



Bundesverwaltungsgericht



**Seminar organized by the Federal Administrative Court of  
Germany and ACA-Europe**

**Functions of and Access to Supreme Administrative  
Courts**

Berlin, 13 May 2019

**Answers to questionnaire: Germany**



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

# **ACA-Europe Seminar on Functions of and Access to Supreme Administrative Courts**

12 - 14 May 2019

Oberverwaltungsgericht Berlin-Brandenburg  
(Higher Administrative Court Berlin-Brandenburg)

## *Questionnaire*

### **Introduction**

One of the most important tasks of ACA- Europe is to foster mutual understanding of the jurisprudence of the member states. The recognition and evaluation of the jurisprudence of the Supreme Administrative Courts of other member states is a key prerequisite for the development of a European legal community. For this purpose it is not sufficient to be able to read the decisions of the other member courts. In order to really understand their jurisprudence it is also eminent to understand under what conditions and traditions our colleagues perform their duties.

The conditions Supreme Administrative Courts work under are among others strongly determined by the specific functions a Supreme Administrative Court has in its national legal order. The specific functions on their part might have strong influence on how the access to the Supreme Administrative Court is designed and what scope of assessment of a case is applied. This leads to a number of questions: Which “filters”, for example, does administrative procedural law incorporate into the procedure, if it does at all? Does the procedure require a special admission or can every case be brought to the Supreme Administrative Court by the parties? Are only legal questions or also facts to be discussed?

Dealing with these questions the seminar to be held in Berlin from 12<sup>th</sup> to 14<sup>th</sup> May 2019 hopes to contribute to a deeper mutual understanding of the decisions of the member states' Supreme Administrative Courts. It shares this objective with the closely linked seminar taking place in Dublin on 25<sup>th</sup> and 26<sup>th</sup> March 2019, which will lay an emphasis on the internal mode of decision making, asking how our courts decide. Both seminars will deal with different aspects of the ways of our judicial conduct, deliberation and reasoning which are all important to understand the jurisprudence of the different member states.

These aspects cannot be studied efficiently from manuals, so ACA-Europe seminars are the right place to assess these important features of the judge's daily work.

## I. Functions of the Supreme Administrative Court (SAC)

1. a) How many **instances** are known in your (administrative) jurisdiction?

*Three. These are administrative courts (51 in Germany), higher administrative courts (15, usually 1 per state with the exception of Berlin and Brandenburg which have one common higher administrative court) and the Federal Administrative Court (Bundesverwaltungsgericht, BVerwG)*

b) Does your SAC also serve as a first instance court?

Yes.

c) If so, under what circumstances does your court serve as a first instance court?

- depending on the subject-matter?
- depending on the importance of the case?
- depending on a choice by the plaintiff (alone) or the parties (by agreement)?
- depending on other criteria?

Please explain.

*According to sec. 50 of the German Code of Administrative Court Procedure (Verwaltungsgerichtsordnung, VwGO) the BVerwG decides at first and last instance on a number of disputes which are allocated to it depending on the subject matter.*

*These are:*

- *public law disputes which are not of a constitutional nature between the Federation and the States and between individual States,*
- *actions brought against prohibitions of associations made by the Federal Minister of the Interior,*
- *actions against expulsion orders in accordance with sec. 58a of the Residence Act (Aufenthaltsgesetz, AufenthG) and their implementation (i.e. deportation order for a foreigner without a prior expulsion order based on the assessment of facts, in order to avert a special danger to the security of the Federal Republic of Germany or a terrorist threat),*
- *actions arising from dossiers within the ambit of the Federal Intelligence Service,*
- *actions against measures and decisions in accordance with sec. 44a of the Members of the Bundestag Act (Abgeordnetengesetz) and the rules of conduct for Members of the German Bundestag (i.e. especially on illegal donations and on fines issued by the President of Bundestag),*
- *actions against measures and decisions prohibiting employment or other activities of former federal ministers or secretaries of state during the first 18 months after they left office issued by the Federal Government and*

- *disputes related to project approval procedures and plan approval procedures for projects designated in the General Rail Act (Allgemeines Eisenbahngesetz), the Federal Highways Act (Bundesfernstraßengesetz), the Federal Waterways Act (Bundeswasserstraßengesetz), the Transmission Line Extension Act (Energieleitungsausbaugesetz), the Federal Requirement Plan Act (Bundesbedarfsplangesetz) or the Magnetic Suspension Train Planning Act (Magnetschwebebahnplanungsgesetz).*

*In the last case (specific project approval procedures and plan approval procedures) the specific acts usually contain an annex listing projects which have special importance for the creation of the German Unity, for the integration of the new member states into the European Union, the improvement of the accessibility of the German sea ports, for other international relations or because of their special function to alleviate a heavy traffic bottleneck.*

d) What is the percentage of first instance cases compared to the overall case load? Please give statistical data about the quantity of cases (not about the quality or the relative working load resp.)!

