

The Judicial Review of Administrative Decisions in Germany

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ADMINISTRATIVE REVIEW:

LEARNING FROM DIFFERENT PERSPECTIVES

The purpose of this overview over the Judicial Review of Administrative Decisions in Germany is to give an impression how our Judicial Review works in reality.

1. Access

Let me start with the **access** to German administrative jurisdiction. Two regulations are of crucial importance for the access to the judicial review in Germany: The constitutional guarantee of effective judicial protection and the Administrative Court Act.

The German constitution – called Basic Law (Grundgesetz - GG) – contains as a fundamental right that there has to be an **efficient judicial remedy** for any violation of individual rights (article 19 para. 4 GG). The Administrative Courts Act (Verwaltungsgerichtsordnung, sec. 40), our Procedure Code, states in a **“General Clause”** that the administrative courts are competent to decide all litigation arising from questions of public law except purely constitutional matters and except matters assigned to a more specialised branch of administrative jurisdiction.¹ Unlike in Australia – if I see that correctly – the access to administrative court review in Germany does not depend on the existence of an explicit provision in the law relevant to the specific case. Unlike other countries even in Europe we don't have an “enumeration principle”. Therefore a citizen needs no special allowance for challenging in court all types of administrative decisions which may violate his individual rights.

But the litigant/plaintiff who seeks access to the administrative jurisdiction must know which **branch of jurisdiction** is competent to decide his case. Contrary to most other countries Germany does not have a unitary admin-

istrative jurisdiction. Instead, the competence for administrative matters is divided among the General Administrative Jurisdiction on the one hand and two other specialized administrative jurisdictions on the other hand which are the Fiscal Jurisdiction and the Social Jurisdiction. The **fiscal courts** deal with the legal review of customs and taxes.² The **social courts** are exclusively competent for public insurance matters including disputes arising between medical doctors and public health insurance institutions; since 2005 they additionally decide matters of social welfare which were until then assigned to the general administrative courts. All other non-constitutional public law litigation falls within the competence of the general administrative courts on which I will concentrate now.

2. First Instance's Procedure

To give you a picture of the review procedure of an administrative decision in all three instances I would like to illustrate it slightly on the basis of a real case, which my court, the Federal Administrative Court, decided in May 2009.³ It is a case which demonstrates the dangers of modern tourism and which generated strong media interest in Germany:

The plaintiff, a German citizen – let's call her Ms. Müller – participated in a trekking tour throughout Colombia in 2003. Together with other participants of her international travel group she got kidnapped by a group of rebels and was detained for about two months. The German Foreign Office, the German embassy in Bogotá, Colombian authorities and several international organisations strove intensely for her release. The kidnapers agreed to the release of our plaintiff and another Spanish hostage under the condition that the hostages be fetched from the handover location by a civilian helicopter. So it was done. A helicopter was chartered and the hostages peacefully freed. The charter costs – and this is the core of the dispute - were paid half by the German embassy in Bogotá and half by Spanish authorities. From Bogotá Ms. Müller took her return flight to Germany. Altogether, the costs for her release totalled 40,000 Euro – in Australian dollars it is a sum of about 62 000⁴.

*Some months later the state authority, the Federal Republic of Germany, – the defendant in our case - demanded of Ms. Müller the payment of around 12,000 Euro by formal administrative decision. This amount corresponds to 50 percent of the costs of the helicopter, which had been paid by the state initially. The decision was based on **sec. 5 of the German Consular Act**. This regulation provides that consular officials shall render the necessary assistance to Germans in trouble, if there is no other solu-*

tion to an emergency situation. Furthermore it determines that the beneficiary of the assistance is obliged to reimburse the expenses. Three weeks after receiving the decision Ms. Müller brought her case to the Administrative Court of Berlin.

At this point I would like to make a few remarks on the **procedure before the administrative courts of first instance**: The proceedings start by **filing an action**. Legal representation by a lawyer⁵ is not compulsory before the courts of first instance. That is different when the case comes to High Administrative Courts or to the Federal Administrative Court: There the parties need to be represented by a lawyer or a university professor of law.

For filing an action no special formalities have to be observed. Thus anyone can submit his action on an ordinary piece of paper or get it recorded with the help of a court clerk. At some courts it is also possible to use a safe electronic mailbox if your electronic signature is admitted: The submission of an action by "simple" e-mail is not permitted.

As to the **contents of the action** there are some essential and non-essential requirements that have to be observed. **Essential requirements** are the signature of the plaintiff or his lawyer as well as the description of the parties and the subject-matter of the dispute. **Non-essential requirements** are the description of the facts and evidence, and a copy of the contested administrative decision. However, any defects in form or contents of the action are curable and the presiding judge may ask the plaintiff to complete his submissions within a specific period.

Court fees have to be paid, but they are not very high.⁶ Those who cannot afford the fees for the court and the lawyer have the right to obtain **legal aid**. *In the case of our plaintiff Ms. Müller the court fees in first instance amount to about 650 Euro – i.e. not much more than 1000 Austr. Dollar. And the average costs of a lawyer for Ms. Müller – based on the fee code for lawyers – would sum up to about 1,600 Euro.* But if the plaintiff wins his case he does not have any costs at all. On the other hand at the end he has to bear the court fees and the expenses for his lawyer and for the lawyer of his opponent if his action is finally dismissed.

