



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: Slovenia



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 12th to 14th 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 25th and 26th 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?

In administrative disputes decisions are made by the Administrative Court of the Republic of Slovenia and by the Supreme Court of the Republic of Slovenia (hereinafter: the Supreme Court). Adjudication of first instance is carried out by the Administrative Court, unless otherwise stipulated by law. The rulings on legal remedies against the decisions of the Administrative court are made by the Supreme Court.

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

In specific cases, determined by law, the Supreme Court decides as a court of first and last instance. In this way the Supreme Court e. g. decides on the legality of acts issued by electoral bodies for election to the National Assembly, the National Council and for electing the President of Slovenia.

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.

Depending on the subject-matter the jurisdiction of the Supreme Court as the first instance court is determined by an act of Parliament. These cases are relatively few and exceptional since it is not considered to be compatible with the position of the Supreme Court within the judicial structure.

See also the answer above (b).

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.)!

It's 2,3 % of all cases lodged in 2018.

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?

The relevant caseload in connection with all cases lodged in 2018 is:

- 6 % of provisional proceedings (interim measures),

- 31 % of appeal proceedings,
- 47 % of proceedings regarding a request (leave) for a revision,
- 5,4 % of revision proceedings (decision on merits of the case, limited to points of law).

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)?

Revision proceedings usually require extensive time for preparation of draft judgements and/or preliminary reports and deliberation.

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?

There are two types of appeal (in the broader sense of the legal remedy) against a decision of the Administrative Court. One is the appeal (in the sense of German "Berufung") which is possible to the Supreme Court in cases specifically determined by an act of parliament, and is possible with both a view to the facts and to the law, with certain limitations.

The other possibility to appeal the decision of Administrative Court is the revision (same as in German "Revision") which is possible solely with a view to the law and generally limited to answering a specific legal question that importance for the future development of judicial and administrative practice.

In cases where the appeal (Berufung) is allowed by law, there can be no revision.

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?

The main purpose is both the unification of the law applied in administrative matters as well as its further development. The single case justice and adherence to procedural rules of the Administrative Court are secondary to that.

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

Given the importance of the matter The Supreme Court decides on the legality of acts that have to be resolved quickly and are of significant importance within the constitutional system (e. g. decisions of electoral bodies in national elections, decision of the Judicial Council in appointment/dismissal of judges).

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

See the answer above.

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

Yes.

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

No.

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

Judges are independent in the performance of the judicial function and they are bound by the Constitution and laws. This means that SAC always considers all cases from the aspect of constitutional law and aims to interpret the law in conformity with the Constitution. In this way the majority of constitutional law issues are resolved, it is only in cases where such an interpretation of the act of parliament is not possible that the Supreme Court stays its proceedings and challenges the act before the Constitutional Court.

It is also important to stress, that under a special constitutional provision (Art. 157, para 2) there is a general jurisdiction of courts deciding in an administrative dispute to adjudicate on the claim that public authorities have violated human rights and fundamental freedoms of a person by their individual acts or actions, if there is not an other (special) effective judicial protection established by law. This includes the jurisdiction of the Supreme Court deciding on appeal.

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?

The Constitutional Court decides on constitutional complaints stemming from the violation of human rights and fundamental freedoms by individual acts. This includes complaints against the decisions of the Supreme Court.

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 The Supreme Court deciding some matter deems an act of parliament which it should apply to be unconstitutional, it must stay the proceedings and initiate proceedings before the Constitutional Court, challenging the act. The proceedings in the court may be continued after the Constitutional Court has issued its decision. Only the Constitutional Court decides on the conformity of parliamentary acts with the Constitution and/or ratified international treaties, but the by-laws (secondary legislation) can be set aside (disapplied) by other courts as well. In certain cases the Supreme Court has the power to annul a regulation (Government Decree determining the spatial planning in a certain area, etc.).

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?