*In the year 2017 out of 1256 new cases of all kinds 93 were first instance cases.*

2.

a) Looking at the **case load** of a single judge of your SAC, can you identify larger groups of cases which make up the overall case load (quantitative approach)? I.e. Provisional proceedings, proceedings of admitting an appeal, first instance proceedings, other. What is the percentage of these groups of cases in the overall case load?

*Based on the statistical data for 2017 there are three groups of cases which are of relevance. About 55 % of cases concern proceedings of admitting an appeal, about 25 % of cases are appeals cases (including those previously admitted by the court) and about 7 % of cases are first instance cases.*

b) If you can identify larger groups of cases (question a), is it possible to weigh these cases as to their complexity and thus to the amount of time required in treating them (qualitative approach)?

*There are no statistical data about the “weight” of different groups of cases. Yet, on the basis of experience appeals cases weigh a multiple of cases in proceedings of admitting an appeal. First instance cases range from simple first instance cases, weighing sometimes less than an appeals case, to very complex cases of urban planning which probably cause the largest workload to a judge.*

3. a) In appeals cases, does your SAC:

- review decisions of the lower courts with a view to the facts and to the law?
- review decisions of the lower courts with a view to the law only?
- solely answer a(n abstract) legal question?

*The BVerwG as an appeals court is generally limited to review the decisions of the lower courts on points of law (Revision as opposed to Berufung). For its appeals decisions the Court is bound by the assessment of the facts by the lower courts. A review of the facts is only possible in an indirect way, if the lower court committed a procedural error (violation of procedural law) which might have had influence on the result. In cases the BVerwG ascertains such a procedural error the appeal might be successful, what probably might only lead to the case being remitted to the lower court. In general the BVerwG also does not consider other facts than those ascertained by the lower court although some very limited exceptions apply here as for example with regard to new and uncontested developments.*

*The BVerwG does not answer abstract legal questions. As the other supreme courts in Germany, too, the Court solves concrete case and does not give legal experts' advice or opinions.*

4. What are the **purposes** of the jurisdictional work of the SAC as a court of appeals?

- the standardisation/unification of the law?
- the deliverance of single case justice?
- (further) development of the law?
- care for adherence to procedural rules of lower courts?

*In different degrees the jurisdictional work of the BVerwG as a court of appeals serves all of the proposed purposes.*

*The main purposes of the appeals to the supreme courts in Germany, which is an appeal on points of law only (cf. question 1. 3.), are the unification of the law and the further development of the law (this is not only true for the administrative courts). The emphasis on these purposes gets clear looking at the requirements for an appeal to the BVerwG to be admissible: the legal case is of fundamental significance, the judgment deviates from a ruling of the BVerwG, of the Joint Panel of the supreme courts of the Federation or of the Federal Constitutional Court and is based on this deviation, or a procedural shortcoming is asserted and applies on which the ruling can be based.*

*The last item demonstrates that the adherence of the lower courts to procedural rules is a purpose of the appeal to the BVerwG, too, although in a somewhat lesser degree. The procedural shortcoming has to be asserted and there has to be a possibility that the ruling is based on it. In other words, the appeal is not even admissible, if there is an undisputed procedural error, if this error has not had an effect on the final ruling of the lower court.*

*Single case justice is, in the framework of the law, a purpose of all jurisdictional work. And so it is a purpose of the jurisdictional work of the BVerwG as a court of appeals, too. Yet, this purpose has to be considered as an implied purpose in the other purposes with the effect that the others play a more central role in the daily work.*

5. a) What are the purposes of the jurisdictional work of the SAC as a court of first instance?

*The purposes of the jurisdictional work of the BVerwG as a court of first instance are the same as of every administrative court. The most central purpose is the protection*

*of subjective rights of individuals against public authorities (art. 19 par. 4 Basic Law – Grundgesetz, GG). To ensure the legality of the actions of the administration is another central purpose, as well as to provide single case justice in the framework of the law.*

b) What is the rationale of assigning certain proceedings to the SAC as a court of first instance?

