REPORT

Identification of the participant

Nationality: Estonian

Functions: Justice at the Administrative Law Chamber of the Supreme Court of Estonia

Length of service: one year

Identification of the exchange

Hosting jurisdiction/institution: Federal Administrative Court

City: Leipzig

Country: Germany

Dates of the exchange: 18-29 November 2019
SUMMARY

I. Programme of the exchange

I visited the Federal Administrative Court of Germany and its three senates: the First (responsible for immigration, asylum and citizenship law), the Seventh (responsible mainly for environmental law) and Ninth (responsible for road law). I met and discussed with presiding judges, judges and research associates of the senates.

I attended two preliminary deliberations and seven public hearings and subsequent deliberations of these three senates. In overall, I followed handling and deciding of 12 cases: two on immigration law, five on environmental law, four on tax law and one on road law.

I also had separate meetings with the President of the Court and the Head of the President’s Office who is responsible for international relations and communication activities of the court. In addition, I had a tour in the court building and was introduced to the resources and services of the court’s library.

A copy of the programme from the hosting institution is attached.

II. The hosting institution

The Federal Administrative Court is the supreme administrative court in Germany. It resolves administrative law disputes and has no jurisdiction over constitutional, tax (as a rule) and social law cases. In most cases it is a court of appeal dealing with questions of law. The primary task of the court is to ensure legal unity and to develop the law. As a federal court it reviews if decisions of the state administrative courts are consistent with the federal law. In some cases (e.g. planning and development of particularly important transport networks) it acts as the court of first and last resort.

Currently the court comprises 56 judges who have been organised in ten senates (there are also two senates for military affairs). Each senate has a presiding judge and additional four to five judges. A senate is also equipped with one or two research associates who are recruited for a two-year period from the ranks of the first instance administrative court judges. Substantive cases are decided by the senate of five judges and so-called leave cases (review of denials of leave to appeal by the state supreme administrative courts) in the panel of three judges. One senate has approximately 30 substantive cases and 80-90 leave cases per year. The presiding judge of the senate will participate in the handling of all these cases.

The preparation of cases follows a so-called “six-eyes principle”. In substantive appeal cases a reporting judge, first, drafts a comprehensive opinion which identifies main dispute questions and proposes a decision. In some cases his or her opinion is preceded and based on the preliminary
report of the research associate. Then the opinion will be seconded by a co-opinion of another judge of the senate. Some days or a week before the public hearing a preliminary deliberation is held where main questions of the case are thoroughly and attentively discussed among the judges and research associates in order to prepare the public hearing. If I correctly understood, the leave cases are decided in a written procedure.

The senate has normally one public hearing day per month (in 10 months of the year) with two or three hearings per day. The presiding judge of the senate chairs all hearings. After the facts of the case are briefly presented by the reporting judge the presiding judge raises open legal questions and asks the parties to address them. In general the parties must be represented by a lawyer. Usually a hearing of an appeal takes one hour. Thereafter the senate convenes again in camera for final deliberations and to make a decision. In about half of the cases the senate also drafts a press statement which brings forward the main legal message as a headline, main legal arguments and briefly facts and background of the case. The presiding judge announces the decision publicly in the courtroom on the same day and, when the parties are present, summarises major reasons of the decision. The press office publishes the press release and explains the decision to the media when necessary. In the following days, which may take up to five months, the reporting judge will draft the written judgment with detailed grounds. This text is discussed and agreed in written by the senate. Finally, a clerk of the court checks if there are any linguistic errors and that all citations are correct before the judgment is communicated to the parties and published.

III. The law of the host country

Germany has a highly developed legal system with sophisticated legislation, a plenty of inspiring and instructive case law and rich of jurisprudence and academic literature. One of my observations was how intertwined are case law and legal dogmatics in Germany. It was interesting to see how much were legal concepts, schemes and methods developed by jurisprudence present in judicial techniques practised by the court and how much was academic literature used in developing court’s reasons for its judgments.

From my home country’s perspective it was beneficial to learn about division of competencies between different jurisdictions, like handling of complaints of prisoners or disputes over medical treatment. Particularly interesting was a consultation on the law governing examinations in universities. I learned that in this field the German law is remarkably more generous in possibilities to litigate in the administrative courts than the Estonian law.

IV. The comparative law aspect in your exchange

There are many similarities between the Estonian and the German administrative law and the administrative court system since the Estonian general administrative law and administrative court procedure are to a great extent modelled after and influenced by the German legal system. Basic features of the administrative court system like focus on defending subjective rights rather than
general protection of the legal order, an elaborated system of actions and the corresponding powers of the court as well as an effective interim relief system are very similar.

However, there are also some differences between the law and administrative court system of the two countries which cannot be explained by differences in size (83 vs 1,3 mln people) or structure (federal vs unitary) of the country. On the one hand Germany has for decades developed an highly advanced system of judicial protection of individual constitutional rights with separate constitutional courts. On the other hand the Estonian administrative law and administrative court system has been developed more recently and thus seems to be more modern in some aspects. For example, adjudication of state liability cases belongs to the powers of administrative courts not to the ordinary courts like in Germany.