When the Administrative Court of first instance receives a suit/complaint it will be passed on immediately to the responsible **panel of judges** – it is called "chamber" and means a bench consisting of three professional, lifetime (i.e. up to the age of 65/67) judges, one of them is the presiding judge. The bench for oral hearings is completed by two honorary judges elected for a certain period. One professional member of the panel is as-

signed the role of the reporting judge. The reporting judge may organize the procedure instead of the presiding judge.⁷

The **facts of the case are established by the court ex officio**. That means errors of facts made by the primary decision maker – the public authority – have to be corrected by the court.⁸ So first of all the court usually will request the files of the administrative proceedings from the authority as a first measure of fact-finding. The authority is obliged to **hand over its administrative files to the court**. Corresponding to this duty the plaintiff has a right to **inspection of files** in order to be able to pursue his complaint effectively.

In our case of the kidnapped Ms. Müller the German Foreign Office refused the presentation of part of the files, claiming it to be classified information⁹. The legality of this refusal could have been reviewed by the Federal Administrative Court on the basis of a preliminary application.¹⁰ But Ms. Müller didn't make use of this right, probably because the facts of the case were not in dispute and it concerned legal questions only.

Usually the plaintiff submits his **pleading** after having inspected the files. The defendant – the public authority – replies in a written statement. As the Administrative Court investigates the facts of the case ex officio it is not bound by the submissions of the parties or their motions to take evidence. Nonetheless the court can already take evidence in the **preliminary proceedings** – before the oral hearing. An example would be ordering an expert opinion which might be necessary for example if an asylum seeker claims to suffer from post-traumatic stress disorder (PTSD) or if a civil servant has been retired against his will for reasons of permanent disability for service.

The court – that means the presiding judge or the reporting judge – can also summon the parties to a **preliminary hearing**, for example to fathom out if the parties are open to a settlement of their dispute.¹¹ The code of procedure explicitly encourages the court to promote settlements at any stage of the proceedings. If the parties reach an agreement, they can settle the dispute under arrangement of the court. A **court settlement** terminates the proceedings, without any further court decision necessary.

In addition, the courts have recently been making use of the option of conflict settlement by **mediation** more frequently. Mediation had not gained acceptance in the administrative jurisdiction until a few years ago. As far as I understand, it corresponds to the "alternative dispute resolution" in Australia.¹² Many administrative courts in Germany have now one

or more judges who additionally are trained *mediators*. Suitable cases are assigned to the mediator – who may not be member of the otherwise deciding panel – provided that the parties agree to mediation. Currently statutory rules for mediation still don't exist in the Administrative Courts Act – obviously Australia is more on top of this development in this area than we are.

I come back to the possibilities or duties of the court reviewing the decision of the public authority: The court has to give **legal hints and information** in order to encourage the parties – if necessary – to submit additional statements or to prompt the plaintiff to withdraw his complaint if it has no prospects of success. If the plaintiff insists on having a decision, the court will have to summon an oral hearing and to deliver a judgement – even if the complaint will have to be dismissed as inadmissible without substantive examination. This even applies to complaints of the querulous kind. Despite the obligation to give legal hints there is no obligation to announce the final judgement in advance.

Concerning the **admissibility** of an action the court has to check the following **conditions**:

Firstly it is important that the subject-matter falls within the **jurisdiction of the administrative courts** and secondly the action must have been filed in the **competent** court of first instance. As you might know Germany is a federal state consisting of 16 states called "Land" or – in plural – "Länder". Every state has at least one administrative court, in total they sum up to 52. They do not only decide on the basis of the laws of the state, the "Land", but also on the basis of federal law. They even have jurisdiction over the correct use of Federal Law by federal authorities. The regulations concerning the **local jurisdiction** are set down in the – already mentioned - Administrative Courts Act. Among them there is a special provision on actions against the Federal Republic of Germany concerning the responsibilities of Germany's diplomatic agencies. Actions against them have to be brought to the Administrative Court of Germany's capital because this is the seat of the Federal Government.

Therefore in our case Ms. Müller correctly brought her action – concerning a non-constitutional dispute under public law – to the Administrative Court of Berlin.

Another important condition for the admissibility of an action is **legal standing (locus standi)**: That means the plaintiff has to demonstrate that one or more of his individual rights have been infringed. "Right" in this connection always means a legal right or at least a legally protected

interest. No action is admissible against the infringement of mere political, cultural, religious, ecological or economic interests. I am marking here a difference to the other influential continental system of administrative law which is in France. Before German courts a public action (“*actio popularis*”) or an action to enforce rights of third parties is generally not admissible.