*The rationale of allocating certain proceedings to the BVerwG at first and last instance needs to be assessed taking into account the background of the constitutional decision that the jurisprudence in Germany should be mainly organized by the States, not by the Federation with the exception of the supreme courts. In exceptional cases it can be justified that the Federal Administrative Court decides at first and last instance (i.e. without any State court participation), if these disputes need to be decided quickly because of compelling reasons of public interest, have importance or effects that transcend an individual State or do not have a genuine link to a State at all.*

*The last idea leads to the rationale of allocating disputes arising from the activities of the Federal Intelligence Service or in respect of members of Bundestag or Federal ministers and state secretaries.*

*In a similar way disputes of the Federation and a State or between States have to be solved in the federal interest by a federal court.*

*As far as important infrastructure projects are concerned, the rationale in allocating disputes about these projects at first and last instance to the BVerwG is mainly in speeding up the realisation of these projects. Experience has shown that the planning of larger projects, especially with a proper assessment of environmental effects and participation of the public, already takes a significant time. This time is multiplied if the permit is challenged with a court action as – without any special regulations – the administrative courts as well as the higher administrative courts both have to investigate the facts of the case themselves and review the legality and then the BVerwG has to review the case on points of law. Finally if in the third instance it is determined that additional facts are needed, the case has to be remit to the lower instance to investigate the facts, what in some cases might lead to another appeal to the third instance on points of the law. As all these procedures take time and, as experience has shown, in quite a number of actions against larger projects, the aim of the plaintiffs seems to be merely to delay the realisation, the legislator has decided to reduce instances for very important and urgent projects. Following this idea the most important and urgent projects are allocated at first and last instance to the BVerwG, another group of large and important projects are allocated at first instance to the higher administrative courts (leaving out the administrative courts), with only the appeal on points of law to the BVerwG given.*

*Finally, as far as specific deportation orders are concerned, speed is a very important issue, too, because the affected foreigners are deemed to be dangerous. Also, these disputes can be considered to be in an interest that affects the Federation as a whole.*

6. a) Is there a separate constitutional court in your country?

Yes, the Federal Constitutional Court (*Bundesverfassungsgericht, BVerfG*) in Karlsruhe.

b) Does the SAC in your country serve as a constitutional court?

*No. The jurisdiction of the administrative courts is given in public-law disputes of a non-constitutional nature. Constitutional disputes are to be decided by the Federal Constitutional Court or, if they are about a State constitution, by the constitutional court of the respective State. This does not exclude, however, that the BVerwG applies constitutional law, too. On the contrary, every court is held to consider constitutional law and especially the constitutional basic/fundamental rights in every case.*

c) In how far does your SAC consider constitutional law, especially fundamental rights?

*As just pointed out, every court is held to consider constitutional law and especially the constitutional basic/fundamental rights in every case. This means not only that every court has to apply the constitutional basic/fundamental rights, which are directly applicable subjective rights of the individual and play a very important role especially in any assessment of proportionality, but also has to be sure that the law, by-laws, but also acts passed by the parliament, are constitutional (see also question I. 6. e)).*

d) If there is a separate constitutional court, is there a special/extraordinary remedy against (final) decisions of the SAC to the constitutional court claiming violations of constitutional law?

*Yes, according to art. 93 par. 1 n° 4a GG there is the possibility to file a constitutional complaint at the BVerfG alleging that the basic rights or some specific similar constitutional rights have been infringed by public authority. Public authority in this sense can also be (and in fact in most cases is) a supreme court like the BVerwG. It is noteworthy that before resorting to the BVerfG with such a constitutional complaint all normal legal remedies have to be exhausted (see also question I.6.f)).*

e) If there is a separate constitutional court and your court considers constitutional law, too, how would your court handle a case, if your court deems a relevant law as unconstitutional?

