initially located in Berlin. After the reunification of Germany in the year 1989, it was necessary for the new states to receive the institutions of the union (authorities and courts). Consequently, in 2002, the Federal Administrative Court was moved to the renovated building of the Supreme Court of the German Reich (which was built in 1895) in the city of Leipzig (Free State of Saxony).

The Federal Administrative Court is responsible for the general administrative jurisdiction. It has ten revision senates, two military service senates and one expert committee. Each revision senate has five judges, while each military service senate has three judges. The Federal Administrative Court contains a total of 53 judges. Apart from that, the Federal Administrative Court also has academic employees, each of which is assigned to a particular senate. Thanks to the allocation of duties of the court and the internal allocation of duties of the senate, it is clear at the time of receipt of a lawsuit as to which senate is going to be responsible for the matter in question, and which judge is going to serve as a rapporteur. In order to prevent manipulations, the constitutional requirement that states that nobody may be taken away from his ‘legal judge’ (i.e. the legally responsible judge) is complied with. The rapporteur draws up a report, which is passed on to the co-rapporteur. The co-rapporteur draws up an additional report. An academic employee may also draw up a preliminary report. This involves preliminary consultations and verbal negotiations. The cases are introduced by the rapporteur in all the senates. The verbal negotiations are followed by consultations, which results in a decision. The judgement is then announced in a meeting or a special announcement session. The chairman of the senate then gives a brief verbal justification for the judgement. Subsequently, the long version of the judgement is written out by the rapporteur, and it is signed by all the judges in the senate. Finally, it is handed over to the stakeholders, along with the written justification for the judgement.

In case of all the administrative courts, the decision in a case takes the form of a judgement or a decree. A judgement ends the main legal proceedings associated with a particular instance that were initiated through the respective lawsuit, and it is usually issued in conjunction with a verbal negotiation. On the other hand, a decree is issued
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without verbal negotiations. It relates to interlocutory decisions in the main proceedings (e.g. granting of legal aid, evidence order regarding the obtaining of a report or the questioning of witnesses). Furthermore, decrees are issued in expedited procedures or interlocutory proceedings, in which a decision is made regarding approval for a legal remedy (appeal or review). Unlike a decree, a judgement uses the phrase ‘in the name of the people’ as a salutation. The decisions are published on the home page of the court (www.bverwg.de), in the official collection and judicial magazines (in part), and in a commercial database (www.juris.de).

The Federal Administrative Court primarily serves as an appellate body against decisions made by the higher administrative courts for issues relating to administrative law. However, in exceptional cases, an administrative court can allow the direct filing of a leap-frog appeal against its ruling with a Federal Administrative Court. In over 90 percent of the cases, appeals involving the Federal Administrative Court are not allowed by the higher administrative court. The defeated party can then raise an objection against the prohibition of an appeal involving the Federal Administrative Court. At this stage of the proceedings, the court does not check the contents of the case to determine whether the previous court made the correct decision. Instead, it merely checks whether the legal matter is of basic significance, whether the higher administrative court has deviated from the supreme court’s case law and whether the situation involved a procedural violation. The Federal Administrative Court only allows the appeal if one of these approval reasons has been proven to exist by the entity raising the objection. When it comes to the decision regarding whether or not an appeal is to be allowed, Germany’s administrative process law does not believe that the task of the Federal Administrative Court is, in its capacity as the court of last resort, to examine all cases to check whether justice has been preserved in each individual case. Rather, it believes that the task of the Federal Administrative Court is to achieve uniformity with regard to case law, and to further develop the case law if necessary.

The Federal Administrative Court only serves as the first and last legal and factual authority in exceptional cases outlined by the legislature. For example, this may be the case if one state files a lawsuit against another state, or if the Federal Republic of Germany files a lawsuit against a state, and the dispute has nothing to do with the constitutional law (e.g. questions of liability). Such a scenario can also arise in situations involving the intelligence sector or large infrastructure projects (highways, waterways). When it comes to issues related to military service, the Federal
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Administrative Court is the appellate court. Honorary judges only play a part in cases involving matters related to military service.

In its capacity as an appellate court, the Federal Administrative Court makes its decisions when it is staffed by five professional judges. In case of decrees without verbal negotiations, it makes its decisions when it is staffed by three professional judges. New matters cannot be presented within the framework of the appeals process; furthermore, the Federal Administrative Court is bound to the actual findings discovered by the previous court.

III- The law of the host country

The German legal system makes provisions for the inclusion of honorary judges in the dispensation of justice. This participation is based on the historical tradition of involving the people in the dispensation of justice as a characteristic of the power of the state, and has been preserved in Germany to this day. This leads to a greater acceptance of judicial decisions, because ‘normal citizens’ are involved in the decision-making process. Furthermore, the honorary judges provide their personal circles with an impression of how the courts work. In this way, they contribute to the transparency of the judicial decision-making process, and to the population’s acceptance of the constitutional state. The lay judges are not lawyers. They are active in the fields of criminal jurisdiction, administrative jurisdiction, social jurisdiction, financial jurisdiction and employment jurisdiction. Honorary judges have the same voting rights as professional judges.

The Federal Republic of Germany is a federal state (federal administration, state administration, self-administration). Consequently, the federal government appoints a representative of the public interest with the Federal Administrative Court. He can participate in any procedure involving the Federal Administrative Court, in order to convey to the court the point of view of the respective federal ministry; this does not apply to proceedings involving the military service senates.

