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Due Process

ANSWERS FROM NORWAY

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

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.

Answer:

In Norway, there are no separate administrative courts and administrative cases are brought before the general courts. These proceedings are regulated by the ordinary rules of the Civil Procedure Act. This act provides certain possibilities for simplified proceedings, although the scope of these provisions are not limited to administrative cases. Before addressing these possibilities, we find it appropriate to present some aspects of the Norwegian administrative law procedure.

The key act is in this respect the Norwegian Public Administration Act. This act sets out several procedural provisions for administrative cases. These provisions are supplemented by provisions and regulations for the relevant area of administrative law. The scope of the act is limited to the activities set out by administrative agencies, and it does not apply to court proceedings.

An essential part of the Norwegian system for appeals against administrative decisions is independent appellate committees in different areas of administrative law, inter alia the National Social Security Committee and the Immigration Appeals Board ("UNE"). These are the second instance administrative bodies in their areas of law. The proceedings before these committees can be similar to the ordinary administrative law procedure, but they can sometimes have more similarities to ordinary court proceedings. For instance, the National Social Security Committee has the possibility to have oral hearings and appeals over their decisions are brought before the ordinary appellate court.

The mentioned UNE is an important body in this respect. UNE considers appeals against the decisions from the Norwegian Directorate of Immigration ("UDI") pursuant to the Immigration Act, the Immigration Regulations and the Citizenship Act. UNE is superior to the UDI as a body for legal interpretation. This means that UNE's practice forms the basis for the UDI's practice. The UNE is an independent administrative body, meaning that it in ordinary cases cannot be instructed by e.g. the Ministry of Foreign Affairs.

A reason why this board is important in this respect, is the number of cases it resolves. According to its 2016 annual report, approximately 17,000 new cases were brought before the board in 2016. We have been informed that 144 UNE decisions were brought to the courts in 2016. Consequently, the vast majority of the cases are finally resolved with UNE's decision.

UNE resolves each case in an in chambers meeting, after written preparatory proceedings. The board can, at its own discretion, allow the immigrant to meet in person (and with counsel) to give a testimony. According to the Immigration Act, such approval shall normally be given in asylum cases. Further, the Immigration Regulation sets out certain other types of cases in which such approval as a main rule shall be given.

Although the administrative proceedings must observe the rule of law and due process, these proceedings are in general more simplified than the ordinary court proceedings. The administrative acts do not provide any significant possibilities for simplifying the court proceedings in administrative cases.

The Civil Procedure Act sets out several provisions under which the court has the discretion to adapt the proceedings to the importance of the dispute. However, the only formalised regime under the act is the small claims procedure. Section 10-1 second paragraph act sets out three alternative grounds for following this procedure:

The following cases shall be heard pursuant to the small claims procedure:
a) all cases in which the disputed amount is less than NOK 125 000,
b) cases in which the disputed amount is more than NOK 125 000 and the parties consent to the case being heard pursuant to the small claims procedure and the court so decides, and
c) cases that do not concern asset claims where the court finds that application of the small claims procedure will be proper and appropriate, and neither of the parties object to the procedure.

Also administrative cases can follow the small claims procedure. In these cases the plaintiff's claim is normally that an administrative decision is invalid or that it should be repealed. This does not necessarily mean that the case does not concern asset claims under Section 10-1. For example, in a case concerning the validity of a tax return decision, the amount in dispute will be the difference between the tax decided by the government and what the plaintiff means he/she should pay in taxes. The case will therefore be assessed under letter a or b cited above.

However, not all civil cases can follow the small claims procedure. Section 10-1 third paragraph sets out exemptions. One exemption is made for cases regarding legal issues in respect of which the right to disposition of the parties is limited according to Section 11-4. This exemption is for the most part only relevant in administrative cases. The right to disposition is limited in cases relating to matters of personal status and legal capacity, the legal status of children pursuant to the Children's Act, administrative decisions on coercive measures pursuant to Chapter 36 and other cases in which public interests limit the parties' rights of disposition in the legal action. In such cases the court is only bound by the parties' procedural steps to the extent that these are compatible with public interests.

Although the preparatory part of the proceedings are simplified, the final hearing is normally carried out orally in a court session. The court session for final hearing in the small claims process follows the same model as the main hearing in a civil case, but the court has more options to simplify the process. The court can inter alia permit that the proceedings are completed in writing. The court session can also be held as a remote session - i.e. both parties can take part by telephone or video conference. Usually, the court session will not last more than one day and will often not exceed a half day. The parties undertake to provide notice of evidence and submit documentary evidence which have not been previously notified or submitted no later than one week before the court session. In the event of verbal proceedings, judgement can be rendered at the end of the session or within one week after the court being adjourned to consider judgement. The judgement will briefly summarise what the case concerns, represent the claims and their grounds and explain the factors that the court considers important. If judgement is rendered at the end of the court session, the judge will summarise the main points of his/her reasoning orally. Judgement will be reported to the parties within one week of the court session. To limit the size of costs, each party can only claim 20% of the disputed amount in costs (minimum NOK 2,500 and maximum NOK 25,000). Actual costs incurred can be claimed for groundless cases. The claimant has to pay court fees before the court will consider the case.