*If any court deems law relevant in a case to be decided to be unconstitutional the further steps depend on the nature of the respective law. If the respective law is a by-law or any other piece of law ranking below a formal act of parliament, the court (i.e. not only the BVerwG or another supreme court, but also any administrative court) will not apply this law in its decision which will not have binding effect to other parties or other cases, though.*

*If the respective piece of law is a formal federal act, the normal courts, including the supreme courts do not have the right to ignore it, although they are obliged to review the law on its constitutionality. If the court deems the act to be unconstitutional it has to refer this question to the BVerfG which has the power to declare the act to be unconstitutional and void with effect erga omnes. In case of formal State acts similar*

*rules apply according to most of the State constitutions in respect of the State constitutional courts.*

f) If there is a separate constitutional court in your country, can plaintiffs challenge administrative acts also before the constitutional court (i.e. without bringing the case before the SAC first)? If so, how are actions before the constitutional court related to the proceedings before the SAC?

*No. The legal remedies have to be exhausted before a constitutional complaint can be admissible. This means that the plaintiff has to challenge the administrative act with an action to be brought to the administrative courts and, if the case is not at first and last instance with the BVerwG, has to appeal in all instances until there is no normal legal remedy left. Only then the plaintiff can file the constitutional complaint at the BVerfG (see also question I.6.d)).*

## **II. Access to the SAC**

1. a) Does a party have to be **represented by a legal professional** before the SAC?

*As a general rule: yes. According to sec. 67 par. 4 sent. 1 VwGO parties to proceedings before the higher administrative courts and the BVerwG have to be represented by an authorised legal professional with the exception of legal aid proceedings.*

b) If so, does the representative have to be an attorney at law/solicitor/barrister?

*According to sec. 67 par. 4 sent. 3 and par. 2 sent. 1 VwGO the representative in general has to be an attorney (Rechtsanwalt) or a law teacher at a state or state-recognised institution of higher education of a Member State of the European Union, of another Contracting Party to the Agreement on the European Economic Area or Switzerland who has qualification for judicial office.*

c) Are there attorneys/solicitors/barristers specially authorized to act before the SAC?

*No. Unlike as for the Federal High Court of Justice (Bundegerichtshof, BGH) in civil matters, any attorney can act before the BVerwG and there are no attorneys specialised in acting before this Court.*

d) Are other legal professionals admitted as representatives? I.e. legal scholars, representatives of NGOs...?

*Yes. As already said, law teachers at a state or state-recognised institution of higher education of a Member State of the European Union, of another Contracting Party to the Agreement on the European Economic Area or Switzerland who have qualification for judicial office can act as legal representatives before the BVerwG, too (cf. question II.1.b)).*

*For disputes about employment as a civil servant, as a judge or during compulsory or voluntary military service or civilian service (replacing military service), for disputes in employee representation cases also labour unions and associations of labour unions as well as the corresponding associations of employers are entitled to act as repre-*

*sentatives for parties before the BVerwG, although these organisations have to act through persons with qualification for judicial office (sec. 67 par. 4 sent. 5 and 6 VwGO).*

e) Are there specific (different) rules for representatives of administrative authorities?

*Yes. According to sec. 67 par. 4 sent. 4 VwGO administrative authorities and legal persons of public law may be represented by their own employees with qualification for judicial office or by employees with qualification for judicial office of other administrative authorities or legal persons of law.*

2. a) What are the **formal requirements** for an appeal to the SAC (e.g. precise application, reasoning,...)?

*According to sec. 139 par. 1 VwGO the appeal has to be in writing and has to designate the impugned judgment. The appeal has to be lodged to the court whose judgment is impugned within one month of service of the complete judgment or of the order on the admission of the appeal. According to sec. 139 par. 3 VwGO the appeal has to be reasoned within two months of service of the complete judgement or of the order on the admission of the appeal. This deadline may be extended by the presiding judge of the senate. The reasoning must contain a definite motion, the violated legal provision and, insofar as the complaint relates to procedural shortcomings, must state the facts from which the shortcomings emerge.*

*As far as a party complains against the non-admission of the appeal, this complaint must also be lodged with the court against whose judgment an appeal is intended within one month after service of the complete judgment and must designate the impugned judgment. Also there is a two months deadline to reason the complaint, in which the fundamental significance of the case must be explained or the ruling from which the judgment deviates, or the procedural shortcoming, must be designated.*

b) Is your SAC bound by (and limited to) review the case according to specific objections (on procedural law and/or on substantive law) of the appellant?

*As far as substantive law is concerned, the BVerwG is not limited to review the decisions of the lower courts on points the parties have specifically alleged. On the contrary, the principle of full review applies (Vollrevision) and the BVerwG performs a full review to determine whether the decision of the lower court infringes with substantive federal law and is based on this infringement.*

*As far as procedural law is concerned, the BVerwG reviews the decisions of the lower courts only on these points, if the party has alleged such points and presented the facts from which the alleged infringement can result.*

c) If this is the case, how does your SAC deal with its duty to refer to the ECJ for a preliminary ruling under art. 267 TFEU?