An **exception** to this principle applies to **recognized environmental organizations**. They may bring actions against building projects or decisions concerning protected nature reserves independently of whether their inherent rights are violated or not.¹³ Their standing only presupposes that the interests of nature are affected, the matter falls within the area of responsibility set out in the organisation’s statutes and the organisation has taken part in the administrative procedure. These special regulations have come into effect only a few years ago. They result – on the background of the Aarhus Convention – from obligations under European Law, in particular from the implementation of the Directive¹⁴ on the assessment of the effects of certain public and private projects on the environment.¹⁵

For our “kidnapping case” these special regulations are not of any importance. It is accepted that the addressee of an onerous administrative act always has a right of action: In our case Ms. Müller may claim that the administrative decision ordering her to reimburse 12,000 Euro had no sufficient legal basis. Therefore an infringement of her individual rights seems to be at least possible.

Moreover, the admissibility of an action before the administrative court presupposes that all administrative remedies against the contested decision have been exhausted. In many cases the law provides for a special pre-trial proceeding called “**objection**”. The claimant may start this procedure by lodging a written complaint against the same administrative authority whose decision he objects to. The authority may then re-examine and rectify its decision. If it refuses to correct the decision, usually the next higher authority will decide on the objection. Only in cases where the objection procedure does not provide relief, the claimant is entitled to proceed to court. As far as I see it these powers of the higher objection authority seem to be roughly comparable with those of Australian’s “Administrative Appeals Tribunal”, which is also considered part of the executive. However, the German objection authorities regularly don’t enjoy independence with exceptions by law of some of the states.¹⁶

Our plaintiff Ms. Müller was entitled to bring her suit to the Administrative Court directly as the contested decision was issued by a supreme federal

authority. In that case a formal objection is not provided for in the federal regulations of the Administrative Courts Act.¹⁷

Finally a plaintiff's action has to be filed within **time limits**. These time limits depend on the **type of action**. Actions aiming at the quashing or the issuance of an administrative decision have to be instituted within **one month** after the service of the last administrative decision.¹⁸ No special time limits apply for actions for performance or declaratory actions.¹⁹ Nevertheless, the plaintiff can forfeit his right of action, if he waits too long and gives the impression of being not willing to raise a certain claim.

Basically, **five types of actions** can be distinguished in German administrative law. The two most important are actions aimed at the **quashing** of an individual administrative decision (rescissory actions – **Anfechtungsklagen**) and – as a counterpart – actions aiming at the **issuance** of such a decision (actions for mandatory injunctions – **Verpflichtungsklagen**). If the plaintiff requests a measure different from a formal administrative decision to be taken or discontinued, the **general action for performance (allgemeine Leistungsklage)** would be appropriate. If none of the afore-mentioned types of action is admissible, a **declaratory action (Feststellungsklage)** might be suitable. It is directed towards a judicial declaration by the court and is admissible – to give an example – if the authority contests the German nationality of a person. Finally it is possible to directly **challenge non-parliamentary law** – i.e. ordinance or decree law or local bye-law – at the High Administrative Court that decides on its validity with effect erga omnes (**Normenkontrollklage**). Main field of application are development plans which are enacted as local bye-laws.

Most other regulations, especially formal acts of parliament, can be reviewed by the administrative courts only indirectly. For example in cases where an administrative decision is challenged, the validity of its legal basis has to be reviewed within that context. If the court doubts the constitutionality of a **legal statute enacted by parliament** however, it is obliged to suspend its proceedings and to refer the question of validity to the Federal Constitutional Court for a preliminary ruling.

Apart from these types of actions the Administrative Courts Act provides for **interim injunctions and other provisional measures** in order to guarantee the effectiveness of judicial protection in urgent cases.

In our case Ms. Müller's action is directed towards the quashing of the order to pay 12,000 Euro which is to be qualified as an administrative decision. She has also kept the deadline of a one month's period after the service of the challenged decision. Thus her action is admissible. Until the

*court's decision has not become final, she does not need to fear **execution** against her property.*

I have to explain this: In general, an administrative decision itself is an **enforceable title** and therefore gives a sufficient legal basis for the execution of a financial claim. However, objections and actions against onerous administrative decisions have **suspensory effect**, unless a legal exception applies²⁰ or unless the public authority orders immediate execution for reasons of special urgency.

These exceptions are not relevant in our case. Hence, Ms. Müller remains spared from enforcement due to the suspensory effect provided by law. Thus she doesn't need to seek temporary relief before the Administrative Court.

Let us look at the progress of the proceedings. The court will render its judgment usually based on a public **oral hearing**. The procedural rights guaranteed by the European Convention on Human Rights (Article 6 ECHR), which is binding for Germany, require the guarantee that the plaintiff can reach an oral hearing of his case in at least one instance.²¹ The Administrative Courts Act takes this requirement into account in its provisions for the proceedings at first instance: It guarantees the right of an oral hearing, unless the parties waive it unanimously. Divergent regulations exist for emergency proceedings.²²

During the oral hearing the court discusses the factual *and* legal situation with the parties. They have the opportunity to extend and add to their written submissions. They should not repeat any written argument and may instead refer to their submissions. The parties may also ask the court to take evidence. The court will have to approve such motions, unless there is a statutory reason to reject them. **Motions to take evidence** may be rejected for example if the fact to be proven cannot have any influence on the decision or if the party's allegations are so inaccurate or contradictory that the motion has to be considered inadmissible for being a "shot in the dark". Important is that the parties' right to apply for taking evidence does not affect the court's duty to investigate the facts of the case *ex officio* and to take evidence on its own, if it seems appropriate. For example the court may summon witnesses or the parties themselves to appear at the oral hearing and question them. Or it may introduce pieces of information given by a third party and discuss them with the parties.

