TRAINING PROGRAMME REPORT AND SUMMARY

Identification of the participant

Last name: ADAMS
First name: Carlo
Nationality: Belgian
Roles: Councillor of State
Seniority: 21 years in the Council of State, 5 years of which as auditor and 16 years as Councillor of State

Identification of the training programme

Hosting court/institution: Bundesverwaltungsgericht
City: Leipzig
Country: Federal Republic of Germany
Dates of the training programme: from 15 to 26 October 2018

SUMMARY

The Bundesverwaltungsgericht (Federal Administrative Court) is the supreme administrative court of the Federal Republic of Germany. Its headquarters is located in Leipzig. It gives rulings on disputes that fall under administrative law, insofar as they have not been assigned to another court. In general, the Bundesverwaltungsgericht acts as a court of cassation. In the context of specific litigation (e.g. the planning of particularly important traffic roads or prohibition of particular associations), the Bundesverwaltungsgericht gives a ruling as the court of first and last instance.

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I- Training programme

After the welcome programme and a few practical aspects were taken care of, there was an extensive visit of the buildings of the Bundesverwaltungsgericht (BVerwG). This visit provided an overview of the general role of the administrative court in Germany and specifically that of the BVerwG. It also included an overview of the organisation of and procedure before the BVerwG.

During my stay, I also had a chance to visit the very modern and efficient library where a lot of attention has been given to digital options. In addition, the BverwG library is of great historical and cultural importance as it also contains a part of the collection of the former Reichsgericht, the library of the parliament of the former Democratic Republic of Germany and other unique documents, including the medieval manuscripts.

As regards the activities of the BVerwG, I was able to attend three hearings, mainly of the 1st, 5th and the 7th chamber (Senate). During every session, I had a discussion with the president or a judge of the Senate to understand the case in the context of the German law and for a better understanding of the competences and the procedure before the BVerwG. Not only did I attend the hearings but also the deliberations that immediately followed the hearings and the delivery of decisions. It should be noted that the comprehensive judgment is written only after the decision has been delivered, which could take from a few days to six weeks later.

I also had discussions with a number of judges to talk about the characteristics of the competence and the review procedure in comparison with the competences and the cassation procedure before the Belgian Council of State. There also were informal discussions during lunch breaks, coffee breaks, etc.

Moreover, I got an opportunity to understand the cultural activities of the companies "Kunst und Justiz" and "Justizverein Leipzig". Concerts and presentations are occasionally conducted in the Great hall of hearings. The BVerwG is a fairly "open" institution. There is even a small museum in the main court building with objects and information about the history of the building and the Reichsgericht and the present role of the BVerwG.
II- The hosting institution

II. A. The administrative court in Germany

Germany has five types of courts, namely the ordinary court (die ordentliche Gerichtsbarkeit), the administrative court (die Verwaltungsgerichtsbarkeit), the financial court (die Finanzgerichtsbarkeit), the labour court (die Arbeitsgerichtsbarkeit) and the social court (die Sozialgerichtsbarkeit).

The BVerwG is the head of the administrative court that consists of three levels:
- The first instance: the administrative tribunals (das Verwaltungsgericht). There are 52 such courts in Germany;
- The court of appeal: the higher administrative tribunals (das Oberverwaltungsgericht; der Verwaltungsgerichtshof in the Länder of Baden-Württemberg, Bavaria and Hesse). There are 16 such courts for the 16 Länder;
- The Court for revision: le BVerwG.

The administrative courts are competent for all public law disputes that have not been expressly assigned to other courts under a federal law. Thus, the ordinary court is almost exclusively competent for litigation regarding the fault-based liability of the State and for litigation for compensations upon expropriation. The Constitutional Tribunal (das Bundesverfassungsgericht) is competent for constitutional litigation.

It is important to note that the appeal for review before the BVerwG is only possible for violations of federal law and not for violations of the Länder law.

II. B. BVerwG: organisation

The BVerwG is set up in Berlin under the law of 23 September 1952. Its headquarters is located in Leipzig since 2002 in the main court building of the old Reichsgericht, which was the first federal tribunal of the German empire.