*Not applicable.*

3. Concerning the function of the SAC in your country as a **court of appeals** (i.e. not as a court of first instance):

a) Does every party of the proceedings at the lower instance have the right to seize the decision of the SAC against all kinds of decisions of the court of lower instance?

*Both the plaintiff and the defendant, irrespective of being a natural person or an administrative body, can – the general requirements given – appeal to the BVerwG. This also applies to others, third parties subpoenaed to the procedure by the lower court, whenever they might be aggrieved.*

*In general the appeal (on points of law) to the BVerwG is only available against sentences of the higher administrative courts and – if explicitly admitted by the administrative court and agreed on by the parties – of the administrative courts, circumventing the second instance of the higher administrative courts. Against other types of decisions, like court orders in injunction proceedings other enactments about costs, procedural aid etc., there is no appeal to the BVerwG with the only exceptions of appeals against decisions of the higher administrative courts about the administrative authority's refusal to present its files for confidentiality reasons, against decisions about the admissibility or inadmissibility of the jurisdiction of the administrative courts (as opposed to ordinary courts etc.), if this (further) appeal has been admitted by the higher administrative court and against decisions of the higher administrative courts to not admit the appeal (on points of law) against their sentences.*

b) Can certain types of decisions of lower courts (e.g. provisional decisions, certain fields of law,...) not be brought before the SAC?

*See question II.3.a). Additionally some limitations for appeals apply in asylum cases. In asylum law cases the appeal (on points of fact and of law) to the higher administrative courts is already more limited than in normal administrative law cases. Especially noteworthy is that there is no appeal at all against sentences of the administrative courts establishing that an action in asylum law is evidently inadmissible or evidently without merit. In these cases the direct appeal to the BVerwG on points of law (Sprungrevision) is excluded, too.*

4. As far as in general the parties of the proceedings of the lower instance can seize the decision of the SAC (as a court of appeals):

a) Is this right restricted by a legally established **filter** (quantitative, e.g. depending on a certain value in litigation, or qualitative, e.g. in certain fields of law, depending on a preliminary assessment)?

*Yes, the appeal to the BVerwG has to be admitted, either by the higher administrative court (or by the administrative court) or by the BVerwG on complaint against the non-admission.*

b) If there is a preliminary assessment, please give details:

- Which court decides (lower court or SAC)?
  - If the lower court admits a case to the SAC, does this decision have binding effect on the SAC?
  - If the SAC decides, is there a specific procedure of admittance before the SAC?
- Please give details!

- If the lower court decides (in a negative way), can the SAC still admit a case?
- If the lower court decides, does it decide on the admission of an appeal ex officio or only on application?

*In the first place the lower courts are supposed to decide on admitting the appeal ex officio. In the case of the higher administrative courts the parties have the possibility to complain about the non-admission in order to enable to BVerwG to decide itself on the admission of the appeal (on points of law, Revision) to the BVerwG. This means that, if the higher administrative court admits the appeal to the BVerwG, the latter is bound by this positive decision; if the higher administrative court does not admit the appeal and one of the parties complains, the BVerwG has to decide itself, whether to admit an appeal in a specific procedure.*

*The administrative courts (of first instance) are supposed to consider an admission of the direct appeal (on points of law) to the BVerwG circumventing the higher administrative court (Sprungrevision) ex officio, too. They have to decide on this, when one of the parties applies for the admission. The positive decision of the administrative court is binding for the BVerwG. The negative decision here is final, what means that in this case the direct appeal to the BVerwG is not admissible. But the parties' right to try to go to the second instance (the higher administrative court) with an appeal on facts and law (Berufung) remains untouched (and also, given that the appeal to the higher administrative court is admitted, the possibility to try to appeal against the judgement of the higher administrative court to the BVerwG).*

- c) Are there special rules for filters for certain fields of law (e.g. asylum law,...)?