A constitutional complaint may be lodged only after all legal remedies have been exhausted. Before all extraordinary legal remedies have been exhausted, the Constitutional Court may exceptionally decide on a constitutional complaint if the alleged violation is manifestly obvious and if irreparable consequences for the complainant would result from the implementation of the individual act. But in practice this would mean that exceptionally only a judgement of the Administrative Court could be challenged directly (before the appeal or revision to the Supreme Court), not the administrative act itself.

II. Access to the SAC

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

In the procedures before The Supreme Court a party may perform procedural actions only through a counsel who has passed the national bar examination.

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

No, it is not necessary to be a member of the bar, if the abovementioned legal qualification is attained by a person.

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

No.

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

Yes, if they have passed the national bar examination.

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

No.

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

The appeal must contain the designation of the judgment, the statement as to whether the judgment is challenged in whole or in a specific part, the grounds of appeal, the signature of the appellant.

The leave for a revision also has to point out an important point of law (important legal question) that could (should) be resolved in the proceedings before the Supreme Court.

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?

The Supreme Court examines the judgment of the Administrative Court only in respect of those parts which are challenged by the appeal. If the appeal fails to indicate such parts of the judgment, the review is limited to certain questions of material and procedural law.

In revision the Supreme Court examines the judgment of the Administrative Court within the scope of the important legal questions (points of law) for which the leave was granted. These questions can be related both to substantive and procedural law. (N. B. The questions of procedural law applied by the administrative authorities can not be raised in the revision, so that only procedural law of judicial administrative dispute can be examined.)

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?

If The Supreme Court considers that there is an important question of EU law it would always (try to) resolve it in appeal and revision proceedings (and grant a leave for a revision). If the question of application of EU law is such, to be referred to the ECJ, the rules for the application of the law have never presented a limitation to this obligation of the Supreme Court.

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?

Every party, that has taken part in the administrative dispute of first instance, may lodge an appeal or revision against a decision of the Administrative Court, under conditions provided by law. Generally different kinds of decisions can be appealed in the Supreme Court.

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

A procedural decision of the Administrative Court can only be appealed to in cases specifically determined by law (e.g. there is an appeal against a procedural decision terminating the administrative dispute on procedural grounds).

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)?

The appeal (“pritožba” in the sense of “Berufung”) has no filter, but is possible only in cases determined by the act of parliament. The revision (“revizija” in the sense of “Revision”) is subject to a special leave by the Supreme Court in preliminary assessment of its importance for the unification and development of the law.

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

- Which court decides (lower court or SAC)?

The Supreme Court.

- 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!

The Administrative Court can not admit a case to the Supreme Court.

There is a special procedure to grant leave for a revision (if the appeal is not permitted) of a judgement of Administrative Court, where the Supreme Court decides in a panel of three judges that the leave should be granted. In the positive decision the party is informed regarding the legal questions that will be examined in revision proceedings and is therefore instructed to bring the appropriate arguments in the subsequent revision lodged by it against the judgement of Administrative Court.

- 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?

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

No.

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

See the answer to the question 2. b.

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?

There are only two instances in Slovenia.

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

No.

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

Because of the recent change of the law regulating the procedure to grant leave for a revision, the statistical data is not yet available.

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?

There is a legally established filter. For more see the answer to a question 3 a.

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?

The restrictions stress the role of the Supreme Court of safeguarding the uniformity of judicial practice.

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

Yes, according to the Constitution everyone is guaranteed the right to an appeal or to any other legal remedy against the decisions of courts by which his rights, duties, or legal interests are determined.

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?

Depends on the legislation in a certain field of law. See also the answer to a question 3 a.

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)?

At this stage there is no such discussion with regards to the access to The Supreme Court as a court of appeals.

On the other hand there were significant changes of the revision procedure (system of extraordinary legal remedy) in 2017. According to the amendments to the Administrative Disputes Act (ADA-1) the provisions of the Act regulating general procedure for civil law cases are applied, unless otherwise provided by the ADA-1.

