



**Seminar organized by  
the Supreme Court of Estonia and ACA-Europe**

*“Due process”*

Tallinn, 18-19 October 2018

**Answers to questionnaire: Germany**



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# Due Process

## Questionnaire for the ACA Seminar in Tallinn, 26-27 April 2018

Answers by the Federal Administrative Court, Germany, in italics:

### Part A

#### Efficiency of Court Proceedings (at the Expense of Procedural Guarantees)

##### 1. Simplified proceedings

Does your administrative procedural law provide for the possibility of resolving administrative cases in simplified proceedings: on the level of the highest administrative court and/or in lower administrative courts? (YES/NO)

- If NO, then are there any other possibilities for simplifying administrative court procedures (are there exceptions in, for example, taking the minutes, procedural deadlines, format requirements, delivering the procedural documents, pre-trial proceedings, the formatting of a decision, the court panel, holding an oral hearing, etc.)? Have there been discussions about the creation of simplified proceedings as a separate type of procedure? What are the main positions on the issue?
- If YES, please answer questions 2–4.

*Yes, there is one field of law, in which simplified proceedings are provided for by the law: Asylum Law (see questions 2-4).*

*All other subject-matters do not know simplified proceedings. Yet, the Code of Administrative Court Procedure (Verwaltungsgerichtsordnung – VwGO. An English translation can be found at [http://www.gesetze-im-internet.de/englisch\\_vwgo/englisch\\_vwgo](http://www.gesetze-im-internet.de/englisch_vwgo/englisch_vwgo)) provides for several tools that can help simplify proceedings, i.e.:*

- *Section 87b Code of Administrative Court Procedure allows setting a deadline to state the facts, designate items of evidence, submit certificates or other moveables and to transmit electronic documents. The court may reject declarations or items of evidence which are not submitted until after expiry of such a deadline, if the party concerned was informed about this consequence, if the court considers its admission would delay the conclusion of the dispute and if the party concerned does not provide sufficient excuses for the lateness. Since a proper evaluation of the presented excuses is sometimes more complicated than simply admitting the evidence, this provision is not being made use of on a larger scale. But of course, this depends on the experience the single judge or the single panel may have had in applying this provision. It can only be applied in proceedings which treat questions of fact and of law. These are usually cases before the Administrative Courts and the Higher Administrative Courts. In the Federal Administrative Court the provision can only be applied, where it has a first instance competence and is thus not limited to questions of law (enumerated subject-matters).*

- *First instance Administrative Courts usually decide in a panel of three professional and two honorary judges. In contrast, section 6 (1) Code of Administrative Court Procedure provides that the chamber should, after hearing the parties, assign the legal dispute to one of its members as an individual judge for a ruling if the case does not show any particular factual or legal difficulties and the case has no fundamental significance. This decision – to be met after hearing the parties – cannot be challenged. The individual judge may remit the dispute to the chamber after hearing those concerned if it emerges from a major alteration to the procedural situation that the case has fundamental significance or the case shows particular factual or legal difficulties. This rule applies in first instance only. In practice it applies to a large number of cases; probably the majority of cases is decided by an individual judge.*
- *Similarly, the presiding judge or the rapporteur may decide a case as an individual judge, if the parties agree hereto (section 87a (2 and 3) Code of Administrative Court Procedure.*
- *According to section 117 (2 and 3) Code of Administrative Court Procedure a judgment shall contain among others a statement of facts and a reasoning for the ruling. In legal practice the reasoning is of preeminent importance. It makes the judgment transparent and forces the judges to make their decision comprehensible. It is thus an important feature of the state of law. Section 117 (5) Code of Administrative Court Procedure allows an exception to this principle: The court may refrain from a further portrayal of the reasoning for the ruling insofar as it concurs with the reasoning of the administrative act or of the ruling on an objection and this is established in its ruling. This way transparency is established by citing the administrative act which the court considers not only correct in the content of the decision, but also in its reasoning. In practice, courts do not make much use of this provision. The reason may be, that they do not always fully agree with the reasoning of the administrative authority. It is more likely, that a court will make reference to only a part of the reasoning of the administrative authority and add or alter further parts of its own provenience.*

