Seminar organized by the Supreme Administrative Court of the Czech Republic and ACA-Europe

Limits of judicial guarantee

Brno, 9 September 2019

Answers to questionnaire: Germany

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ACA-Europe Seminar on Measures to Facilitate and Restrict Access to Administrative Courts

September 9, 2019

Nejvyšší správní soud Brno
(Supreme Administrative Court Brno)

Questionnaire

Introduction:

The role of the administrative judiciary determines the conditions under which administrative courts work. These include the limits on the right of access to these courts, as well as the rules on such cases potentially progressing further within the judicial hierarchy. It is an area defined by an ongoing tension between two principles: the right to a fair trial that would speak in favour of opening the gates of judicial review, with the efficiency of judicial review pulling in exactly the other direction, namely of limiting access to administrative courts, in particular the higher ones.

The seminar to be held in Brno, the Czech Republic, on September 9, 2019 at the Supreme Administrative Court, follows the path opened by the seminars in Dublin and Berlin. It shares the objective of contributing to mutual understanding of the scope of judicial review of administrative cases. Consequently, it broadens and deepens the topic of access to the courts. The seminar therefore deals with the issue before the administrative judiciary as a whole, including the administrative courts of lower instances. It covers both formal and material measures which either facilitate or restrict access to the courts.

The seminar attempts to merge the principles of fair trial and efficiency. Based on shared knowledge of member states, it aims to describe the areas where the administrative judiciary should remain open to litigants and to analyse those where it may constrain its current role or, on the contrary, may exceed it. In other words, it examines the proportionality of restrictions on access to the administrative courts.

I. The structure of the administrative judiciary

a. Please describe briefly the structure of the administrative judiciary, i. e. how many instances your administrative judiciary (including all specialized jurisdictions, e. g. financial or social security) consists of and the relations of superiority and subordination between them, unless this information is available and up to date at the ACA-Europe webpage, Tour of Europe file.

See I. A. 6 at the Tour of Europe.

b. How many administrative courts and judges are in each of the instances? Please give numbers relevant at the end of the year 2018.
(Note: if your administrative judiciary consists of two instances, use columns I. and II.; if it consists of more than three instances, please adjust the table. The same applies to all the tables used in this questionnaire.)

Instance	I.	II.	III.
Name	Administrative Court	Higher Administrative Court	Federal Administrative Court
Number of courts	51	15	1
Number of judges	1 800 (3 200)	400 (1 370)	56 (157)

Please note: The numbers given are those of the administrative jurisdiction. The numbers in brackets represent the sum of judges in the administrative, the social and the financial jurisdiction. The financial jurisdiction has no "first" instance/the higher financial courts are practically the first instance. This explains why the increase in the number in brackets is relatively larger in the numbers of the second instance.

c. How many judges are in all jurisdictions (i. e. administrative, civil and penal) altogether? Please give numbers relevant at the end of the year 2018.

About 21 000.

Note: In all the subsequent sections please give answers for each of the instances of the administrative judiciary, even if it is not specifically mentioned in the question.

II. Fees and access to the court

a. Is access to the administrative court subject to a judicial (filing) fee? Please indicate the general principle (for exceptions see questions e., f. and g.). Answer yes/no.

Instance	I.	II.	III.
Judicial fee	yes	yes	yes

b. If you answered *yes*, what is the amount of this fee (in euro)?

The amount rises degressively with the value of the claim. If no value of the claim can be estimated (especially in matters with no economic importance), the value of the claim is set to 5 000 € by law. The withdrawal of an action may reduce the fees. For the purpose of this questionnaire the fees are listed as they are for a full recourse to court, when the proceedings end with a written judgment.
Some examples:

Value of the claim	Fee 1st instance	Fee 2nd instance	Fee 3rd instance
500 €	105	140	175
5 000 €	438	584	730
15 000 €	801	1 172	1 465
100 000 €	3 078	4 104	5 130

In addition the (losing) parties are liable for paying extra costs which may arise from the reimbursement of witnesses, expert witnesses etc..

c. Is the amount of the fee in each of the instances flat or can it differ? If the amount can differ, under what conditions and how (e. g. when the petitioner is required to correct or eliminate faults in the petition, the fee rises)?

See answer to question b.

d. In what phase of the proceedings does the petitioner have to pay the fee (e. g. with the petition, after the proceedings commence, after the decision of the court is delivered)? What are the consequences of not fulfilling the duty to pay the fee?

After the claimant has initiated proceedings he will be informed by court about the fees to be paid. If the claimant does not pay the fee, this does not directly affect the judicial proceedings. But the fee can be enforced against him.

e. Are any petitioners (e. g. a public authority) or areas of disputes exempt by law from the duty to pay the fee?