The **right to be heard** (Article 103 para. 1 GG) and the **principle of fair trial** is guaranteed by constitutional law and obliges the court to **indicate**

relevant legal questions which have been overlooked by the parties.

If a duly summoned party remains absent from the hearing without proper excuse the court can nevertheless hear the case and decide on it. However, even in this case the court cannot decide against the absent party without considering the factual and legal situation. A “judgment by default” as it seems to be possible at Australia’s “Administrative Appeals Tribunal” or as we know from German civil proceedings, does not exist in our administrative court proceedings.

Back to our example: Ms. Müller’s case was decided by the Administrative Court of Berlin through a chamber consisting of three professional and two honorary judges.

This is the **composition of the bench** intended for the more difficult cases. If a case does not imply particular factual or legal difficulties and is not of fundamental importance it shall usually be transferred to one member of the panel to be decided by this single judge.

In our case the court could refrain from taking evidence, since the facts of the case were not in dispute between Ms. Müller and the Foreign Office. Rather, it was discussed which provisions of law could be the legal basis for the Foreign Office’s compensation claim and whether their conditions were fulfilled.

After the oral hearing the court retires for deliberation and usually renders its judgment immediately afterwards.²³ The written grounds for the judgment are drafted later on by the reporting judge based on the result of the deliberation. Alterations proposed by the other judges are adopted by majority approval. The final decision including instructions on the right of appeal will be served to the parties.

3. Scope and intensity of judicial review

Now, let us look at some of the grounds of judicial review by answering the following question: To what extent are administrative decisions subject to court’s review, how far do **scope and intensity of judicial review** reach?

The **scope of judicial review** generally **includes all procedural and substantial legal aspects of the case**. However, there are exceptions, for example in cases where a citizen challenges a privilege granted to a third party – for instance a building permit or a licence to operate a restaurant. In this case the court will only examine the observance of those regulations intended to protect the claimant neighbour.

The court is not limited to an examination by the legal arguments of the plaintiff.²⁴ It is limited though to his applications: The court may not award more than requested, but it has to render assistance to ensure that

the plaintiff's applications correctly reflect his claim. As long as no discretion has to be exercised by the administrative authority, the court is free to confirm an administrative decision on the basis of a regulation different from that applied by the authority. Of course this is only possible if the requirements of the correct regulation are complied with.

The **intensity of judicial review** concerning assessments by the administrative authority and thus the court's power to replace them is only outlined by written law. In principle the court is not bound by the authority's interpretation of the law. The correct [- or at least final -] interpretation generally is given by the court even in cases of vague legal concepts or terms. **In exceptional cases** the intensity of judicial review of administrative decisions **is reduced** though. Examples are prognostic decisions depending on complex technical assessments like natural-scientific questions²⁵ or decisions, in which the executive is conceded a margin of appreciation like decisions concerning examination results²⁶ or the performance assessment of civil servants²⁷.

Judicial control is also **limited** where the law empowers the authority to use **discretion**. In Germany discretion (*Ermessen*) is not the same as having a **margin of appreciation in interpreting legal terms** or **in recognizing facts** (*Beurteilungsspielraum*). If law gives discretion the authority is empowered to choose between several possible decisions.

The wording of a statute then uses the terms "can" or "may" instead of - for example - "must", "will" or "has to" to indicate that the authority has freedom of manoeuvre.

The court will only object to an **illegal use of discretion**: Discretion has been illegally exercised

- if the authority **didn't make use of its discretionary power at all** – maybe because it didn't realize it –, or
- if the authority **exceeded the statutory limits of its discretion**, or
- if it made use of its discretionary powers **in a way not intended by the statute** and finally, or
- if the **principle of proportionality is violated**.²⁸

In cases of illegal use of discretion the court has to quash the decision and cannot save it by using its own considerations on the appropriate use of discretion or by replacing it by another measure. Thus it is not subject to judicial review by the administrative courts whether the authority took the most appropriate or preferable decision.²⁹ Unlike an executive authority a court can only review the **legality** of an administrative decision. This includes judging whether the decision is founded on the correct facts. But the court is **not entitled to question the purpose** of an administrative

decision if it lies within the purpose of the authorization itself – this review on the merits is restricted to the public authorities.