The BVerwG has 55 judges (Richtern und Richterinnen im BVerwG) in 12 chambers (Senaten). There are ten cassation chambers (Revisionssenaten) and two chambers for military-related cases (Wehrdienstsenaten). Each chamber has a chamber president (Vorsitzende Richter im BVerwG) and four or five judges. The chambers for military-related cases have three magistrates and two military persons.
The matters heard by the different chambers are fixed each year by the BVerwG Präsidium, which comprises the president, the vice-president and eight judges elected by their colleagues. The Präsidium also determines which judge belongs to which chamber.

Every chamber also has a legal officer. There of course is the Registry, the administrative and technical staff, library, documentation department, which among other tasks, manages the website and the external relations department.

II. C. The BVerwG: competences

The main function of the BVerwG, as the Tribunal of cassation, is to pronounce judgments on the questions of federal law. The BVerwG does not observe the facts but it is bound by the finding of facts by the higher administrative courts or the courts of first instance.

Nevertheless, the BVerwG also has the competences of the court of first and last instance that have been assigned to it by federal laws. In these cases, the BVerwG examines the facts and the law and it gives a decision as the court of both first and last instance. It mainly pertains to disputes over major projects such as the planning for the construction of motorways, ports, etc. Another example is the appeal against an expulsion decision that is taken by the highest administrative authorities, after a fact-based examination, against a foreigner who poses a specific risk to the German security or is a terrorist threat. Moreover, these competences are gaining more and more importance. As court of the first and last instance, the BVerwG should also establish the facts and take into account the Länder law.

The BVerwG is also competent as court of first instance for the disputes of public law with a non-constitutional character between the Federal State and the Länder or between several different Länder.

Lastly, the BverwG is competent for hierarchical appeals in matters of national service and general discipline regulations of the armed forces, depending on the case as a court of law or a trial court. This depends on the appeal on which the Court is to deliver its judgment.

II. D. The procedure before the BVerwG

In order to be admissible, the appeal in cassation must be authorised. There are two possibilities:
The judgment of the higher administrative tribunal expressly accepts the appeal in cassation. In this case, the appeal in cassation is can be made immediately within a month after the notification of this judgement.

If this judgment refuses to accept the appeal, the party can, within the same period of one month, apply for the authorisation for the appeal in cassation at the administrative court of appeal (and file the appeal in cassation within the same period). The appeal in cassation is admissible if this court approves it (by order). If this court does not authorise it, the BVerwG delivers a judgment by way of order, on the admission of the appeal in cassation. In this order, the BVerwG never delivers a judgment on the merits of the appeal.

The appeal is accepted if one of the reasons for admission as listed by the law and invoked by the party is established, namely:

- the case is of fundamental importance,
- the judgment deviates from a decision of the Federal Administrative Court, the Joint Review Panel of the Supreme Courts of the Federation or the Federal Constitutional Court and is based on this deviation,
- or a procedural flaw is invoked and is applicable, upon which the decision may be based.

After the admission of the appeal in cassation, the parties express their point of view in writing.

After the preliminary work of the legal officers, a member of the chamber concerned, the rapporteur, drafts a report with a comprehensive proposal for a decision (das Gutachten). This opinion is communicated to all the members of the Chamber. Then, another member of the chamber, the co-rapporteur, prepares a co-report (das Mitgutachten), which is also sent to all the members of the Chamber. These reports are not sent to the parties.

During the predeliberations (die Vorberatung), the rapporteur presents the case and justifies his decision proposal. The Chamber works on the case and thus prepares the hearing, without already delivering a judgment on the case. These predeliberations take place during the week or a few days before the hearing.

During the hearing, the case is presented by the rapporteur and the parties can present arguments and answer the questions asked by the Chamber. The debates are in the form a legal consultation during which all the questions of law are discussed with the parties. The deliberations (die Beratung) take place immediately after the hearing. The decision is either taken unanimously or by a majority of votes. The deliberations are followed by the pronouncement of the judgment, at least the operative part of the judgment, with a summary of the decisive grounds.
The written and exhaustive judgment is drafted by the rapporteur during the days or weeks that follow. This draft is sent to the members of the Chamber who can still make remarks before signing the final version. The judgment is then communicated to the parties and an anonymised version is posted on the BVerwG website.

III- The law of the host country

In the Council of State, I mainly deal with the cassation cases involving alien law. I was therefore particularly interested in the BVerwG’s competence of cassation and in the cassation procedure.

As regards the substantive law, I was of course particularly interested in the alien law (asylum and migration). Owing to the influence of the European law (directives and orders) and international law (treaties), the same questions can be asked in the German case-law as in the Belgian case-law.

