Justice dr. Erik Kerševan, Supreme Court of Slovenia

Visit to Federal Court of Australia and Australian Administrative Tribunal

17th to 28th of September 2018

1. General

Australia is a country with a strong tradition of the rule of law. The basis of its legal system can still be seen in the common-law system but has developed a character of its own. Building on the system of the United Kingdom, the Constitution of Australia and its implementation in the modern sovereign state has taken an interestingly specific development, different for example from the United States. As observed by one of the lecturers at the National Administrative Law Conference in Sydney, the United States have built their system of administration and its checks and balances from the position of historic mistrust in the executive and its powers, whereas the Australia was not burdened by this principle, but has nevertheless developed a very strong separation of powers and judicial review of administrative action. This can also be observed in practice, since the independence of the Courts in Australia is strictly respected and highly valued. Even bodies of partially administrative character such as the Australian Administrative Tribunal (AAT) have developed a position of independence to review administrative decisions and ethics supporting this position permeates the whole institution. In relation to this several interesting points can be observed.

One has to bear in mind that Australia is a federation of former colonies uniting in one State, where the federation (Commonwealth) does have important competences and jurisdiction, but a very wide sphere of administrative tasks lies with the states. Since my experience and observations are derived from the visit of Commonwealth institutions (Federal Court, Federal Circuit Court, AAT), there will be no discussion in this presentation of the decentralized levels and institutions.

2. Basic principles of judicial review of administration

The separation of powers doctrine in Australia has been interpreted quite strictly along the main divisive line: the administration can be subjected to examination of legality of its action, but not on the merits of a certain case. In other words: the courts are bound to respect the limits of the judicial jurisdiction, meaning that only a violation of material or procedural law by an administrative authority can lead to exercise of judicial powers against the acts of administration. A court can't decide whether the decision was correct and appropriate on the merits of a certain case and can't substitute an administrative decision with its own view of the appropriate action. This is a limit of courts' jurisdiction in relation to the administration that is recognized in many other legal systems. On the other hand, it can be seen that the need for an effective legal remedy of any person affected by an administrative decision has led to the establishment of an administrative tribunal (AAT), which is not entirely bound by this principle. Occupying the limit between administration and judiciary AAT represents an interesting solution to problems that can be similar in many other legal systems.

Interestingly, the federal courts are seen as forming an alliance with the legislative branch of government in keeping the executive within the legal boundaries, established by Parliamentary Statutes. From the fact of the close ties between the government and the parliamentary majority this may not be entirely true in its substantial sense, but it can be hardly disputed from the point of maintaining the separation of powers within the legal order and the necessary procedures to be observed in maintaining the balance among them. It is also important to stress that even the Parliament can’t limit the exercise of judicial powers in the way that would limit the core functions of the Courts, protected by the Constitution.

3. Institutional framework and procedural rules

The system of administrative decision-making and subsequent legal remedies is varied and differs in several aspects depending on the area of administrative action (e.g. social services, taxation, migration). To simplify the presentation there are the following characteristics:

a) An administrative decision on an administrative matter is taken by the responsible administrative body based on the facts and law. A procedure is observed that can enable the decision to be taken on basis of written submissions and evidence, but in some cases there is a possibility of oral hearing and submissions to the administrative authority. Within the

administration itself there can be an internal review procedure that can be available to the parties.

b) The appeal against the administrative decision is decided by **Australian Administrative Tribunal (AAT)**. It has to be submitted within a prescribed time-limit and – unless otherwise provided – the applicant has to pay the legal fees (as the costs of the proceedings) to the tribunal. Parties are not represented in all cases and the possibility of having legal representation is in majority of proceedings dependent on the consent of the AAT. The application is examined by the responsible persons within the AAT administration and – when necessary with additional information and proposals – submitted to the members of the tribunal. Members are appointed by the federal government for a certain mandate (not exceeding seven years in practice) and can be reappointed.[1] Appointments can be either full- or part-time, where some members continue with their profession (as solicitors etc.). Majority of members have legal education and professional experience, but there are exceptions based on the necessary skills and/or expertise in a certain area (e.g. medical knowledge). Members of the tribunal are acting in the name of the AAT and are the only persons having the possibility to decide in appeal proceedings, sometimes sitting in a panel of two members. The procedure in AAT is in principle inquisitorial and in majority of cases combines both written evidence as well as a hearing of the applicant. The communication with the applicant as well as hearings can be sometimes made by teleconferences or videoconferences, with all the necessary parties participating. The hearings are detailed and well prepared, with a combination of excellent social and professional skills of members, giving the applicant every possibility to present his case as well as giving the member a necessary insight in the truthfulness of submissions and proper evaluation of evidence. The procedure is also characterized by the effort of members to make it very clear to the applicant both his procedural possibilities as well as the substantial questions that are to be resolved – including the view of the member as to the success of the hearing regarding the clarification of certain factual or legal points. There is a considerable support of information technology (IT) in the form of recordings and electronically available documents supporting the written documents and files.

