Seminar organized by the Supreme Administrative Court of the Czech Republic and ACA-Europe

Limits of judicial guarantee

Brno, 9 September 2019

Answers to questionnaire: United Kingdom

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ACA-Europe Seminar on Measures to Facilitate and Restrict Access to Administrative Courts

September 9, 2019

Nejvyšší správní soud Brno
(Supreme Administrative Court Brno)

Questionnaire

Introduction:

The role of the administrative judiciary determines the conditions under which administrative courts work. These include the limits on the right of access to these courts, as well as the rules on such cases potentially progressing further within the judicial hierarchy. It is an area defined by an ongoing tension between two principles: the right to a fair trial that would speak in favour of opening the gates of judicial review, with the efficiency of judicial review pulling in exactly the other direction, namely of limiting access to administrative courts, in particular the higher ones.

The seminar to be held in Brno, the Czech Republic, on September 9, 2019 at the Supreme Administrative Court, follows the path opened by the seminars in Dublin and Berlin. It shares the objective of contributing to mutual understanding of the scope of judicial review of administrative cases. Consequently, it broadens and deepens the topic of access to the courts. The seminar therefore deals with the issue before the administrative judiciary as a whole, including the administrative courts of lower instances. It covers both formal and material measures which either facilitate or restrict access to the courts.

The seminar attempts to merge the principles of fair trial and efficiency. Based on shared knowledge of member states, it aims to describe the areas where the administrative judiciary should remain open to litigants and to analyse those where it may constrain its current role or, on the contrary, may exceed it. In other words, it examines the proportionality of restrictions on access to the administrative courts.

NOTE: answers below refer to the system in England and Wales, unless specified otherwise.

I. The structure of the administrative judiciary

a. Please describe briefly the structure of the administrative judiciary, i. e. how many instances your administrative judiciary (including all specialized jurisdictions, e. g. financial or social security) consists of and the relations of superiority and subordination between them, unless this information is available and up to date at the ACA-Europe webpage, Tour of Europe file.

The Administrative Court within the Queen's Bench Division of the High Court acts as a court of first instance. Appeals go to the Court of Appeal and on to the United Kingdom Supreme Court. In some cases, an applicant may appeal directly from the High Court to the Supreme Court.

Many administrative law matters are dealt with by the Tribunals. The First-tier Tribunal has several chambers relating to different subject areas, many of which involve administrative law. Appeals go to the Upper Tribunal, and further appeals go up to the Court of Appeal (Civil Division), and further up to the Supreme Court.

Except where otherwise specified, the answers below refer to proceedings brought in the Administrative Court.

b. How many administrative courts and judges are in each of the instances? Please give numbers relevant at the end of the year 2018.
(Note: if your administrative judiciary consists of two instances, use columns I. and II.; if it consists of more than three instances, please adjust the table. The same applies to all the tables used in this questionnaire.)

Instance	I.	II.	III.
Name	High Court (Queen's Bench Division)	Court of Appeal (Civil Division)	Supreme Court
Number of courts	1	1	1
Number of judges	62	38	12

c. How many judges are in all jurisdictions (i. e. administrative, civil and penal) altogether? Please give numbers relevant at the end of the year 2018.

2978 (as of 1 April 2018)

Note: In all the subsequent sections please give answers for each of the instances of the administrative judiciary, even if it is not specifically mentioned in the question.

II. Fees and access to the court

a. Is access to the administrative court subject to a judicial (filing) fee? Please indicate the general principle (for exceptions see questions e., f. and g.). Answer yes/no.

Yes

Instance	I.	II.	III.
Judicial fee	Yes Permission to apply: £154 = €172 Permission to proceed: £770 = €860	Yes £1199 = €1340	Yes £1000 = €1117

b. If you answered *yes*, what is the amount of this fee (in euro)?

See above

c. Is the amount of the fee in each of the instances flat or can it differ? If the amount can differ, under what conditions and how (e. g. when the petitioner is required to correct or eliminate faults in the petition, the fee rises)?

The amount is flat.

d. In what phase of the proceedings does the petitioner have to pay the fee (e. g. with the petition, after the proceedings commence, after the decision of the court is delivered)? What are the consequences of not fulfilling the duty to pay the fee?

