SUPREME COURT
REPUBLIC OF ESTONIA

ACA EUROPE

Seminar organized by

the Supreme Court of Estonia and ACA-Europe

"Due process"

Tallinn, 18-19 October 2018

Answers to questionnaire: Montenegro

Seminar co-funded by the «Justice » program of the European Union

Due Process

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

Answered by the Supreme Court of Montenegro

This questionnaire focuses on the limiting of a person's procedural rights based on the principle of procedural economy. First and foremost, it seeks to answer the questions whether Member States have regulated the simplification of procedure in resolving certain types of administrative disputes, and where is the line drawn between effective court procedure and the protection of a person's procedural rights.

The principle of effective judicial protection is a general principle of European Union law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and which has also been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union (joined cases C-402/05 P and C-415/05 P: Kadi, p 335; C-432/05: Unibet, p 37, and the case law referenced therein). The Court of Justice of the European Union (CJEU) has stated that the principle of effective judicial protection laid down in Article 47 of the Charter comprises various elements; in particular, the rights of the defence, the principle of equality of arms, the right of access to a tribunal and the right to be advised, defended and represented (C-199/11: European Union v. Otis NV and others, p 48).

On the other hand, it is the CJEU's settled case law that fundamental rights, such as respect for the rights of the defence, do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not involve, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed (C-166/13: Mukarubega, p 53, and the case law referenced therein). In addition, the CJEU has stated that the principle of effective judicial protection does not only require that everyone should be able to exercise their right of access to court, but also that the administration of justice should be effective (F-3/11: Marcuccio, p 53). For instance, according to the CJEU, as long as the person can exercise their right to be heard, Article 47 of the Charter does not require an oral hearing in each case (see, for example, C-239/12 P: Abdulrahim, p 42; joined cases T-589/14 and T-772/14: Musso, p 59).

It follows from Article 52 subsection 3 of the Charter and the explanations relating to Article 47, that when defining the meaning and scope of the principle of effective judicial protection, it is also important to look at Article 6 of the European Convention for the Protection of Human Rights and the case law of the European Court of Human Rights (ECHR) on the topic.

According to Article 6 subsection 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the principle of a fair trial also includes the format of hearing a matter. According to the case law of the ECHR, a court case generally has to be reviewed in an oral hearing by at least one court instance; however, Member States can implement simplified proceedings for smaller and less complex disputes. This can serve the interests of the parties by facilitating access to justice, by reducing costs related to the proceedings and by accelerating the resolution of disputes.

According to ECHR case law, simplified proceedings can generally mean written proceedings, except in cases when the court deems an oral hearing to be necessary or if a party to the proceedings requests a hearing (in which case the request may be refused by

the court) (see Pönka vs Estonia, No. 64160/11, p 30; on the obligation to hold a hearing see also: Göç v. Turkey [Grand Chamber], No. 36590/97, p 47, ECHR 2002-V, and the case law referenced therein; Miller v. Sweden, No. 55853/00, p 29, February 8, 2005). ECHR has accepted exceptional circumstances for foregoing an oral hearing in cases where the proceedings concerned exclusively legal or highly technical questions, and which by their nature are not complex (see Koottummel v. Austria, No. 49616/06, p 19, December 10, 2009, and the case law referenced therein, Allan Jacobsson v. Sweden (no. 2), p 49; Valová, Slezák and Slezák v. Slovakia, p-s 65-68, Varela Assalino v. Portugal (dec.); Speil v. Austria (dec.), Schuler-Zgraggen v. Switzerland, p 58; Döry v. Sweden, No. 28394/95, p 41; and contrast Salomonsson v. Sweden, p-s 39-40; Jussila v. Finland [GC], No. 73053/01, p-s 41–42 and 47–48). A case can also be heard in simplified proceedings or written proceedings if the case raises no questions of fact or law which cannot be adequately resolved on the basis of the case file and the parties' written observations (see Döry v. Sweden, p 37) or if written proceedings are more effective than oral ones (Jussila v. Finland [GC], p-s 41–42 and 47–48).