*In respect of the appeal (on points of law) to the BVerwG there are no structurally different rules for certain fields of law, although in a number of very specific fields of law, the second instance is circumvented completely by law. This applies for example in regulation affairs about telecommunications in some affairs about interventions of the state in the economy or in certain military affairs. In these cases the rules for the admission of the appeal (on points of law) to the BVerwG against sentences of the higher administrative courts apply to the appeals against these sentences of the administrative courts (of first instance).*

*In asylum law special – stricter – rules do apply for the admission of the appeal to the higher administrative courts (on points of fact and of law), what evidently has secondary effects on the number of cases appealed to (on points of law) to the BVerwG.*

- d) If your jurisdiction knows a procedure of admittance, what are the general requirements under which a case can be admitted to the SAC?

*According to sec. 132 par. 2 VwGO the appeal (on points of law) to the BVerwG is only to be admitted, if the legal case is of fundamental significance, the judgment (of the higher administrative court) deviates from a ruling of the BVerwG, of the Joint Panel of the supreme courts of the Federation or of the BVerfG and is based on this deviation, or a procedural shortcoming is asserted and applies on which the ruling can be based.*

e) If there are more than two instances in your country, is it possible to appeal against decisions of the court of first instance to the SAC directly? Under what requirements?

*Yes, it is possible, as already pointed out (cf. questions II.3.b) and II.4.b)). According to sec. 134 par. 2 VwGO such an appeal circumventing the higher administrative courts is only to be admitted, if the legal case is of fundamental significance, the judgment (of the higher administrative court) deviates from a ruling of the BVerwG, of the Joint Panel of the supreme courts of the Federation or of the BVerfG and is based on this deviation. Additionally this direct appeal to the BVerwG requires the consent of the other party. Procedural shortcomings do not play a role here.*

f) Are there specific requirements in certain fields of law?

*In the law of officials (Beamte) an appeal (on points of law) to the BVerwG is also to be admitted, if the sentence of the lower court deviates from a ruling of the higher administrative court of another state and is based on this deviation as long as there is no ruling of the BVerwG on the issue.*

g) If your jurisdiction knows a procedure of admittance, what is the percentage of cases admitted?

*Statistically, about 15 percent of cases are permitted.*

5. If there is no legally established filter (Q. II.4.), has your SAC established a jurisprudence on the (in-)admissibility of appeals or of specific objections (see also Q. II.2.b)) which has the effect of a factual filter, e.g. by rejecting them as abusive, or by dismissing petty cases?

*Not applicable.*

6. Considering the functions of your SAC as a court of appeals (Q. I. 3.), how are these functions related to restrictions of the access to the SAC as discussed in Q. II.4.), as far as applicable?

*As pointed out in question II.4. the main purposes of the appeals (on points of law) to the supreme courts in Germany are the unification of the law and the further development of the law. The filter established by the requirements of the appeal to be admissible and the special admission procedure focussing exclusively on these points make sure that only cases are to be dealt with by the BVerwG in depth that meet the requirements for the admission of the appeal and in the same way the BVerwG can dedicate the necessary time on the pursuit of these purposes in suitable cases.*

*For the appeal to be admissible the requirements are mainly the fundamental significance of the legal case or the deviation of the judgement of the lower court from a ruling of the BVerwG, of the Joint Panel of the supreme courts of the Federation or of the BVerfG. These (alternative) requirements for the admission reflect the main purposes of the appeals procedure: if the legal case is of fundamental importance, it is best suited to contemplate a further development of the law and if the judgment of the lower court deviates from the rulings of the Supreme Court or the Constitutional*

*Court the need for a new decision of the Supreme Court to restore the uniformity of the law by a uniform application by the courts is greatest.*

*Finally, as far as the care for adherence to procedural rules by the lower courts is a purpose to be met, it was stated that this purpose might be considered as minor compared to the first two. This is reflected by the admission procedure as well in the requirement to allege specific shortcomings and the facts supporting this allegation in order to enable the BVerwG to review the judgement of the lower court on this point whereas the review on the main purposes has to be performed without specific allegations ex officio.*

7. a) Are there any constitutional provisions in your country with respect to having an appeal's instance?

*In a certain way. The Constitution demands that there is a legal remedy against possible violations of a person's rights by a public authority, in this context understood as an administrative authority (art. 19 par. 4 GG). This demand is already fulfilled if there is one judicial instance. Although a second or third instance is not demanded for by the Constitution (protection by the judge, not against the judge) from this point of view, still there is an institutional guarantee for the federal (supreme) courts of all the five different jurisdictions provided for by the constitution (art. 95 par. 1 GG) as this norm stipulates the task for the legislator to establish these courts.*

b) If so, does the constitution in your country provide for a full review of a first instance decision or for access to a procedure of admittance to the next instance?

