REPORT

Identification of the participant

Nationality: Dutch

Functions: Member of the Jurisdiction Division of the Dutch Council of State

Length of service: 5 years

Identification of the exchange

Hosting jurisdiction/institution: The Supreme Court of Ireland

City: Dublin

Country: Ireland

Dates of the exchange: 4 – 12 November 2019
SUMMARY

I participated in the ACA exchange programme at the Supreme Court of Ireland. I had a very interesting programme which consisted of observations in several hearings in different kind of procedures and of interviews with a number of judges. The exchange gave me a deeper insight in the position of administrative law in a common law system. Really a plus is that one can see the 'law in action' and not just the 'law in the books'. A cautious finding is that on the substantive part of administrative law the difference between the Irish legal system and the Dutch legal system is not as big as you might expect contrasting a common law system to a civil law system. However, the way procedures are organized appears rather different.

Programme of the exchange

Most of the time of my placement I was based in the Four Courts, the main Courts building in Dublin. There were two other judges (from Portugal and from Poland) participating in the exchange visit under the auspices of the Network of the Presidents of the Supreme Judicial Courts of the European Union. I was the only one who was specifically interested in judicial review/administrative law, so I had a partly personalized programme, but I also joined some general meetings prepared for the three of us. It was a good opportunity to compare and contrast the system and experiences of us, the three visiting judges, with the Irish system.

I attended several hearings in the Supreme Court (an important liability case - in which the Supreme Court is expected to deliver a landmark decision after which a large amount of similar cases might possibly be decided by an ad hoc tribunal - and a hearing in a judicial review case); in the High Court (specifically some cases in judicial review) and in the Criminal Court. I spoke to several judges and members of the court staff; they provided a lot of information about the legal system, the court management...
and the specific cases and I was also able to discuss my observations and findings with them.

On my request we also visited a tribunal, the Disclosures Tribunal, and discussed the position of tribunals in the legal system of Ireland.
Attached is the programme of the Visit.

The hosting institution

The Supreme Court of Ireland (Cúirt Uachtarach na hÉirinn... which I cannot pronounce) is the final court of appeal in all areas of law. The Court considers appeals from the Court of Appeal where it is satisfied that the relevant decision involves a matter of general public importance or that it is the interests of justice necessary that there be an appeal to the Supreme Court. It is also possible for the Supreme Court to consider an appeal directly from the High Court when exceptional circumstances ask for such a direct appeal (a so called leapfrog appeal).

Ireland has no separate jurisdiction in administrative law matters; administrative law cases are initially heard by the High Court and subsequently can go to the Court of Appeal and/or the Supreme Court.

The Supreme Court has a first instance jurisdiction in deciding on the constitutionality of a Bill which has been referred to it by the President of Ireland after the consultation with the Council of State. Another initial jurisdiction lies with the Supreme Court in establishing whether the President of Ireland has become permanently incapacitated (this has never been excercised up till now).

According to legislation the Supreme Court has to consist of 10 members (the Chief Justice and 9 ordinary judges). In addition the President of the Court of Appeal and the President of the High Court are ex officio members of the Supreme Court.

Appeals are heard and determined by 5 judges but the Chief Justice can direct that any appeal should be heard by 3 judges or – in exceptional cases – by 7 judges. The different hearings I attended were staffed by 5 judges. The applications for leave to appeal are
considered and determined by 3 judges. In interlocutory or procedural applications a judge may sit alone, which was for instance the case in the case management I attended on Wednesday 6th of November.

**The law of the host country & The comparative law aspect**

I was particularly interested in getting a deeper understanding of the concept of judicial review in a common law system. In an earlier stage of my professional career I had the opportunity to do some comparative research concerning the legal systems of common law and civil law. The characterization of the courts’ jurisdiction was one of the intriguing topics for me. Lawyers in the common law often emphasize the difference between ‘appeal’ and ‘review’. My goal in this exchange was to find out more about the intensity of the review in administrative law cases in the common law system of Ireland. That is why I also was interested in visiting a tribunal and discuss the differences between courts and tribunals.