IV- The compared law aspect of your training programme

It is already evident from the overview of the competences of the BVerwG that the main similarity with the Belgian Council of State is the competence of cassation. We also mentioned that the BVerwG has an acceptance procedure for the appeals in cassation, which is also the case for the Council of State.

However, there are a quite a few differences, both in the organisation and the role of institutions as well as in the procedure.

- Other than in Germany, Belgium is not aware of a general administrative court but is aware about all kinds of administrative judicial boards.
- The BVerwG has a purely judicial function. On the contrary, the Belgian Council of State not only has a judicial function (the administrative litigation division) but also an advisory function (the legislation division).
- In the capacity of a court of cassation, the BVerwG does not take into account the disputes on the Länder law, while the Belgian Council of State is competent for the federal law and the law of the communities and regions, and also for cassation.
- The most important dispute for the BVerwG is the judicial review, but other disputes are also gradually gaining importance. For the Belgian State Council, the disputes pertaining to annulment (of administrative decisions) were the most important, but the judicial reviews also acquired significance (particularly due to the creation of the Conseil pour le Contentieux
des Etrangers (Aliens Litigation Council) like the federal administrative court and several Flemish administrative courts).

- The BVerwG has judges but it does not have a legal adviser’s office like the Belgian Council of State. The preliminary inquiry is made by two judges, the rapporteur and the co-rapporteur, while in the Council of State, a legal adviser carries out this inquiry. The legal adviser’s report is not only sent to the headquarters but also to the parties who are aware of it well before the hearing.

- We have seen that in Germany an appeal in cassation at the BVerwG is only admissible in three cases (fundamental importance, deviation from case-law, procedural flaw). This limitation does not exist in Belgium.

- The procedure of admission in litigation of cassation is different. In Germany, the previous court may, in its judgment declare a possible judicial review proceedings as admissible. Otherwise, the previous court and possibly the BVerwG can later, by order, declare the appeal in cassation as admissible or inadmissible, without ruling on the merits of the appeal. In Belgium, the appeal in cassation that is filed goes through a "filter", where a Councillor of State declares the appeal in cassation as admissible or inadmissible, by order, because it is clearly inadmissible or clearly unfounded. The Council of State can therefore give a decision on the merits of the grounds for cassation to declare the appeal as inadmissible.

- In Belgium, only an exhaustive, well-reasoned and signed judgment is "declared" in writing. In Germany, on the other hand, there is usually an oral declaration of the judgment, while the exhaustive judgment is drafted and communicated to the parties only later. The parties thus know about the judgment faster than that in Germany.

V- The European aspect of your training programme

In the cases of German domestic law that I was able to follow, there was, for instance, the question of the application of the European Convention on Human Rights and Fundamental Freedoms (Article 3 in a case of expulsion of a foreigner, Article 10 in a case of freedom of press). As is known to everyone, there is a significant influence of the directives and orders of the European Union on the internal law, for example in migration and asylum law.

VI- The “good practices” aspect in the visited court

The existence of a general administrative court instead of different administrative courts with different competences and procedures seems to me to be a great advantage of the German system for the citizens as well as the magistrates. This organisation and the conditions of admission for cassation help the BVerwG to almost exclusively address the real questions of law.
In the administrative court, there is a great mobility of staff: legal officers of the BVerwG become judges of the administrative courts, and later return to the BVwG. This interaction is valuable at all levels.

VII- Advantages drawn from the training programme

The opportunity to learn and better understand another administrative court system is an important advantage. The comparison between the Revision at the BVerwG and the cassation at the Council of State was especially interesting and I hope to present it to my colleagues at the Council of State.

Such comparisons are not really of immediate use in our daily professional practice, but they trigger our thought process for possible improvements in our own system.

Another benefit was the immersion in the German language, which will undoubtedly help me when I deal with cases involving the use of German in our institution.

Lastly, the experience of communicating on both levels, professional and personal, with all the persons concerned, magistrates and staff members, was very pleasant and enriching.

VIII- Suggestions

As a matter of fact, I do not have any suggestions to offer. I can only recommend to all those who would have an opportunity, to participate in this ACA exchange programme.

Not only was the training programme interesting and balanced, but I also got a lot of help with the preparation of my stay in Leipzig (hotel etc.).

It only remains for me to wholeheartedly thank the Bundesverwaltungsgericht, the Belgian Council of State and the ACA officers for making this training programme possible.