Proceedings in social matters and in matters of international protection are exempt from the duty to pay the fee.

f. Are non-governmental organizations exempt from the duty to pay the fee?

No.

g. Can a petitioner be exempt from the duty to pay the fee by decision of the court? What are the conditions for the exemption?

The petitioner may practically be exempt from paying the fee, if legal aid is granted. This is done by the court, which is competent to decide the case, if the petitioner's financial situation (income and assets) does not allow him to pay court fees and provided that the action has sufficient prospects of success.

h. Under what conditions is the fee returned to the petitioner (e. g. in case of the withdrawal of the petition)? Is the fee returned in full or partially?

With the withdrawal of the petition two thirds of the fee will be returned.

i. May a petitioner be required to pay a deposit before the proceedings commence? If you answered *yes*, please explain under what conditions.

See answer to question d.

j. Are frivolous petitions penalized? Please explain how and under what conditions.

There no possibility to penalize frivolous petitions. Should the petitioner lose the case, he will have to bear the costs (his own, the other party's costs and the court fees).

k. Finally, is there any analysis (based on empirical studies or just your personal assessment) of the correlation between the amount of the fees payable within your system of administrative justice and the degree of any incentive or dissuasive effect those fees have on petitioners (in general or particular groups thereof) bringing or not bringing an action?

To my knowledge there is no such analysis. Yet, according to the jurisprudence of the Constitutional Court, no potential petitioner is to be kept from taking a reasonable action because he cannot afford it. This is the abstract jurisdictional guideline for granting legal aid (see answer to question g.).

III. Costs of proceedings

a. Can the court adjudicate the compensation of costs of proceedings to the participant? If you answered *yes*, please explain under what conditions?

No.

b. Can the court adjudicate the compensation of costs of proceedings to the public authority? If you answered *yes*, please explain under what conditions? In particular, are there any cases/situations where by default, the costs incurred by the public authorities are not recoverable, even

if the (private) petitioner was not successful (and, following the normal rule that costs follow the event, a costs order should normally be awarded in favour of the public authority)?

No.

c. Can the court decide not to adjudicate the compensation of costs of proceedings, although the conditions described in answer to question a. are fulfilled? If you answered *yes*, please explain under what conditions?

No.

d. Are there any specific areas of administrative law where different rules to those discussed in this section apply? What areas are those and how and why do the rules applicable therein differ?

No.

e. How does the court determine the amount of the costs of legal representation as a part of compensation of costs? Is it defined by a tariff (in that case describe the principal method of calculation), or is it based on a price stipulated between an attorney and his client (in that case describe also whether there is any limitation)?

The costs of legal representation which are subject to the court's decision about who bears the costs of proceedings are determined by law. Similar to the court fees such fees rise degressively with the value of the claim (see answer to question II. b. as to court fees). Note that the legally recognized representative's fees are higher than the court fees. It is also admissible to freely negotiate the price of the attorney's service. Yet, this price can only be subject to compensation by the other (losing) party, as far as they do not exceed the representative's fees recognized by law.

IV. Representation

a. Does a party have to be represented by a legal professional? Answer yes/no.

Instance	I.	II.	III.
Representation of petitioner	no	yes	yes
Representation of opposing party	no	no	no

b. Does your legal order provide free legal aid for participants (e. g. representation appointed at the request of a participant)?

Yes, see answer to question II. g.

c. What are the forms and conditions of free legal aid? Please explain for all instances.

See answer to question II. g.

d. Is there any connection between exemption from the duty to pay the judicial fee and the right to free legal aid?

See answer to question II. g.

V. Exclusions and immunities

(Note: If you answer yes to any question in this section, please provide details.)

a. Are there any mandatory steps after the public authority delivers its final decision and prior to filing a petition to an administrative court (e. g. mediation)?

Yes. Section 68 (1) of the Code of Administrative Court Procedure provides that before seizing court the administrative act will have to be challenged in a preliminary proceeding. This is conducted by the administration. In principle these proceedings should be carried out by the hierarchically higher administrative authority. Yet, many special rules apply in different fields of law, so that in some cases the same administrative authority will conduct the preliminary proceedings as had adopted the administrative act (this applies especially with self-governing bodies).

Although the Code of Administrative Court Procedure is a federal law, the federal states are allowed to waive the preliminary proceedings as far as state authorities' acts are concerned. In this case the administrative act will be directly contested before the administrative court. Some federal states have made use of this option to quite some extent. The reason given for this is to alleviate the work load of the administration and to accelerate proceedings.