I interviewed several judges before or after a hearing in a judicial review case and they all started the interview stressing the specific character of judicial review and stating that the accent of the judging would be of a more *procedural* character. ("It’s review, not appeal!") However, during the hearings I attended quite some attention was paid to the substantive matters of the case, for example the proportionality of a specific measure an administrative body had taken. In discussing this with the judges, we concluded that a judicial review in Ireland might not be that different from what we would call an ‘appeal’ to the administrative courts in the Netherlands. Here we find one of the complications in the comparison of different legal systems: the language. In essence the role of the court in both jurisdictions is to assess decisions of administrative bodies without getting into the merits of the case. In other words: the court has to respect the discretion of the administrative authority and can only interfere on a point of law. In the Netherlands we would not call this a mainly procedural judging, but again: this is language!
Another interesting observation is the huge importance that is given to, and the amount of time that is concerned with the oral hearings in the Irish courts. In this respect the character of the hearings is very different from the practice in the Dutch administrative courts. In the judicial review hearings in the High Court, the cases were really ‘opened up’ before the court, the judge being ‘blank’ on it at the start. It is up to the parties to present their case and substantiate their arguments in the hearing. The judge sometimes puts questions to get something more clarified, but the accent of the hearing is with the statements of the parties. I understood that this is different in the Irish Commercial Court, which also is engaged in judicial review cases but with a value of over € 1 million. In general, I would characterize the proceedings much more adversarial than in the Netherlands.

**The European aspect**

On Tuesday 5th of November I attended a hearing in the High Court concerning a decision by An Bord Pleanála to refuse a planning permission for a proposed wind farm. In this case a reference was made to European Law, i.e. the Environmental Impact Assessment Directive. The applicant challenged the decision on the ground An Bord Pleanála failed to carry out the requisite EIA or, alternatively, failed to give reasons for its decisions and/or failed to properly record its assessment. In the judgment, which I received after my exchange, the judge analyses the Irish legislative regime, which was amended in 2012 as a consequence of the Court of Justice in Case C-50/09, Commission v. Ireland. The finding of the court was that An Bord Pleanála had carried out an EIA (during the hearing this appeared not to be a point of discussion any more) and that it had sufficiently and knowable motivated its decision by referring to the reports of the inspector who had been assigned the role of reporting and preparing a recommendation. Therefore the application for judicial review was dismissed. In fact the applicant’s argument was rather formal. He did not suggest that the substance of the decision was
incorrect or that the inspector’s assessment was erroneous. The only point was that An Bord Pleanála had not explicitly adopted the EIA the inspector’s report, but ‘only’ referred to it.

On Thursday 7th of November I attended a hearing in the Supreme Court in a judicial review case on the social housing rights of separated parents with custody and access rights. In this case the applicant referred inter alia to Article 8 of the European Convention on Human Rights in stating that his rights were breached because he was assessed by Dublin City Council as a single person household for housing, when his ex-partner was assessed as a household of four. Therefor the father got Housing Assistance Payment at a single person’s rate while the mother gets Housing Assistance Payment as a separated mother-of-three. The Attorney General applied to make submissions in the appeal, inter alia arguing that there is no right to housing under the European Convention on Human Rights. In the first day of the hearing the court concluded that, since none of the parties raised the housing right issue and the case centred on interpretation of the Housing Act 2009, a right to housing was not an issue in this case.

**Good Practice within the host jurisdiction**

It is interesting to see that the Irish legal system has different mechanisms prevailing that cases too easily would go to a court and thus restricting the amount of cases taking a claim of the capacity of the different courts. In this respect I am thinking of the specific procedures before a tribunal or a ‘board’. Another instrument is that the possibility to appeal to a higher court, is restricted by the demand of getting leave to appeal.

**The benefits of the exchange**

The difference between this exchange and research visits in my earlier professional career is the true insight in the work – their acting, their thinking – of the judges I met. It
is not the ‘law from the books’, but the ‘law in action’. What I like in the comparison of legal systems is that it helps you to bring the outsider-perspective in the evaluation of your own system and of your own work. I already discussed several observations with my colleagues and will be doing so in the nearby future. My observations could also be useful in future publications in legal journals.