Thus (as mentioned above) the parties have to file a request for leave for a revision against a final ruling issued by the Administrative Court within thirty days of the serving of the decision.

The Supreme Court allows the revision (grants the leave) only if the dispute raises an important question of law or if the ruling of the court of first instance deviates from the relevant case law of the Supreme Court or if there is no uniform position of the Administrative Court concerning this legal issue. After The Supreme Court's affirmative decision (to allow the revision), the revision must be filed within fifteen days of the serving of the decision.

Before the abovementioned amendments to the law, a "one-step" procedure was in place. The parties could have filed an immediate revision against a final ruling issued by the Administrative Court. In addition to the aforementioned cause for (leave for) a revision, it could also have been lodged if the value of the contested part of the final administrative act

exceeded EUR 20.000 EUR or if the Authority's decision had very grave consequences for the party.

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?

The Supreme Court can annul the administrative act (cassation) and - if the conditions of the law are fulfilled (i. E. the requirements of effective judicial protection prohibit an annulment) - decide on the merits of the case substituting the administrative act by its own judgement (issues an administrative act). The latter is not possible if there is a wide discretionary power given to the administrative authority.

If the administrative act is annulled, the administrative authority has in principle issue a new act within a given timeframe, acting in accordance with the instructions (legal reasoning) of the court.

In the case the Supreme Court would change (issue) the administrative act itself, it could also award damages to the plaintiff.

If the act of parliament is contrary to the Constitution, the Supreme Court has to stay its proceedings and challenge the act in Constitutional Court.

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?

The Supreme Court could annul the decision of the Administrative Court and remit the case back to it but also exercise all the powers as if acting in first instance (above, question 1), changing the ruling of the Administrative Court appropriately.

No abstract interpretation of the law can be given.

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

In the appeal procedure the Supreme Court may, where the appellant contests the accuracy of the facts established by the Administrative Court in its main hearing, also conduct an appellate hearing, if it establishes that all or some of the evidence already presented should be presented again (before The Supreme Court) in order to state the facts correctly, or if it believes that new facts should be established and new evidence should be presented that would be beneficial for the clarification of matters.

In revision procedure the Supreme Court is bound to the facts determined by the Administrative Court.

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, in principle. But there are special procedural provisions for many cases of first-instance decision-making by the Supreme Court (e. g. electoral disputes).

b) If not, what are the differences?

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?

No.

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

A decision on a legal remedies (ordinary judicial review) is usually made in a closed session "on papers". In the appeal proceedings The Supreme Court may render a decision with a appellate hearing, if it establishes that all or some of the evidence already presented should be presented again before The Supreme Court in order to state the facts correctly, or if it believes that new facts should be established and new evidence should be presented that would be beneficial for the clarification of matters.

In revision procedure the Supreme Court usually considers a case in a closed session. It may also call a public hearing on its own initiative if the decision is important in order to ensure legal certainty or evolution of the law and when it ascertains that there is an overriding public interest. There can be no public hearing in the procedure of granting leave for revision by the Supreme Court.

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

Yes. Through a constitutional right to equality before the law, which also demands that like cases should be decided alike, the case law of the Supreme Court is an important legal source. This specific right is violated if there is a well established case law on certain point and if in the applicant's case a court or the administrative authority has departed from it without explicit and thorough legal grounds as to why it departed from an established precedent. Such a departure from an established case law (i. E. a ruling of the Supreme Court) can be denoted as being unlawful and the applicant's legal remedy (and/or constitutional complaint) against such a judicial decision will be successful.

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

Yes, see the answer above.

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

See the answer to a question 6.

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

No.

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

It can change its reasoning in the subsequent decisions if there is a need to further develop administrative law or to bring it in accordance with legal reasoning the other relevant courts have made within the scope of their own jurisdiction (Constitutional Court, ECJ, ECtHR etc.).

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

No, see the answer 6 d).