All this shows that the administrative courts in Germany in general don't have administrative powers themselves. This approach seems to resemble the Australian system, if I've understood it correctly. However, the dividing line between judicial review and review on the merits – which is reserved to executive bodies – in Germany seems to run somewhat differently from Australia: I learned from a summary on Australian administrative law written by *Peter McClellan* that the Australian comprehension of the principle of separation of powers objects to recognizing the principle of proportionality as a separate ground for judicial review.³⁰ Additionally the finding of the relevant facts seems to be regarded – apart from some exceptions – as being reserved to the executive authorities within the system of common law.³¹ This is different in Germany. The German system of administrative judicial protection is heavily influenced by the constitutional guarantee of an **effective judicial protection**. Thus the re-examination of the factual basis of an administrative decision as well as the control of its proportionality is considered to be an integral part of judicial review.

Not least of all the influence of the European Community law and the **European Convention on Human Rights**³² demand a high intensity of judicial review in many areas: This becomes clearly visible for example in the procedure for the expulsion of foreign nationals, which hardly leaves any room for administrative considerations that are not subject to judicial review. The restrictions for private and family life, which often result from an expulsion, are permissible under the scope of Article 8 of the European Convention on Human Rights, only if the expulsion is necessary in a democratic society for the protection of the public against criminal offences or other important public interests. This requires a strict examination of the expulsion's proportionality.

*After this long excursion I come back to our case: Ms. Müller **succeeded before the Administrative Court of first instance**: The court granted the plaintiff's motion to **quash** the administrative decision. The court held that the Consular Act, especially its sec. 5, does not provide for the reimbursement of costs in cases of consular assistance to kidnapped persons.³³ The Federal Republic of Germany, represented by the Foreign Office, wasn't content with this judgement – no wonder, regarding that kidnapping all over the world seems to be a growing industry! It sought leave to appeal to the High Administrative Court – bad luck for Ms. Müller.*

4. Second Instance – Courts of Appeal

The **access to appeal** depends on **leave** to be granted either by the Administrative Court which rendered the judgment in first instance or by the Court of Appeal. The Administrative Court may grant leave to appeal in the operative part of its judgment, if it differs from a judgment of a higher court or if the case is of fundamental importance.

The Court of Appeal may grant leave for the same reasons and additionally, if the case shows particular factual or legal difficulties, if the correctness of the judgment is seriously doubtful or if a procedural error has been made. If the Administrative Court has granted leave to appeal in its judgment, the appeal has to be filed within a one month's period after the service of the judgment.

Since the Administrative Court in our case did not grant leave to appeal, the defendant – the Federal Republic of Germany, represented by the Foreign Office – had to raise motion for leave to appeal at the competent High Administrative Court.

The High Administrative Court is the highest Administrative Court of the respective "Land". There are altogether 15 High Administrative Courts in Germany.³⁴

In our case the High Administrative Court Berlin-Brandenburg granted leave to appeal on request of the defendant because it had serious doubts as to the correctness of the judgment of first instance.

Once leave to appeal has been granted, the High Administrative Court will fully re-examine the factual and legal issues of the case. The proceedings correspond more or less to the proceedings in the first instance. Generally, the High Administrative Court will also hold an oral hearing, but it can decide without, if the professional judges agree on the judgment and do not consider an oral hearing necessary³⁵.

In our "kidnapping case" the Foreign Office's appeal had success: The High Administrative Court set aside the judgment of the Administrative Court and dismissed Ms. Müller's action. Contrary to the court of first instance it held that sec. 5 of the Consular Act was a sufficient legal basis for an obligation to reimburse the expenses advanced by an authority in case of a kidnapping.

Against this judgment Ms. Müller could appeal, but only on questions of law, to the Federal Administrative Court without special admission, because the High Administrative Court had already granted leave to appeal to my court as third instance.

5. Third instance – Federal Administrative Court as Supreme Court of Appeal

The review of decisions of the lower courts by the Federal Administrative Court is limited to **legal errors** and is bound by the facts as established in the judgment to be reviewed. These proceedings are called “revision”. Generally these appeals at the Federal Administrative Court are directed against decisions of the High Administrative Courts acting as court of second instance. There is an exception here as well: With both parties’ assent it is also possible to bypass the appellate court and to challenge the ruling of a court of first instance directly before the Supreme Court. The courts of first instance will grant leave to such a **“leapfrog appeal”** to the Federal Administrative Court especially in cases concerning a highly controversial legal question, not yet decided by the Federal Administrative Court.

The **leave to appeal** (“revision”) thus may be **granted** either by the court issuing the judgment in dispute or – initiated by a **special complaint against denial of leave to appeal** – by the Federal Administrative Court itself. The Federal Administrative Court must grant leave to appeal if the case is of fundamental importance, if the decision differs from a judgment of the Federal Administrative Court or of the Federal Constitutional Court or if it is based on a procedural error.³⁶ While appeals at the High Administrative Court of a certain “Land”/state may be based both on the infringement of laws of that “Land” or on the violation of Federal Law, revision appeals may be based on **infringements of Federal Law** only. The Federal Administrative Court sits in panels/senates with a bench of five professional judges.