*Not applicable.*

8. Is there a political or academic discussion concerning any kind of reform with regard to the access to the SAC (e.g. introducing filters, restricting the filter, loosening the filter)?

*Currently there is a discussion about reforming the law of appeals especially in asylum cases. A widespread perception is that as a consequence of the filtered access to the second instance and the filtered access to the third instance, the BVerwG could get more cases in order to maintain the overview over different developments, especially in asylum law with an even stricter filter for the second instance. Additionally and specifically in asylum law there is the idea to create a new possibility of precedence decisions of the BVerwG on facts, what is alien to the existing concept of the supreme courts in Germany with the system of appeals on points of law only. According to this idea the BVerwG should decide on the general situation in the countries of origin of the refugees claiming asylum in Germany to reduce the differing judgements of different higher administrative courts in assessing these general situations (e.g. is there an internal armed conflict in Afghanistan or is the conflict there short of the necessary scale?).*

### **III. Implementation / Procedural Aspects**

1. As far as your SAC serves as a court of first instance: What is the **possible content of decisions** of your SAC:

- cassation of the administrative act?
- obligation of the administrative authority to issue an administrative act?
- obligation of the administrative authority to issue a new discretionary decision?
- obligation of the administrative authority to act in a certain way (other than by administrative act: payment, omission...)?
- issue an administrative act itself?
- issue a discretionary decision out of its own authority?
- remit to the constitutional court?
- other?

*As far as the BVerwG serves as a court of first instance its decisions can have the same content as of administrative courts in Germany in general: the Court may rescind the challenged administrative act, obligate the administrative authority to issue the demanded administrative act, obligate the administrative authority to issue a new discretionary decision, if there is discretion to be used by the administration, obligate the administrative authority to act in a specific way (other than issue an administrative act). Also, as already pointed out (see question 1.6.e)) the BVerwG has the obligation to refer the question whether a formal act of parliament is constitutional to the BVerfG if it deems it to be unconstitutional and it is necessary for the case. Yet, this is only about the question of constitutionality; the original procedure stays in the BVerwG and is paused until the BVerfG has decided about the act, then it is resumed. The administrative courts in Germany cannot issue administrative acts or even issue discretionary decisions themselves.*

2. As far as your SAC serves as a court of appeal:

a) What is the possible **content of decisions** of your SAC:

- cassation of the decision of the lower court and remitting the case back to the lower court?
- cassation of the administrative act?
- obligation of the administrative authority to issue an administrative act?
- obligation of the administrative authority to issue a new discretionary decision?
- obligation of the administrative authority to act in a certain way (other than by administrative act: payment, omission...)?
- issue an administrative act itself?
- issue a discretionary decision out of its own authority?
- remit to the constitutional court?
- issue a legal opinion/authoritative interpretation of the law without connection to a single case?
- other?

*As a court of appeals the BVerwG firstly determines whether the challenged sentence is based on an error in applying the substantive federal law by the lower court or – as far as alleged – on a procedural shortcoming. If this is the case and the sentence is not correct on other grounds, the appeal is successful. In this case the BVerwG will quash the sentence of the lower court and can remit the case to the lower court or – if no additional facts are needed – decide on the merits of the original case itself. If in the course of the review of the sentence of the lower court the*

*BVerwG comes to the conclusion that an applicable act of parliament is unconstitutional, it remits this question of the constitutionality of the act to the BVerfG.*

*If the BVerwG decides on the merits of the original case itself, the final decision can have the same content as in procedures as first instance (see question III.1.).*

*Also as a court of appeals the BVerwG cannot issue administrative acts or even issue discretionary decisions itself. It does not issue a legal opinions or authoritative interpretations of the law without a connection to a single case, but only decides on concrete cases.*

b) To what extent can or must your SAC rely on the facts as they were investigated and determined by the lower court?

*The facts determined by the higher administrative court as the lower court are binding for the BVerwG, if the determination of the facts is not based on an erroneous application of the law and the appeal is based on this (sec. 137 par. 2 VwGO). This especially means that the determination of facts can be challenged by alleging procedural shortcomings. If the appeal succeeds in doing so, the BVerwG will most likely remit the case back to the higher administrative court. If the facts are determined by an administrative court (of first instance), the direct appeal cannot be based on procedural shortcomings (sec. 134 par. 4 VwGO) what impedes to question the determined facts. New facts can under very restrictive conditions be considered by the BVerwG. These facts must, among other requirements, be uncontested because the BVerwG as a court of appeals does not investigate facts itself.*

3. a) When your SAC serves as a first instance court, does it apply the same rules of court procedure as the common first instance courts?