Simplified proceedings in the context of this questionnaire mean special arrangements in administrative court procedure (a type of procedure) that allow for the court proceedings to be carried out in a simpler or faster manner than usual (shortened proceedings, accelerated proceedings, simple proceedings or any other special arrangements for resolving an administrative case in administrative court). Simplified proceedings, their prerequisites and nature are dealt with in part A of this questionnaire. It must be noted that in part A of the questionnaire, simplified proceedings do not include written proceedings without any other simplification, nor limitations of the right to appeal. The possibilities for resolving administrative cases in written proceedings will be dealt with in part B of the questionnaire, which also briefly touches upon the possibility of conducting a hearing via videoconferencing.

If simplified proceedings do not exist as a separate type of procedure in administrative courts in your country, when answering please do consider whether there are other, specific possibilities to make procedures more effective in certain ways (for example, exceptions 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, etc.).

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.

NO

The reform of the legal system in Montenegro, which included the field of state administration and judicial protection of the rights and legal interests of natural and legal persons, continued with the implementation of the new Law on Administrative Disputes. In an administrative dispute, the court decides in the panel. However, in order to rationalize the performance of the Administrative Court, it is foreseen, inter alia, that an individual judge can adjudicate in in the event of: a rejection of a claim (if the complaint is incomplete or incomprehensible and the prosecutor fails to remedy the shortcomings in the complaint within the deadline) and if the claim is untimely or submitted before time, if it is obvious that the administrative act or other administrative activity, which is challenged by the claim, or does not affect the prosecutor's right or his legal interest.

An economically efficient and effective judgment that prevents significant costs of the proceedings for the parties and other participants in the proceedings, is reflected in the possibility that the Administrative Court cancels the act or other administrative activity by a judgment and without serving one transcript of the claim for response to the defendant, if the concerned administrative act or other administrative activity contains such defects that prevent the assessment of legality. In addition, if the Administrative Court is filed several claims against the enactments where the rights and duties are related to the same or similar facts and the same legal basis, the Court may, after receiving the response to such claims, conduct the proceedings on the basis of one of such claims, while it can suspend other proceedings by the time of rendering the final decision in that particular procedure (sample procedure). Therefore, the application of the sample procedure is optional. After the finality of the judgment in the selected case, the Court will decide on cases in which the proceedings were suspended, without oral hearing.

The Administrative Court may make a decision in the preliminary proceeding. In particular, if the Administrative Court does not reject the claim and if it finds that the challenged administrative enactment or other administrative activity contains such deficiencies that hinder the assessment of compliance with the law, the Court can annul annul the enactment or other administrative activity without seeking the response to the claim.

Some law fields, prescribe short deadlines for adjudicating an administrative dispute, but the procedure held before the court is conducted in a general procedure, settled by rules in line with the Law on Administrative Dispute. Namely, in the event of elections' procedure, when the voter submits a request for enrollment, deletion, amendment, or correction of the voter register, the competent Ministry will make the appropriate change and introduce it into the voter register, by rendering a decision. Against this decision, a claim can be filed to the Administrative Court within 48 hours from the time of delivery of the decision and the Administrative Court decides on the claim within 24 hours from the date of receipt of the claim. The 48-hour time limit for the adjudication of a case is provided in the event of restriction of the freedom of

public assembly, if that restriction is necessary in a democratic society in order to prevent violations of public order and peace, the commission of criminal offenses, the endangering of human rights and freedoms and special minority rights and freedoms of others persons, safety of persons and property, or at the request of the state administration body in charge of health affairs, in case of health threats.

Regarding the form of the request, i.e. claim which initiated the dispute, the Law on Administrative Disputes stipulates that besides the plaintiff's data, it shall contain the indication of the administrative enactment or any other administrative activity the claim is filed against, and the reasons for filing the claim and the statement of the claim.

In terms of submitting a decision to a foreigner, the appointment of a representative for the receipt of a letter is prescribed, in case if the plaintiff or his representative is abroad and does not have a proxy in the territory of Montenegro. The Court will appoint a proxy to the plaintiff, in order to receive relevant documentation, and invite him, via appointed proxy, to appoint a proxy for the receipt of a written notice within a specified period. In the same way, the Court will proceed also when it comes to the defendant or his representative.