*In Ms. Müller’s case the High Administrative Court granted leave to appeal because of the **fundamental importance** of the case: So far the Federal Administrative Court had not decided whether the regulations of the Consular Act allow for the demand for reimbursement of expenses incurred by liberation after kidnapping. This question required clarification for future cases.*

One of the most important responsibilities of the Federal Administrative Court is to ensure a consistent application of the federal law throughout the federal territory. This objective is reached particularly by giving qualified reasons in the written judgments. Except for the individual case, decisions of the Federal Administrative Court are not generally binding. They are not precedents in a formal way (but – of course – in an informal way).³⁷

For the last time I come back to our case: *The 7th Panel of the Federal Administrative Court approved the judgment of the High Administrative Court in May 2009 **by dismissing the plaintiff's "revision"**. It held that the claim for refund of expenses by the contested administrative decision was lawful: It had a sufficient legal basis in sec. 5 of the Consular Act. The scope of the regulation is – according to the Court - not restricted to economic emergencies. Its **wording** provides for all conceivable kinds of emergencies. Additionally, the **explanatory memorandum to the Consular Act** clarifies that the legislator had consciously refrained from enumerating all possible consular responsibilities. In the Federal Administrative Court's opinion the **spirit and purpose** of sec. 5 of the Consular Act is to guarantee effective and immediate help for Germans in any kind of emergency situation within a consular district. Thus it authorizes consular officials to render practical assistance as well. This comprises assistance in cases of kidnapping. According to sec. 5 of the Consular Act consular assistance can consist in granting legal protection. To the court's belief this illustrates, that sec. 5 of the Consular Act is not restricted to economic emergencies. Hence the plaintiff as beneficiary of the assistance has been obliged to reimburse the expenses to the defendant.*

*The Federal Administrative Court also did not question **the sum claimed for**. According to sec. 5 of the Consular Act the decision whether to demand reimbursement of costs is not at the authority's discretion. The regulation determines that the receiver of the assistance "has to" reimburse the expenses and not - for example - that he "may" be made liable for expenses.*

*Nevertheless, when assessing the amount to be reimbursed the Foreign Office has to observe the **principle of proportionality**. The principle of proportionality may – depending on the circumstances of the individual case – require claiming the reimbursement of costs just partly or - in exceptional cases - completely renouncing reimbursement. Even under this aspect the administrative decision could not be contested: The findings of fact of the High Administrative Court included, that the plaintiff had received a tidy sum of money for a newspaper interview on her time being held hostage. Besides that she had a regular income. Additionally it was taken into account that the dangers related to the trekking tour in Colombia were foreseeable for the plaintiff and thus avoidable: The Foreign Office had advised against journeys to Colombia and indicated the serious danger of being kidnapped. Finally the respondent had claimed only part of the costs. The plaintiff could also request deferment of payment or*

*payment by instalments. For these reasons the Federal Administrative Court did not deem the contested decision disproportionate.*³⁸

*The last question examined by the 7th Panel of the Federal Administrative Court concerned a possible **procedural** error because the plaintiff had not been properly heard by the authority before the administrative decision was issued. Law provides a **hearing in advance** as part of a fair procedure³⁹. It shall enable the addressee of an administrative decision to raise well-founded objections. To the panel's opinion a mere announcement by telephone one day before issuing the decision – as it had been done in this case – was not sufficient to offer a genuine opportunity to raise objections. However, in our case it was obvious that the missing hearing had not affected the decision. Procedural defects are **insignificant** under German law in cases of lack of causality for the outcome.*⁴⁰

In the end our Ms. Müller did not succeed with her action and is now obliged to pay the 12,000 Euro demanded. She will also have to pay the court fees of all three instances (which amount to 2,628. – Euro) and the bill of her lawyer – that is a total of around 8,400. – Euro.

I hope that I succeeded in illustrating slightly the course and content of judicial review of administrative decisions in Germany. I think that we will learn from the other lectures given today and tomorrow that the continental-European judicial system apart from many differences also contains quite a few similar structures.

¹ Due to this general definition, there is no part of the executive whose acts are principally excluded from judicial review. As far as their lawfulness and the infringement on individual rights are concerned, even political acts of the members of the state or federal government themselves ("staatsleitende Regierungsakte") may be reviewed. However, since law is executed and administrative measures are commonly taken by local authorities, there are in fact few acts of the government that might be challenged by individuals.

² The taxes and duties levied by the municipalities are a small exception: This small part of the tax law is assigned to the Administrative Courts. It concerns for example property taxes and trade taxes.

³ Federal Administrative Court, decision 7 C 13.08 of 28 May 2009.

⁴ Exchange rate at the end of January 2010: 1 € = 1,40 US-\$ = 1,56 AU-\$.

⁵ I chose the neutral term "lawyer" since German law does not distinguish between solicitors and attorneys (AE) respectively barristers (BE).

⁶ In administrative proceedings, it is only since 2004 that the plaintiff has to pay the court fees in advance, i.e. with the submission of his complaint. However, the Administrative Courts may not make their proceedings dependent on the settlement of the fees.

⁷ Sec. 87, 87a VwGO.

⁸ An error of fact by the court may be – under constitutional scrutiny – considered arbitrary.

⁹ Sec. 99 I 2 VwGO; if the public authority of one of the German states refuses to present files, the administrative High Court of this state is competent to decide on the basis of the preliminary application.