In many cases, the Federal Administrative Court issues a written press statement after the judgement has been announced. This statement is prepared by the rapporteur
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associated with the case in question, after which it is corrected by every member of the senate. It is then published on the internet.

IV- The comparative aspects of the exchange

Administrative law is part of the domain of public law, which is also the case in the Turkish legal system. The Federal Administrative Court does not examine the facts. However, a full factual and legal examination is carried out in the Turkish state council. When it comes to Turkish administrative jurisdiction, there are two instances, with three levels. The administrative and financial courts form the lowest level. The next level comprises the regional administrative courts (the so-called ‘district administrative court’), which also serve as appellate courts. The highest level consists of the highest administrative court (Danıştay). In accordance with the administrative procedures act, the administrative and financial courts (including the district administrative court) belong to the domain of general administrative jurisdiction, and they form the first instance. According to the new draft law, the administrative and financial courts are to represent the first instance, while the district administrative court is to represent the second instance. The existing district administrative courts are to be transformed into the appellate court. The Turkish system is, to a large extent, based on the Swedish system. However, the amendment has not yet entered into force. Naturally, new facts are not determined in our appeals proceedings, either.

The proceedings of the Federal Administrative Court necessitate the appointment of a lawyer for the citizen. The Turkish state council does not require this.

The nomination as a judge can take place until the person reaches the age of 67 years. For the purpose of judicial independence, the judges are not bound to a specific working period (unlike Turkey).

In Turkey, the specialised jurisdictions (administrative, social, financial and labour courts) belong to the domain of general administrative jurisdiction.
The Turkish legal system is oriented towards the continental European legal system. Consequently, the proceedings of the Turkish state council are similar to those of the Federal Administrative Court.

V- The European aspects of the exchange

The legislation carried out by the European Community induces a standardisation within the European Union, and within the Federal Republic of Germany. Legislative acts of the European Union increasingly encounter the exclusive shaping skills of the individual countries, or the countries’ legislatures. The need for a fundamental reorganisation of the respective competencies between the different European institutions (horizontal as well as vertical) cannot be disputed.

The decisions of the Federal Administrative Court are oriented towards the case law of the European Court of Justice and the European Court of Human Rights.

The German government accepts that the affected parties are to be paid financial compensation if the administrative processes take too long. This is specified in the German judicature act. The legal regulations regarding payment and the payment procedure are based on the judgements of the European Court of Human Rights when it comes to cases in which the Federal Republic of Germany has been convicted on account of an over-long process duration.

On 5 and 6 November 2015, the ReNEUAL conference took place at the Federal Administrative Court. At this conference, the German version of a sample draft for a European law on administrative procedures was presented and discussed. The draft was drawn up by a network of European legal scholars [Research Network on EU Administrative Law (ReNEUAL; on the internet: www.reneual.eu)].

Within the framework of the international cross-linkage of the Federal Administrative Court, selected decisions made by the French state council are regularly supposed to
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be published in the German language, in a German professional journal. Similarly, particularly significant decisions made by the Federal Administrative Court shall appear in the French language, in a French professional journal.

VI- Practices within the host jurisdiction

The most important problem in Turkey is that the number of cases is constantly increasing, as a result of which the process takes a very long time. In Germany, since the appeals (appeal involving the higher administrative court and review involving the Federal Administrative Court) require an approval from either the initial court or the higher court, not all of the higher numbers of cases involving the first instance associated with the administrative court advance to the appellate courts. With regard to the Turkish system of administrative courts, alternative dispute resolution procedures are being discussed. For example, when it comes to German administrative jurisdiction, there is the legal institution of process settlement, which can be associated in court with every instance. Naturally, I am not referring to the extra-judicial settlement, but to the judicial settlement. During the preparation phase for the verbal negotiations, the court can also issue a decree to present the stakeholders with a settlement recommendation. The stakeholders can accept this recommendation within a certain period of time; if they choose to do so, the proceedings are automatically ended. I believe that we can adopt this system as a template.

Apart from that, the appointment of a lawyer for the citizen should also be necessary in the Turkish state council. Furthermore, I would like to point out that before the administrative law judges in Germany are appointed as judges for life, they can work for various administrative authorities. In some states (e.g. Bavaria), it is common practice for future administrative law judges to get to know the administrative practice in this manner. I believe that this is insightful in many ways. A system of this nature may also be implemented on our side.

VII- The advantages of the exchange

My work at the Turkish state council does not involve any professional contact with international partners. Consequently, my favourite aspect of the programme involving
With a financial support of the European Union the Federal Administrative Court was the opportunity to get to know new colleagues. I believe that this is also very important with regard to developing a rapport between the two societies. I received interesting insights into Germany’s administrative and legal structures. I was able to familiarise myself with a small part of the German administrative and legal system in a practical manner.

The discussions enabled me to gain knowledge about the German administrative jurisdiction, introduce myself to another court and view the judicial proceedings. Apart from that, I discussed such practices with German judges.

VIII- Recommendations

This work experience was much better than I had imagined. My request for assistance was accepted by my colleagues. We talked about administrative topics. However, the time-frame that was envisioned for this programme is too brief. In my opinion, the visit should last for at least three weeks. This would allow one to get used to the atmosphere and the proceedings of the court. One would need an additional week in order to be able to fully appreciate the legal aspects of the court. I would like to thank ACA Europe for organising the programme, and I would also like to thank the Federal Administrative Court for its hospitality.