*Yes, although the rules about the requirement of a legal representation for the BVerwG apply without making a difference whether the Court acts as a court of appeals or of first instance.*

b) If not, what are the differences?

*The only difference is that a legal representative is needed.*

4. As far as there is a specific procedure of admittance of appeals before the SAC, are there different rules of procedure for these procedures of admittance than for admitted appeals' procedures?

*If the BVerwG admits an appeal, it does so in a specific complaints procedure against the non-admission by the higher administrative court. In this procedure the Court reviews only the alleged reasons that are to justify the admittance of the appeal (cf. II.4.d)). In contrast in the admitted appeal the court reviews the case fully with regard to defects of substantive (federal) law, alleged or not. This admittance procedure is concluded with issuing a judicial decree, which is not a formal sentence, based on the allegations in the complaint against the non-admission of the appeal without oral hearing (cf. question III.5.) and by three (instead of five judges as it would be the case in a formal sentence).*

5. Are there (compulsory, facultative) public hearings in procedures of admittance and or the admitted appeals' procedure?

*Irrespective of the instance, according to sec. 101 VwGO oral hearings are required to be held before an administrative court renders a sentence in the formal sense. For other types of decisions (e.g. court orders, judicial decrees or enactments about costs, procedural aid etc.) an oral hearing is not obligatory. As the BVerwG decides on complaints against the non-admission of the appeal by court order, there is no oral hearing required and not held in practice, either. In the procedure about the admitted appeal, which usually is decided upon by sentence, there is an oral hearing, if the parties (both) do not waive the oral hearing. If they waive it, the oral hearing is not compulsory, but facultative for the court.*

6. Do the decisions of the SAC have an effect on other cases than the one decided?

a) Are lower instance courts bound by law to follow decisions of the SAC in other (similar) cases?

*No. Each court decides in full independence about the cases brought to it. Nevertheless, it can be said that lower courts tend to follow decisions of the BVerwG in practice. Partly this might be because the lower courts are obliged to admit the appeal against their decisions, if the decision deviates from a ruling of the BVerwG, of the Joint Panel of the supreme courts of the Federation or of the BVerfG and is based on this deviation. Even if the lower court does not admit the appeal in this case the appeal is most likely to be admitted upon complaint by the higher instance that, subsequently, can then decide in the admitted appeal, whether to follow the (older) decision of the Supreme Court or follow the new ideas of the lower court.*

b) If so, under which conditions can they deviate from a decision of the SAC?

*Not applicable.*

c) Is the SAC bound by law to follow its own previous decisions?

*No. As long as the previous decision is not binding as res iudicata, because it covers a specific part of the same case, the BVerwG is not bound by law to follow its own older decisions in similar cases. It decides in full independence about the present case and thus can also change its jurisprudence because of new developments or new comprehension.*

*Note: this answer refers to the situation about older decisions of the same section (Senat); concerning older decisions of other sections see question III.7.*

d) If so, under which conditions can it deviate from its previous decision?

*Not applicable.*

7. Are the judges of your SAC bound by the decisions of other sections within your SAC?

*In a certain way the sections (Senate) of the BVerwG cannot deviate freely from decisions of other senates. If the other senate declares upon request that it wants to*

*adhere to its legal opinion, the Grand Senate, which is usually composed by the President of the Court and one member of the appeals senates of the Court, shall rule if a senate wishes to derogate in a legal question from the ruling of another senate or of the Grand Senate (sec. 11 par. 2 VwGO). The Grand Senate shall rule only on the legal question. Its ruling is binding for the senate of decision in the instant case.*

*A similar procedure is provided for by a special act (Act on the Preservation of the uniformity of the jurisprudence of the Supreme Courts of the Federation – Gesetz zur Wahrung der Einheitlichkeit der Rechtsprechung der obersten Gerichtshöfe des Bundes, RsprEinhG) for situations when one supreme court wants to deviate from the rulings of another supreme court in a question of law that affects both jurisdictions. In this event a Joint Chamber of the supreme courts is established by judges of the different supreme courts in order to preserve the uniformity of the jurisprudence.*