The fee for 'Permission to apply' to the Administrative Court is payable with the application. Where the court gives permission to proceed with the claim for judicial review, the 'Permission to proceed' fee is payable within 7 days. Half of that (£385) would have been paid already if the claimant requests the court to reconsider the decision on permission at a hearing.

The fees for the Court of Appeal and the Supreme Court are due upon application.

e. Are any petitioners (e. g. a public authority) or areas of disputes exempt by law from the duty to pay the fee?

No.

f. Are non-governmental organizations exempt from the duty to pay the fee?

No.

g. Can a petitioner be exempt from the duty to pay the fee by decision of the court? What are the conditions for the exemption?

The Court may waive the requirement or remit the fees if the applicant suffers from financial hardship.

h. Under what conditions is the fee returned to the petitioner (e. g. in case of the withdrawal of the petition)? Is the fee returned in full or partially?

There is no provision for fees to be returned.

i. May a petitioner be required to pay a deposit before the proceedings commence? If you answered *yes*, please explain under what conditions.

The applicant may be required to pay security for costs into the court, if it appears that they would not be able to pay the costs of the respondent if they are unsuccessful.

j. Are frivolous petitions penalized? Please explain how and under what conditions.

A frivolous petition may be penalised via an order to pay a share of the costs of the respondent. If someone persistently takes legal action against others in cases without merit, they may be designated a 'vexatious litigant' and forbidden from starting civil cases without permission.

k. Finally, is there any analysis (based on empirical studies or just your personal assessment) of the correlation between the amount of the fees payable within your system of administrative justice and the degree of any incentive or dissuasive effect those fees have on petitioners (in general or particular groups thereof) bringing or not bringing an action?

Not of which this court is aware. If such analysis is subsequently found, it will be shared before the seminar.

III. Costs of proceedings

a. Can the court adjudicate the compensation of costs of proceedings to the participant? If you answered *yes*, please explain under what conditions?

Yes, the court will usually award costs where the applicant has had full or partial success in the proceedings.

b. Can the court adjudicate the compensation of costs of proceedings to the public authority? If you answered *yes*, please explain under what conditions? In particular, are there any cases/situations where by default, the costs incurred by the public authorities are not recoverable, even if the (private) petitioner was not

successful (and, following the normal rule that costs follow the event, a costs order should normally be awarded in favour of the public authority)?

Yes. The courts will usually award costs in any case where the public authority has had full or partial success in the proceedings.

c. Can the court decide not to adjudicate the compensation of costs of proceedings, although the conditions described in answer to question a. are fulfilled? If you answered *yes*, please explain under what conditions?

Yes, it is at the court's discretion. Each case will be considered individually. Case law provides certain guidelines, in particular for costs of judicial review applications which are refused on the papers at the permission stage: R (Mount Cook Land Ltd) v Westminster City Council *[2003] EWCA Civ 1346.*

d. Are there any specific areas of administrative law where different rules to those discussed in this section apply? What areas are those and how and why do the rules applicable therein differ?

In environmental law, if an 'Aarhus Convention claim' is brought then the costs each party may be liable to pay are capped. For a claimant, the maximum amount is £5,000 where the claimant is acting only as an individual and not as, or on behalf of, a business or other legal person, and it is £10,000 in all other cases. For a defendant, the maximum amount is £35,000. (Civil Procedure Rules r45.43)

e. How does the court determine the amount of the costs of legal representation as a part of compensation of costs? Is it defined by a tariff (in that case describe the principal method of calculation), or is it based on a price stipulated between an attorney and his client (in that case describe also whether there is any limitation)?

It is based on the actual costs incurred on legal fees.

Where the amount of costs is to be assessed on the standard basis, the court will only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred. The court will resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party.

Where the amount of costs is to be assessed on the indemnity basis (in certain cases at the court's discretion e.g. where a party has been unreasonable), the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party. (Civil Procedure Rules r44.3)

Where an individual has been given legal aid funding to pursue his case, costs ordered against them must not exceed the amount (if any) which it is reasonable for the individual to pay having regard to all the circumstances, including the financial resources of all of the parties to the proceedings, and their conduct in connection with the dispute to which the proceedings relate. (s.26, Legal Aid, Sentencing and Punishment of Offenders Act 2012)

An applicant can apply for a Costs Capping Order (previously known as a Protective Costs Order) in cases that raise matters of wider public interest. If obtained, such an order will limit the costs that the applicant can be ordered to pay in the event of the judicial review not succeeding. (Civil Procedure Rules rr46.16-.46.19; Criminal Justice and Courts Act 2015 Part 4)

IV. Representation

a. Does a party have to be represented by a legal professional? Answer yes/no.