## **2. Prerequisites of simplified proceedings**

*The following only applies to asylum/refugee cases according to the Asylum Act (Asylgesetz – AsylG. An English translation can be found at [http://www.gesetze-im-internet.de/englisch\\_asylvfg](http://www.gesetze-im-internet.de/englisch_asylvfg)).*

**2.1** To hear a case in simplified proceedings, is the prerequisite:

a. that the dispute is in a specific area of law? Please specify which areas (for example, minor traffic violations, administrative fees, aliens' cases, extradition etc.);

Yes, Asylum law

b. a minor infringement? Please specify criteria for which infringements are considered minor (for example, is the breach of law in question of a low priority or is the amount of the claim small; is it characterised by a monetary limit and if so, what is it?). If possible, please submit the legal definition of a minor infringement or a small claim, as well as examples or definitions from case law;

c. that the solution to the case is clear and obvious;

d. something else (please specify)?

**2.2** Have the possibilities of hearing a case in simplified proceedings been exhaustively defined in law or is it case law instead that has a decisive role in whether it is used (for example, a discretionary decision)?

*It is clearly defined in the law.*

**2.3** Can the court use simplified proceedings regardless of whether the parties to the proceedings agree to it?

*In Asylum cases the court is obliged to apply the special rules of the Asylum Act which alter and amend the general rules of the Code of Administrative Court Procedure. This Code remains applicable as far as the Asylum Act does not contain deviant rules.*

**2.4** Can a person appeal the implementation of simplified proceedings separately from the final court decision?

*No.*

**2.5** Can simplified proceedings be carried over into general procedure and vice versa?

*No.*

### **3. Nature of simplified proceedings**

**3.1** Which rules of administrative court procedure are mandatory in simplified proceedings (for example, hearing the parties, general principles of administrative court procedure, etc.)?

*As a general rule, all provisions of the Code of Administrative Court Procedure are applicable as far as the Asylum Act does not contain deviant rules. So, see answer to question 3.2.*

**3.2** Which general rules of administrative court procedure do not need to be followed in simplified proceedings (are there exceptions, for example, in taking the minutes, procedural deadlines, format requirements, delivering the procedural documents, pre-trial proceedings, the formatting of a decision, the court panel, holding an oral hearing, public announcement etc.)?

*The Asylum Act provides for shorter deadlines within which an administrative act has to be challenged before court (one or two weeks instead of one month, section 74 (1) Asylum Act). The plaintiff shall also by law submit all the facts and evidence within one month after the decision was delivered to him (section 74 (2) Asylum Act). Court actions do as a general rule not have a suspensive effect (with a few enumerated exceptions – section 75 Asylum Act). The rule about the competence of an individual judge is more strict than in general cases (see above, 1.): Cases shall be referred to the individual judge, unless the case presents particular difficulties of a factual or legal nature or unless the legal matter is of fundamental significance (section 76). Also in deviance to the general rule, the court shall dispense with a further presentation of the facts and of the reasons for its decision, provided that it follows the statements and justification of the administrative act against which the appeal was filed and so states in its decision, or provided that the parties concerned unanimously renounce such presentation (section 77 (2) Asylum Act).*

**3.3** Are there differences in using simplified proceedings across the court instances?  
*The rules for simplified proceedings mostly apply in first and second instance.*

**3.4** What are the limitations on the right to appeal in case of simplified proceedings? Can an administrative case that is resolved in simplified proceedings be appealed up to the highest instance? If there are differences compared to general procedure, please describe how a case for which simplified proceedings are used moves through the court system (for example, the appeal might be submitted directly to the highest court, etc.).