In respect of the working of the supreme administrative courts I noted two major differences. First, the Federal Administrative Court of Germany seems to have relatively less cases than the administrative law chamber of the Supreme Court of Estonia. When a typical senate of the Federal Administrative Court decides in average 30 substantive cases and 80-90 leave cases per year, its Estonian counterpart makes annually about 90 decisions in substance and another 1100 decisions on leave cases. This gives the German counterpart more time and allows it to go much deeper in its discussions of a case. “Time is our main asset” is what I heard during my stay and I saw how a real advantage was made of it. Preparatory work may take a form of reports containing tens or even hundreds of pages with extracts not only from domestic or EU case-law but also from explanatory letters of draft legislation, law journals and academic literature. I admired the high quality of papers and how thoroughgoing were the deliberations of the court.

Another major difference what I observed was the form of procedure. The Federal Administrative Court heard all substantive appeals in public whereas its Estonian equivalent follows in almost all cases a written procedure. “Public hearing is a cornerstone of administrative litigation” was a leitmotif I heard several times and from different persons in the court. I was explained that there are two reasons why public hearing is considered so important. First, by conducting a public hearing the court has an opportunity to test its possible solution of the case. Second, a hearing is an important way to engage parties and thereby to contribute to the legitimacy of the judgment.

V. The European aspect of your exchange

I attended deliberations and a public hearing of the case BVerwG 7 2.18 where the implementation of the EU environmental noise directive (2002/49/EC) was touched. The applicant who lives in the neighbourhood of the Frankfurt airport turned to an administrative court to challenge the noise action plan of the airport. She argued that the plan does not meet the requirements of the German Federal Immission Control Act on noise reduction planning and the EU environmental noise directive. The highest state administrative court decided that the applicant had no standing in respect of the noise action plan and the case is inadmissible. There is no provision that gives the applicant a right to claim that the noise action plan be reviewed or supplemented. The Federal Administrative Court upheld the decision of the state administrative court. The court found that the Federal Immission
Control Act contains no third-party protecting provision for noise reduction planning upon the applicant can rely. Nor arises any such individual right in the EU law. According to the case law of the European Court of Justice an individual can demand a compliance of an obligation imposed by a directive only when he or she is directly affected by its violation. The obligation must be clear, precise and unconditional, which may be the case when noise limit values have been established. The environmental noise directive does not meet these criteria, concluded the court.

VI. Good Practice within the host jurisdiction.

It is not so easy to recommend something to be exported to other countries. Every country has already its system in place and this limits dissemination of legal transplants. Estonia has followed German model in re-building its legal system and has gained a lot of it. In combination with Nordic features of performance management and customer orientation Estonia has developed from scratch a well-functioning state with world-class public administration and digital public services. This strategic legal policy choice was enabled and favoured by a history and culture, already before the Soviet occupation Estonia was a member of the German legal family.

In respect of the practices and working of the Federal Administrative Court of Germany I discovered many positive things. For example, the practice of using public hearings so widely and the way how they were conducted was impressive. In the same way immediate announcement of decisions and making of press releases may also serve well as good examples of best practice. Above all, however, I would suggest other countries to consider a filter system which enables the court to select cases of real importance. I am not recommending details of the German filter system which seems to have developed into a proceeding of its own and is surprisingly even too effective in the eyes of German judges. My suggestion is rather to reflect and to consider the whole idea of selecting cases that deserve special attention by a supreme administrative court. I believe that an effective filter system allows supreme bodies of administrative jurisdiction to focus on really important legal issues, to use more effectively their unique resources and thereby to become real courts of precedent to guide and develop the law of their country.

VII. The benefits of the exchange

The greatest advantage of the programme was definitely an opportunity to attend the deliberations of the Federal Administrative Court. It was a special privilege to be in the core of the highest level of judicial pyramid of another country and to see how judicial work and legal reasoning of their top legal professionals take place. The work exchange made the supreme administrative court of Germany as well as the German administrative jurisdiction in general much closer and more understandable to me. I am sure it will help and encourage me to search and use their case law as a source of inspiration in adjudicating similar cases in the future.

On the other hand a lot of what I have learned during this exchange programme has helped me to see and better understand the way of working of my own institution – the administrative law
chamber of the Supreme Court of Estonia. It has made me to reflect on differences between the systems and to analyse their strengths and weaknesses. I believe this information will be of great help in the future discussions about how to develop and improve the functioning of the Estonian supreme administrative jurisdiction.

Immediately after turning back home I gave my colleagues an overview of my stay and of what I learned during the programme and I intend to use this knowledge and information in our future discussions and deliberations.

**VIII. Suggestions**

In my opinion it is an excellent programme and ACA-Europe does a valuable work in providing it. My only suggestion is to continue with it and if possible to expand opportunities to participate.

My host, the Federal Administrative Court of Germany, did a wonderful job. I admire how open they were in accepting me to their internal deliberations and how helpful in explaining their working methods and habits. My special thanks goes to Mr. C.G. who was my contact person and responsible for drawing up and implementing the programme of my stay.

I highly recommend this programme to my every colleague in and outside Estonia.