¹⁰ Sec. 99 II 2 VwGO.

¹¹ Or the court may summon to a **meeting on-site**. This is done quite often in the field of building and planning law to discuss the case at the designated project site, to take evidence and to promote an amicable settlement.

¹² Alternative Dispute Resolution (ADR) comprises mediation and arbitration. See sec. 34 ff AAT Act 1975.

¹³ Sec. 61 Federal Act on the protection of nature (Bundesnaturschutzgesetz).

¹⁴ Directive 85/337/EC.

¹⁵ The German legislation still tries to limit public actions in order to maintain the German system of the protection of individual rights as far as possible. For example it did not extend the legal standing of environmental organizations in the field of immission protection to all legal provisions relevant to the authorization of a project. Their standing is, instead, restricted to those regulations concerning the legal protection of individual interests like health or property rights of neighbours. Hence, environmental organizations are not entitled to claim the compliance of regulations protecting only the public or nature. It is partly doubted whether these restrictions to legal standing comply with Community law. The European Court of Justice will have to decide on this question in the near future. See the pending case C-115/09 „Trianel Kohlekraftwerk Lünen“, <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-115/09>.

¹⁶ Objections there are to be dealt with by an independent committee staffed not only with officials but also with competent citizens.

The function of an internal review is to encourage administrative self-control as well as to lighten the workload of the courts. Besides it offers an additional, economical possibility of legal protection for the citizens. Despite these plausible purposes the legislators of the Länder have abolished the objection proceedings in many areas in the last years. They intended to facilitate access to the courts, assuming that the formal objection prolongs administrative proceedings in most cases without any use, since it seldom leads to success – this is possibly due to the fact that the objection authority is reluctant to interfere with the decisiveness of the lower authority and therefore often corrects the decision only in case of blatant legal errors. The reducing of the administrative objection proceedings has been widely criticized in Germany. Yet a final evaluation is still pending. In the short run we can notice a rise of new cases at the Administrative Courts in some areas concerned.

¹⁷ Sec. 68 I 2 no. 1 VwGO.

¹⁸ If the plaintiff exceeds the stipulated period through no fault of his own, the court may grant restitution to the previous condition, Sec. 60 VwGO.

¹⁹ See *Kopp/Schenke*, VwGO, 15th edition 2007, Vorbem. § 40 Rn. 8a.

²⁰ One exception applies to demand notes concerning public charges and costs. It is accepted though, that this exception concerns only duties and taxes which contribute to the general financing of the state's budget, and costs imposed to a citizen for the performance of an administrative procedure. A claim for refund of expenses like in our kidnapping case does not fall under this exception.

²¹ Comp. Federal Administrative Court, decision 3 B 208.97 of 7 May 1998 and 5 B 38.99 of 15 December 1999.

²² Due to the presupposed urgency these decisions may be taken without oral hearing.

²³ If the parties are still present at the pronouncement of the judgment – they don't have to – the presiding judge of the panel pronounces the operative provisions [or tenor] of the judgment and orally explains in short the reasons for the chamber's decision.

²⁴ Comp. Federal Administrative Court, decision 6 B 47.06 of 24 October 2006, *Arntz*, DVBl. 2008, p. 80.

²⁵ For example the projection of the necessary quantity of *greenhouse gas emission allowances* within the trading scheme established in the European Union - Comp. Federal Constitutional Court, decision 1 BvR 3151/07 of 10 December 2009, http://www.bundesverfassungsgericht.de/entscheidungen/rk20091210_1bvr315107.html.

²⁶ For example if an expert committee has to examine if a candidate has sufficient knowledge to enter a legal profession - Comp. Federal Administrative Court, decision 6 C 35/92 of 24 February 1993, BVerwGE 92, 132 ff.

²⁷ Comp. Federal Constitutional Court, decision 2 BvR 723/99 of 29 May 2002, Federal Administrative Court, judgment 2 C 8/78 of 26 June 1980, BVerwGE 60, 245 ff.

²⁸ Sec. 114 (i) VwGO. They seem to correlate partly with Australia's reasons for annulment "bad faith and improper purposes", "failure to exercise a discretion" and "Wednesbury unreasonableness" (comp. *McClellan*, Australian Administrative Law). There is no true equivalent to the requirement of proportionality in German law (which follows a five-steps-test:

- Legitimate objectives (i.e. objectives protected by the constitution)
- Legitimate measures (enacted law, decision, ...)?
- Suitability of chosen measures
- Necessity of chosen measures: no more burden than is necessary to accomplish the objectives
- Proportionality in the sense of balancing between the severity of the intervention relating to the weight and urgency of the public interests).

However, a reason for annulment in the context of the „Wednesbury unreasonableness“ would be the "complete lack of proportion" (comp. *McClellan*, Australian Administrative Law).