*The right to appeal is limited as compared to the general rule. Asylum cases can only be appealed in cases of fundamental significance, deviation from the jurisdiction of a higher court or in cases of procedural defects. In general proceedings there are two further reasons for appeal not applicable in asylum cases: Serious doubts as to the correctness of the judgment and special factual or legal difficulties. In contrast to general proceedings the Administrative Court may not declare the appeal admissible, which – as in general proceedings – would be binding for the court of appeal.*

*There are no further restrictions as the access to the last instance is concerned. As a matter of fact, presently there is a discussion, whether the Federal Administrative Court should – only in asylum matters – be also competent to decide upon certain matters of fact, in order to reach a consistent evaluation of the situation in certain countries of origin.*

**3.5** In simplified proceedings, can a court issue a judgment without the statement of reasons? (YES/NO)

*Only if it follows the statements and justification of the administrative act against which the appeal was filed and so states in its decision, or provided that the parties concerned unanimously renounce such presentation (section 77 (2) Asylum Act).*

- If NO, then why is such a possibility not provided?
- If YES, then:
  - a. what kind of information does that judgment have to contain?  
*The designation of the parties and their representatives, the designation of the judges deciding, the ruling and the notification of appeals.*
  - b. do the parties to the proceedings have the right to demand for the judgment to be supplemented with the statement of reasons?  
*Under the circumstances described above: No.*

#### **4. Simplified proceedings in court practice**

**4.1** What is the share of cases resolved in simplified proceedings out of all resolved cases? (%)

*This depends on the number of asylum cases which varies at a large scale.*

**4.2** Has the case law in your country pointed to any problems related to simplified proceedings, and if it has, what kinds of problems were they? Please give up to 3 examples.

*1. It has been contested that in Asylum cases a judge on probation can act as an individual judge after six months of service, whereas the general rule provides for a period of one year. Critical voices emphasize that asylum decisions are of particular importance for the applicant and see a contradiction to the general rule. The rule was established in the 1990s in order to react to increasing numbers of asylum cases*

*which triggered the employment of new judges who were supposed quickly be able to work efficiently. A responsible chamber will always see to preparing a judge on probation well for this task.*

*2. Presently there is a debate in expert circles whether the Administrative Court should be allowed to declare the appeal admissible on its own behalf and binding for the court of appeal. With the large number of cases and the large number of first instance (individual) judges deciding these cases there seems to be a stronger need for uniformisation of jurisdiction. Under the present law the number of cases before the higher courts seems to be too small to generate the desired unifying effect.*

## **Part B**

### **Right to Public Hearing**

**1.** Are there any types of administrative cases or any court instances in which only oral proceedings are allowed (i.e. written proceedings are prohibited)?

*No.*

**2.** Under which circumstances may cases be resolved in written proceedings? Can the justification be, for example:

- a. exclusively legal questions;
- b. highly technical questions;
- c. the case raises no questions of fact or law that cannot be adequately resolved on the basis of the case file and the parties' written observations;
- d. other bases, for example at the request of one of the parties to the proceedings?

*Merely written proceedings are admissible in all rulings, which are not judgements (section 101 (3) Code of Administrative Court Procedure), especially in matters of temporary relief. Also, in any matter, if the parties agree hereto and in proceedings applying for the admission of appeal proceedings in the second and third instance. Also, the Administrative Courts may, after hearing the parties hereto, rule by means of a summary decision without an oral hearing if the case does not show any particular factual or legal difficulties and the facts have been clarified. The parties may challenge this decision in regular appeal proceedings or request oral hearings in the first instance, thus rendering the decision void (section 84 Code of Administrative Court Procedure).*

**3.** Can oral proceedings also be carried out via videoconferencing (i.e. in a manner where either a party to the proceedings or their representative or counsel can be in a different place during the hearing and carry out procedural acts in real time, through an audiovisual transmission)? (YES/NO)

Yes (Section 102a Code of Administrative Court Procedure)

- If NO, then has the creation of such a possibility been discussed? What were the main positions on the issue?
- If YES, then:
  - a. what are the legal limitations (for example, in which kinds of cases is it not permitted)?  
*The use of this technique is subject to the court's discretion. The hearing must simultaneously be transmitted in image and sound form to the courtroom and the place, the party or witness is present. The hearing must not be recorded.*

- b. have the risks of videoconferencing and the protection of a person's rights been discussed? What were the main positions on the issue?

4. Can oral proceedings also be carried out outside the court-room (in prison, hospital etc)? In which circumstances is this possible?

*The courts of administrative jurisdiction may also hold sessions outside the seat of the court if this is necessary in order to conclude them in an appropriate manner (Section 102 (3) Code of Administrative Court Procedure).*

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