c) Against a decision taken by the AAT there is (in cases, established by law) a possibility to appeal to a **Federal Circuit Court**. This Court was organized primarily to reduce the case-load

[1] There has been some concern expressed as to the influence of the time limits of the appointments of members on their unburdened performance of duties at the end of their mandate before a new reappointment (i. E. in cases where an unpopular decision must be adopted by the member).

of the Federal Court, especially in matters relating to migration. It is here, where the difference of proceedings before administrative tribunal and a court can be clearly observed, since the inquisitorial principle changes for the adversarial: applicant and respondent are two opposing parties in the judicial process and the appointed judge is to decide on the (administrative) dispute presented to him. The level of formality for the parties rises considerably, as do the costs of the proceedings. It is quite common for the unsuccessful appellant to carry considerable costs of legal representation of the respondent state authority, since mostly attorneys (i. E. barristers) are employed. Since the applicant can represent himself it is evident that sometimes – maybe because of his experience at the AAT – he expects to be guided by the court in his actions, but from the formal position of a judge it's quite clear that he can't give legal counsel to a party. The procedure can be quite expedient, especially with the help of the electronically accessible files and the qualified and dedicated staff of the judge (junior assistant, etc.). It is also evident that the judges have to find an appropriate balance between the requirements of a fair judicial process and effectiveness and timeliness of the decision-making, since the growing case load could cause justice to be delayed and therefore often denied to at least one of the parties.

d) **The Federal Court of Australia** is responsible for deciding on questions of Commonwealth law on appeal against a decision of the Federal Circuit Court, and in other cases (some in first instance) in accordance with the jurisdiction determined by the statute. Its competence is not limited to the matters of administrative law but includes jurisdiction on civil law matters and in some cases also criminal law proceedings. Justices are appointed to a permanent position (till retirement at 70 years of age) and come predominantly from among prominent barristers. Their expertise and skill is at an extremely high and generally respected level. When a case is decided by a single justice, there can be an appeal to the full court of three justices, if this possibility is foreseen in a specific type of case. The procedure is of course very formal, as is quite common for all courts of supreme jurisdictions, with the notable remark that the parties can represent themselves also at this instance. The complexity of cases (e. g. taxation) requires a number of preparatory case management hearings, where the level of formality is reduced in order to find the best way to organize the main hearing and make the judicial proceedings in the case efficient to the highest possible extent. At these occasions the parties and the judge try to clarify all procedural and substantial questions that will enable the hearing of the case to be successful and lead to an effective resolution of the case. The main hearing of the case itself is therefore unburdened with the repetition of arguments already presented and is focusing on the material

questions that have to be addressed before a judgement is made. The judgement itself can be issued directly after the hearing itself or it can be reserved and given at a latter occasion. Also, in these cases the judicial process can entail teleconferences (e.g. interpreter or expert witness can be present only through a phone call audible in the courtroom) or videoconferences from other courtrooms of the Federal Court across Australia. A number of non-contentious issues can be decided by non-judicial staff, registrars appointed by the court. These legal professionals are also involved in cases of mediation (alternative dispute resolution) and perform other tasks within the Federal Court, enabling an effective functioning of the institution as a whole.

4. Final remarks and observations

As the CEO and General Registrar of the Federal Court has pointed out, there is a general approach of trying to provide an efficient and cost-effective access to justice to all citizens and other parties. In this sense the organization and managing of the Federal Court and other courts, as well as the AAT is seen as the running of a company in a competing market of services – as something that has to provide adequate result for the public funding and costs of the proceedings payed by the parties. And to my experience all the above mentioned institutions have made an excellent amalgamation of both judicial and support staff (registries), providing a high level of professionalism and efficiency that is to be admired. There are specialists at all institutions giving appropriate support to justices, judges and members of the tribunal – be it in the form of administrative tasks, communication with parties, IT, accumulation of data (e.g. country reports for migration cases). Informatization can be a good illustration, since a lot of effort has been used to establish an electronic court file system in the Federal Court (and similarly in others), which tries to be both effective and user-friendly to its users, both from within or from outside of the court. It is an ongoing search for an optimal solution, developing a hybrid (electronic/paper) system in all cases where it is practical, since digitalization is not an end in itself, as intelligently presented by one of the staff of the Federal Court registry. And it is also through alternative dispute resolution mechanisms (e.g. mediation) in all instances that the goal of effectiveness can be achieved, since it is quite possible that a case will be resolved by a settlement or a withdrawal of the appeal before the member of the tribunal or a registrar. A very high percentage of successful resolutions mark that this is an important support to the general framework of judicial review of administrative action in Australia.