²⁹ As mentioned, the court in principle is obliged to investigate the facts of the case on its own (sec. 86 VwGO). Mistakes in the fact-finding carried out by the authority do usually not lead to unlawfulness of the decision as they are overrun by the comprehensive findings of fact made by the court ex officio (To some extent this even applies to discretionary decisions, comp. Federal Administrative Court, judgment 1 C 29.85 of 1 December 1987, BVerwGE 78, 285 <295>). Only in cases in which the authority did not establish the relevant facts of the case at all during the administrative proceedings, the court is not obliged to carry out extensive investigations for the first time. In this case it can just quash the onerous administrative decision with the consequence that the authority has to establish the facts and take a new decision (sec. 113 (iii) VwGO).

In the case of an action directed to the issuance of an administrative decision, for example a building permit, the court examines whether the plaintiff has a legal right to the administrative decision that has been rejected or omitted. In this case, the court must not issue the building permit itself, but it will sentence the authority to issue it.

If the requested administrative decision depends on the exercise of discretion and the authority completely failed to exercise this discretion or exercised it in an unlawful manner as described before, the court will quash the rejecting administrative act and sentence the authority to take a new decision.

Additionally the court may give binding guidelines for the new decision to be taken.

³⁰ Comp. *McClellan*.

³¹ Comp. *McClellan*: "As a general rule, errors of fact made by the primary decision-maker cannot be corrected by a court. They are accepted as errors within the jurisdiction of the administrative decision-maker, and as such he or she is entitled to make them. Factual issues are typically issues that go to the merits of a decision, not to its legality." Exemptions apply for example to "jurisdictional facts" or findings on facts by the authority for which no evidence exists.

³² Obviously the binding force of the convention leads to an increase of the intensity of judicial review, including a review of proportionality, comp. *McClellan*.

³³ The court held that sec. 5 of the Consular Act provides that consular officials shall render the necessary assistance to Germans, if there is no other solution to an emergency situation and that it also determines in general that the beneficiary of the assistance is obliged to reimburse the expenses: In the opinion of the court this provision applied only

to payments or allowances in kind given in cases of financial difficulties, for example to a German tourist whose purse got stolen.

³⁴ In one case (Berlin and Brandenburg) two "Länder" share one High Administrative Court.

³⁵ Sec. 130a VwGO

³⁶ If the court whose judgment is challenged granted leave to appeal in its judgment, the appeal has to be filed within one month after the service of the judgment.

³⁷ Other responsibilities of the Federal Administrative Court beyond those already described: Approximately 20 % of the cases before the highest German Administrative Court are proceedings of first – and last – instance. In these cases the scope of judicial review is not limited to legal errors, but includes the establishment of facts. In earlier times competencies of first instance were assigned to the Federal Administrative Court only in very few, unusual cases, for example in non-constitutional disputes between the Federal states (Länder) and the Federal Government or in matters of the Federal Intelligence Service. In recent years the legislator clearly extended these competencies of first instance: After the reunification of the "two Germanies" the catalogue of responsibilities was extended to infrastructure projects like the building of roads, motorways and airports on the territory of former East Germany, in order to accelerate the modernisation of the traffic route network. Initially this competence was intended for a transition period only, but from the parliament's point of view the concept proved so successful that the period of validity was extended by law. Nowadays the competence applies to more than 80 of the largest and most important infrastructure projects throughout the whole Federal territory. As yet we do not know whether this will lead to only several hundred or maybe several thousand new cases – everything is possible. At present three out of ten senates of the Federal Administrative Court work on proceedings of first instance in the field of planning projects.

To this adds a new competence of first instance of a completely different type: Since 2005 the Federal Administrative Court has to decide in first and last instance on actions against the expulsion of certain foreign nationals who endanger the security of the Federal Republic of Germany to a particular extent. Fortunately this regulation particularly tailored to terrorists has gained little practical importance, yet.

³⁸ With its decision the Federal Administrative Court made clear that even bound administrative decisions – decisions which have to be made without discretion – might have to be softened by the requirement of proportionality. By this reasoning it could avoid to refer the question of the validity of sec. 5 of the Consular Act to the Federal Constitutional Court for a preliminary ruling. If sec. 5 of the Consular Act would have to be interpreted as forcing the authority to demand full reimbursement of the entire expenses in any case without exception, one could conclude that the law itself is disproportionate. This would mean a violation of the constitution, because interferences with the protected scope of a fundamental right guaranteed by the Basic Law are only justified if they are based on law, pursue a legitimate aim and if the measures taken are suitable, necessary and proportionate to achieve that aim. The principle of proportionality therefore has constitutional rank. The administrative courts may not simply ignore a statute they consider unconstitutional though: They are obliged to obtain a preliminary ruling of the Federal Constitutional Court on the validity of the law. In our case this could be omitted, because it is more or less generally recognized that the principle of proportionality can even modify the application of laws which, according to their wording, do not offer any discretion. This is an example of the constitutional conformity approach to interpretation demanded by the Federal Constitutional Court to be always considered by all courts.

³⁹ Comp. sec. 28 *Verwaltungsverfahrensgesetz (VwVfG)*, the German Act on the administrative procedure. Accepted as well as „right to be heard" under common law, comp. *McClellan*.

⁴⁰ Sec. 46 *VwVfG*.