There is no mandatory mediation procedure. Yet, parallel mediation proceedings are always possible. On a voluntary basis the administrative jurisdiction also offers a mediation procedure as a form of litigation before oral hearings are conducted and a court decision is adopted.

b. Are there any final administrative acts of a public authority which are not reviewable at all?

No. Art. 19 (4) of the Constitution provides that anyone should have recourse to court, if his rights are violated by a public authority. The Constitutional Court tends towards an extensive interpretation of this norm.

c. Is there any particular public authority whose administrative acts are not subject to judicial review (e. g. acts of a head of state)?

No.

d. Are there any final acts of a public authority which are reviewable by a (state or other) authority other than the administrative court?

Grace is given by the Federal President and the Prime Ministers of the federal states. Yet, grace is not considered a legal act; this is why it is (mostly) exempt from judicial review.

e. Are there any cases which are reviewed by the administrative courts other than review of administrative acts of a public authority (e. g. review of elections, dissolution of a political party)?

Next to administrative acts, administrative contracts and the factual actions of the public authority – if it is considered a public action – may be subject to judicial review before the administrative courts. A dissolution of a political party can only be ordered by the Constitutional Court.

VI. Selection by lower and higher jurisdictions

a. Do the administrative courts have power to select cases? Answer yes/no.

Instance	I.	II.	III.
Power to select cases	no	no	no

b. If you answered *yes*, under what conditions can they select cases? Are there any objective criteria stated in the legislation/case law of the court or is the selection a matter of full discretion?

c. Is the power to select cases restricted to certain fields of law? Please give details.

d. Does the court have power to select cases that fall under administrative criminal law? If it does, are the conditions for selection the same as in others fields of law? Please give details.

e. Please specify who selects the cases to be heard and how. Is there a special judicial panel or case selection procedure for that purpose? Is that procedure only a matter for the higher jurisdiction that will ultimately hear the case, or do the lower courts also somehow participate in that selection?

f. If the court decides to select/not to select a case, is it obliged to notify a petitioner? If it is, does it deliver a formal decision (e. g. rejects the petition) or does it notify a petitioner by an "informal" letter?

g. Is the court obliged to give reasons when it decides not to select a case?

h. If a lower court decides not to select its own case, is the decision reviewable by a higher court? Please give details.

i. Does a lower court have power to select cases of a higher court? If it does, is its selection reviewable by a higher court? Please give details.

j. Does a judge determine the order of the cases to decide?

Yes, it is within the independence of the judge to decide when a case is ready to be decided and to determine the order of the cases to be decided. Yet, a judge is held to deliver judgment as soon as possible if a case is mature to by decided.

VII. Other measures

a. Does your legal order have other measures which simplify or restrict access to the courts? Please explain.

The legal order provides for a double filter system. Appeal to the Higher Administrative Court, where questions of law and of fact can be brought, is only admissible under certain conditions. According to section 124 (2) of the Code of Administrative Court Procedure these are (1.) serious doubts to the correctness of the judgment, (2.) special factual or legal difficulties, (3.) the fundamental significance of the case, (4.) deviation from other Higher Administrative Courts or of the Federal Administrative Courts or (5.) procedural shortcomings of the lower courts judgment. Leave to appeal can be granted by the Administrative Court. In this case this decision is binding for the Higher Administrative Court and the full review will have to be conducted by the Higher Administrative Court. If the Administrative Court does not grant leave to appeal, the parties may apply for granting leave to appeal to the Higher Administrative Court. In this procedure the Higher Administrative Court will only review the reasons presented by the party. If one of the five reasons for granting leave to appeal (see above) is given the Higher Administrative Court must grant leave to appeal and conduct a full review of the case.

For appeals from the Higher Administrative Court to the Federal Administrative Court, which only conducts an appeal in questions of law, a similar procedure for granting leave to appeal is applicable. Yet the reasons for granting leave to appeal are reduced to fundamental significance, deviation and procedural shortcomings.

VIII. Statistics

a. Please give exact numbers of case load and number of cases decided for the years 2016, 2017 and 2018 in each of the instances of the administrative judiciary (including all specialized jurisdictions, e. g. financial or social security).

Instance	I.	II.	III.
Case load 2016	430 000	44 000	6 500
Cases decided 2016	430 000	42 000	7 000
Case load 2017	574 000 (132 000)	48 000 (29 000)	6 400
Cases decided 2017	558 000 (127 000)	46 000 (28 000)	6 300
Case load 2018			
Cases decided 2018			

In this table the numbers in brackets represent the preliminary procedures which have to be added to the numbers given above. These are only available for 2017. Reliable numbers for 2018 have not yet been produced. Complete statistical material is available at: https://www.destatis.de/DE/Themen/Staat/Justiz-Rechtspflege/_inhalt.html