Instance	I.	II.	III.
Representation of petitioner	No	No	No
Representation of opposing party	Yes	Yes	Yes

**In all cases, a party can represent themselves. If someone else is to represent them, however, they must be a legal professional. In practice this means the defendant public authority is always represented by a legal professional, although they can also choose not to attend proceedings.*

b. Does your legal order provide free legal aid for participants (e. g. representation appointed at the request of a participant)?

Yes, in certain cases.

c. What are the forms and conditions of free legal aid? Please explain for all instances.

Applications for civil legal aid – which includes legal aid for judicial review applications – are considered by the Legal Aid Agency on the basis of the means of the applicant and the merit of their claim.

In considering a person's means, the Legal Aid Agency will take into account their income and capital. A claimant in receipt of a means tested benefit such as income support, income-based job seekers allowance or guaranteed state pension credit will be eligible. Legal aid may be awarded in full if a claimant is in receipt of one of these benefits or has low means, if their savings are not too high. Some applicants may be asked to make contributions to their legal expenses. (Lord Chancellor's guidance – determining eligibility (means))

In considering the merits of the person's claim, the Legal Aid Agency will consider the prospects of success of the claim and the likely benefit to the individual or wider public interest, as compared to the likely cost of the proceedings. (Lord Chancellor's guidance under section 4 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012)

Where legal aid has been granted at first instance, it can be extended to appeals to the Court of Appeal or the Supreme Court.

d. Is there any connection between exemption from the duty to pay the judicial fee and the right to free legal aid?

No.

V. Exclusions and immunities

(Note: If you answer yes to any question in this section, please provide details.)

a. Are there any mandatory steps after the public authority delivers its final decision and prior to filing a petition to an administrative court (e. g. mediation)?

A claimant is expected to follow the pre-action protocol for judicial review, which requires them to consider alternative dispute resolution and to send a letter before claim to the defendant. This may not be required where the matter is urgent, the defendant is unable to re-take the relevant decision, or where there is a short time-limit (e.g. planning cases).

b. Are there any final administrative acts of a public authority which are not reviewable at all?

No.

c. Is there any particular public authority whose administrative acts are not subject to judicial review (e. g. acts of a head of state)?

No.

d. Are there any final acts of a public authority which are reviewable by a (state or other) authority other than the administrative court?

Yes. Many public authority decisions are reviewable at first instance in the Tribunals.

e. Are there any cases which are reviewed by the administrative courts other than review of administrative acts of a public authority (e. g. review of elections, dissolution of a political party)?

No. Claims in electoral law are dealt with by a specially convened election court, for example.

VI. Selection by lower and higher jurisdictions

a. Do the administrative courts have power to select cases? Answer yes/no.

Instance	I.	II.	III.
Power to select cases	Yes	Yes	Yes

b. If you answered *yes*, under what conditions can they select cases? Are there any objective criteria stated in the legislation/case law of the court or is the selection a matter of full discretion?

The High Court will only grant permission to applications for judicial review where there is an arguable case for judicial review that justifies a full investigation of the substantive merits.

The Court of Appeal will only grant permission to appeal if it considers that the appeal would have a real prospect of success or there is some other compelling reason for the appeal to be heard.

If the application is for a second appeal (e.g. if a case has already been decided by the First-tier Tribunal and on appeal by the Upper Tribunal), the Court of Appeal will not give permission unless it considers that the appeal would have a real prospect of success and raise an important point of principle or practice, or there is some other compelling reason for the Court of Appeal to hear it.

The Supreme Court will only grant permission to appeal where a case raises an arguable point of law of general public importance that the Supreme Court ought to consider at this time.

c. Is the power to select cases restricted to certain fields of law? Please give details.

No.

d. Does the court have power to select cases that fall under administrative criminal law? If it does, are the conditions for selection the same as in others fields of law? Please give details.

Yes. The conditions for selection are the same.

e. Please specify who selects the cases to be heard and how. Is there a special judicial panel or case selection procedure for that purpose? Is that procedure only a matter for the higher jurisdiction that will ultimately hear the case, or do the lower courts also somehow participate in that selection?