To conclude, the simplified procedure, as a special type of procedure, is not prescribed by the Law on Administrative Disputes, but the manner of resolving the dispute in a closed session or on the basis of the conducted oral hearing prescribed. However, given the circumstances described, it can be held that administrative matter can be actually adjudicated in a shorter procedure, when procedural reasons allow, or when specific short deadlines are prescribed by special laws.

2. Prerequisites of simplified proceedings

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.*);
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)?

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

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

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

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.*)?

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.*)?

3.3 Are there differences in using simplified proceedings across the court instances?

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.).

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

- If NO, then why is such a possibility not provided?
- If YES, then:

    a. what kind of information does that judgment have to contain?
    b. do the parties to the proceedings have the right to demand for the judgment to be supplemented with the statement of reasons?

4. Simplified proceedings in court practice

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

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.

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)?

There is no type of administrative case, or any court instance in which only an oral hearing is allowed. In an administrative dispute, the Administrative Court shall adjudicated in the closed session, or on the basis of an oral hearing. The Administrative Court is obliged to conduct an oral hearing if the party requests it in the claim, or in the response to the claim.

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;

In cases when the Administrative Court renders a ruling rejecting the claim as inaccurate, or rejects the claim for procedural reasons (the claim is untimely, or premature, the enactment challenged in the claim is not an administrative enactment, or administrative activity, a final court decision has already been rendered in the same matter, etc.), or renders a decision on the suspension of the procedure until the final decision in the selected case is reached - the individual judge renders a decision in administrative cases, without oral hearing.

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;

If a number of claims against the enactments where the rights and duties are related to the same or similar facts and the same legal basis, are filed to the Administrative Court, the Court may, after receiving the response to the claims, initiate proceedings on the basis of a single claim, while it can suspend other proceedings by the time of rendering the final decision in that particular procedure. After the judgment in the selected case becomes final, without oral hearing, even if parties requested it, the Administrative Court will decide on the cases in which the proceedings were suspended, if they do not hold important specificities of a factual or legal nature.

d. other bases, for example at the request of one of the parties to the proceedings?

Against the final decisions of the Administrative Court, the parties may file a motion to review court decision. As a rule, a three-judge panel of the Supreme Court decides on the motion to review court decision in a non-closed session. In addition to the above-mentioned, the parties may also file a motion to reopen proceedings, upon which decides a court that rendered a decision against which the motion was filed, as a rule, in a closed session.

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)

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

YES

a. Taking into consideration that the issue of conducting oral hearing through videoconference is not regulated by the Law on Administrative Disputes, the law which regulates civil procedure is applied. In accordance with the Law on Civil Procedure, a court may render a decision by which a party and a person authorized by the party, with the consent of the opposing party, is allowed to conduct actions outside the place where the hearing is held, if electronic communication is provided between the place of holding the hearing and the place of taking actions, through sound and visual transmission (videoconferencing). The court may decide to conduct evidence by interrogation of parties, witnesses and expert witnesses. The law does not prescribe cases in which video conferencing would not be allowed, and it is on the court to assess whether there are specific circumstances in each particular case, which would exclude such a possibility.

b. So far, the risks and the issue of protection of person's rights, have not been the subject of discussion regarding the oral hearing through videoconference. This manner of conducting a procedure was introduced by the Law on Amendments to the Law on Civil Procedure, in accordance with European practice. It significantly contributes to making the procedure more efficient and economical. When evaluating the need for a trial through videoconferencing, the court will assess the risks of possible violation of person's rights in each individual case and, accordingly, undertake adequate protective measures (for example, protect the public identification number of a party, or witness during a public oral-hearing).

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

As a rule, the hearing is held in a court building. However, the court may decide to hold the hearing outside the court building, when it finds that it is necessary, or that it will save time, or costs of the proceedings.

Thank you for sending us the Questionnaire!