Another provision, which is not a provision about simplified proceedings per se, is Section 9-8. According to this provision the court may decide the case on the merits by following simplified proceedings, if it is evident that the claim cannot succeed either in whole or in part, or it is evident that the objections to the claim are manifestly ill-founded. A prerequisite is that such procedure is requested by one of the parties. If the conditions are met, the judgment is rendered without an oral hearing in the preparatory stage of the proceedings.

The recent years there has been a debate regarding specialised first instance courts within certain fields of administrative law, inter alia an immigration court. Earlier this year, a committee appointed by the government delivered its assessment regarding this issue. In the report, the committee recommends to not establish special administrative courts. We assume that if administrative courts are established, a special set of procedural rules must be

adopted. In that case, we might see a debate about simplified proceedings for certain administrative cases. This is not a topic heavily discussed today.

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)?

Answer:

No. At the outset, all cases shall be resolved after an oral hearing. However, the Civil Procedure Act allows the court to decide that the proceedings shall be carried out in writing. This assessment is made on a case-by-case basis, and not on the basis of the type of case per se. Please see below for a presentation of the conditions.

As a side note in this respect, the notion of "criminal sanction" is narrower under Norwegian law than the one applied under the ECtHR. Proceedings concerning administrative sanctions are consequently governed by the Civil Procedure Act and not the Criminal Procedure Act. The courts must in these cases observe the safeguards the ECtHR sets out, which in the specific case may exclude written proceedings. However, the conditions for written proceedings under the Civil Procedure Act are normally not satisfied in these cases.

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?

Answer:

The parties may, with the consent of the court, agree that the decision shall be rendered on the basis of written proceedings or a combination of written and oral proceedings, cf. the Civil Procedure Act Section 9-9 second paragraph. The court's consent to written proceedings can only be given if it will result in the case being completed in a more effective and cost-efficient manner. Written proceedings are nevertheless excluded if the requirements for due process and rule of law requires an oral hearing, inter alia that the proceedings must be held orally to be adequately elucidated before the judgment is rendered.

The situations described in letter a – c are what typically justifies written proceedings.

As earlier mentioned, Section 9-8 allows for simplified and expedited proceedings if the claim or the objection to the claim is manifestly ill-founded. In such case the decisions are rendered without an oral hearing.

Please note that under Norwegian procedural law we have three types of decisions; judgment, ruling and decision. Rulings and decisions are normally reserved for procedural issues, and not substantive matters. At the outset, appellate proceedings for these decisions are carried out in writing. The answer above refers to the proceedings for judgments.

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?

Answer:

As a main rule, the parties and their representatives/counsels are obliged to attend oral proceedings in person. The court may on the request from a party exempt him/her from attending if the conditions for giving a remote testimony (i.e. testimony through videoconferencing or telephone) are satisfied or if the court does not find sufficient grounds for obliging the party to attend. In such cases the party – at the outset – must be represented by a counsel that meets in person, it will otherwise risk dismissal or inadmissibility.

Acceptance of remote testimony requires that attendance in person is not possible or that it would be particularly burdensome or expensive. Such acceptance cannot be given if the testimony may be of particular importance or if it otherwise is inappropriate. Remote examination may always take place if the expense or disadvantage of direct testimony before the adjudicating court is considerable relative to the importance of the dispute to the parties. The Civil Procedure Act does not distinguish between types of cases.

The risks of remote testimony shall be taken into account in the court's assessment of whether acceptance should be given. Legal theory particularly points at situations in which the subject of the testimony is wide-ranging and complex. In addition, remote examination of parties and key witnesses should not be held in cases in which the impression of the party/witness is important, such as in cases concerning parental responsibility, care and visitation rights under the Children Act.

The Civil Procedure Act does not specifically address whether the party in such cases can follow the whole proceeding through videoconferencing or the likes. However, the act does not exclude this possibility.

Please note that the party himself/herself has the right to attend the heading in person if he/she wants to.

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

Answer:

Yes, this is possible. According to the Courts Act Section 25 fourth paragraph the oral proceedings can be carried out other places if the court deems it appropriate. The effectiveness and appropriateness of hearing the evidence, travel arrangements and costs are relevant considerations.

Security reasons may also cause the proceedings to be carried out outside the court-room. In the case Anders Behring Breivik v. Norway regarding the lawfulness of his prison conditions, the first and second instance proceedings were carried out in prison. The press and the public were allowed access to the prison and to follow the hearings in the same matter as if they were held in an ordinary court-room.

Thank you!