In the High Court, the application is usually considered on the papers by a High Court judge but the court may direct a hearing to determine whether to give permission. If refused, the applicant can request for the application to be reconsidered at an oral hearing.

In the Court of Appeal, the application is usually considered on the papers by a Court of Appeal judge, but the court may direct a hearing to determine whether to give permission.

In the Supreme Court, the application is usually considered on the papers by a panel of three Supreme Court judges, but the court may direct a hearing to determine whether to give permission.

f. If the court decides to select/not to select a case, is it obliged to notify a petitioner? If it is, does it deliver a formal decision (e. g. rejects the petition) or does it notify a petitioner by an "informal" letter?

Yes, the petitioner is formally notified.

g. Is the court obliged to give reasons when it decides not to select a case?

The court will give reasons for refusing permission.

h. If a lower court decides not to select its own case, is the decision reviewable by a higher court? Please give details.

If the High Court refuses permission to apply for judicial review, this can be appealed to the Court of Appeal, which can overturn the decision and grant permission to apply for judicial review.

If the Court of Appeal refuses permission to appeal, however, this is not reviewable by the Supreme Court.

i. Does a lower court have power to select cases of a higher court? If it does, is its selection reviewable by a higher court? Please give details.

The High Court may grant permission to appeal to the Court of Appeal. If it grants permission, the Court of Appeal will hear the appeal. If it refuses, then the applicant can apply for permission to the Court of Appeal directly.

The Court of Appeal may grant permission to appeal to the Supreme Court. If it grants permission, the Supreme Court will hear the appeal (but this is rare). If it refuses, then the applicant can apply for permission to the Supreme Court directly.

The Court of Appeal can also certify a question as being an arguable point of law of general public importance, but it will still then be for the Supreme Court to decide whether to grant permission to appeal to the Supreme Court.

The High Court can also certify a point of law of general public importance, in which case the case may be appealed directly to the Supreme Court, provided that the Supreme Court gives permission.

j. Does a judge determine the order of the cases to decide?

The timetabling of cases is decided by the Registrar of each court.

VII. Other measures

a. Does your legal order have other measures which simplify or restrict access to the courts? Please explain.

There are time limits on judicial review claims. All judicial review cases must be brought promptly and in any event within 3 months (except in planning, procurement and Upper Tribunal judicial reviews). (Civil Procedure Rules r54.5)

Planning judicial review cases must be brought within 6 weeks. (Civil Procedure Rules r54.5(5))

Public procurement judicial review cases must be brought within 30 days. (Public Contracts Regulations 2015/102, reg 92(2))

Judicial review challenges to non-appealable decisions of the Upper Tribunal must be brought within 16 days. (Civil Procedure Rules r54.7A(3))

In all cases, the court may extend the time limit, even if the application for extension is made after the time limit has expired (Civil Procedure Rules r3.1(2)(a)). The Court will require evidence explaining the delay. The Court will only extend time if an adequate explanation is given for the delay, and if the Court is satisfied that an extension of time will not cause substantial hardship or prejudice to the defendant or any other party, and that an extension of time will not be detrimental to good administration (Administrative Court Judicial Review Guide 5.4.4.3)

VIII. Statistics

a. Please give exact numbers of case load and number of cases decided for the years 2016, 2017 and 2018 in each of the instances of the administrative judiciary (including all specialized jurisdictions, e. g. financial or social security).

Instance	I.	II.	III.
Case load 2016	2170	435	91* (Apr 16 – Mar 17)

Cases decided 2016	534	422	76* (Apr 16 – Mar 17)
Case load 2017	1724	372	85* (Apr 17 – Mar 18)
Cases decided 2017	602	558	78* (Apr 17 – Mar 18)
Case load 2018	1583	420	91* Apr 18 – Mar 19)
Cases decided 2018	502	526	64* (Apr 18 – Mar 19)

See footnote for sources[1]

**Supreme Court figures refer to all appeals in the United Kingdom, not just in administrative law cases.*

[1] Sources: https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-january-to-march-2019; https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-january-to-march-2017; https://www.supremecourt.uk/docs/annual-report-2016-17.pdf; https://www.supremecourt.uk/docs/annual-report-2017-18.pdf; https://www.supremecourt.uk/docs/annual-report-2018-19.pdf