Exchange programme 2016 – report

The exchange that I carried out in Sydney, Australia, from the 5th till the 16th December 2016, unfolded in the detailed knowledge of the activity developed by Administrative Appeals Tribunal (AAT) and the Federal Court of Australia.

The diversity of legal systems between Portugal and Australia led me to these two entities, the first being presided over by Justice Duncan Kerr, President of the AAT, who dealt with the exchange, and the second, at my request, for thinking that this was the parallel court to the one in which I perform functions - the supreme administrative court of Portugal-.

Administrative Appeals Tribunal (AAT) Australia

The first week from 5th to the 9th December took place with the **Administrative Appeals Tribunal (AAT)** allowing me to take notice of all its departments with an observation of the work produced there.

I felt, from the first moment mostly welcome and had the opportunity to improve my English, my knowledge of laws, and also the way of operating of AAT. Every Division shared with me a day or, a part of the day, and I was introduced to the kinds of files and juridical matters each of them was dealing with. I had a computer at the library and free net access and a librarian lady to give me all the information I needed.

The Administrative Appeals Tribunal (AAT) is divided into Divisions of:

- Freedom of Information
- General Division
- Migration & Refugee
- National Disability Insurance Scheme

- Security
- Social Services & Child Support
- Taxation & Commercial, and
- Veterans' Appeals Division

The Administrative Appeals Tribunal (AAT) is an administrative authority that from 1st July 1976, with independence from the administration, conducts merits review of administrative decisions made under Commonwealth laws, by the state government and non-government bodies, and made under Norfolk Island laws. During the Migration Review Tribunal, Refugee Review Tribunal and Social Security Appeals Tribunal were merged with the AAT and that process is still going on.

The AAT has the power to review decisions if an Act, regulation or other legislative instrument states so, sometimes after an internal review of the primary decision or review by a specialist review body took place, mostly related to:

- child support
- Commonwealth workers' compensation
- family assistance, paid parental leave, social security and student assistance
- migration and refugee visas and visa-related decisions
- taxation
- veterans' entitlements.
- Australian citizenship
- bankruptcy

- civil aviation
- corporations and financial services regulation
- customs
- freedom of information
- the National Disability Insurance Scheme
- passports and
- security assessments by the Australian Security Intelligence Organisation (ASIO).

The AAT reviews a decision “on the merits” taking in consideration the facts, law, and policy related to it and makes the legally correct decision. It has the power to affirm, varies, set aside a decision and substitute it for a new decision, or remit a decision to the decision-maker for reconsideration.

So, it is an institution somewhere between the administration and the courts, with the power to make the right decision which goes beyond the jurisdiction of the courts in administrative matters.

The decisions of Administrative Appeals Tribunal can be appealed to the Federal Court of Australia on a question of law.

It appears to me that is a very useful institution that grants citizens with an independent review of the cases and implements a lawful solution must faster that what could be accomplished by a court.

Because it is an administrative institution is more able to implement a deep dialogue with the administration in order to get in the future a change of administrative proceedings where it is needed. I was told that there are fields where their decisions are much more taken in consideration than others

for future administrative proceedings but, nevertheless, the final flush is very positive.

People from a huge range of academic and professional backgrounds work at AAT. One can find there judges and lawyers, social workers, engineers, etc., and decisions tend to be made more by those who have the best technical qualifications on the issue under discussion and less by those who have more legal or procedural knowledge.

One can find on their web site that AAT aims «*to provide a review process that: is accessible, fair, just, economical, informal and quick, is proportionate to the importance and complexity of the matter, and promotes public trust and confidence in the decision-making of the Tribunal.*».

It seems to me that they try really hard to reach those objectives, and they mostly succeed in doing so. But I should add something more that I found there - a deep concern for the dignity of every human person behind each file.

I dare to mention two procedures that I have witnessed in order to illustrate it:

I attended a telephone inquiry to a citizen who was seeking a visa to enter Australia. In the course of the proceedings, numerous elements showed that his mother and sister had obtained a refugee visa. On the phone call, he referred to a different reason for his mother and sister's visas, but the interrogation proceeded without any request for clarification. After, I was told that the citizen was in his country, with a strong probability of having his call under government listening, so they would not formulate any question or request for clarification because they feared to put in danger the safety of that citizen in his own country. The file had the truth, it was enough for the time being.

At a stage of mediation in an invalidity pension file requested by an Iraqi woman, her daughter, an adolescent, was called to be present. The Iraqi lady had a hard time understanding what was necessary for her to do and she was very anxious. All the time she was treated with great courtesy and patience, having been given the information until we felt that she understood everything. In the informal conversation

that followed, the person who led the process told me that she was very concerned that the children of these women, who were refugees from war, felt and saw that the Australian institutions treat her mother with great respect, because there are many situations in which children do not respect these women.

I send the exchange program for the visit to the Administrative Appeals Tribunal where details of the visit can be found.

It was my great pleasure to get acquainted with all the persons that kindly received me and showed me their work, allowed me to be present in their public proceedings, exchanged legal experiences with me, visions of the world, asked about my work, my country, my Christmas, at AAT.

The experience there finished with a tea party and a souvenir, gathering most of the people I got to know in that week.

It was a wonderful experience at the far end of the world, in a jurisdiction very different from mine and within an independent administrative authority that I can only strongly recommend that many others will in the future profit too.

Federal Court of Australia

The second week of the exchange programme, from the 12th till the 16th December, led me to the **Federal Court of Australia**.

Us one can find on their website, «*The Federal Court of Australia was created by the Federal Court of Australia Act 1976 and began to exercise its jurisdiction on 1 February 1977. The Court is a superior court of record and a court of law and equity. It sits in all capital cities and elsewhere in Australia from time to time.*

The objectives of the Court are to:

•Decide disputes according to law - promptly, courteously and effectively and, in so doing, to interpret the statutory law and develop the general law of the Commonwealth, so as to fulfill the role of a court exercising the judicial power of the Commonwealth under the Constitution.

• Provide an effective registry service to the community.

• Manage the resources allotted by Parliament efficiently.»

The word *courteously* is the write word to express the way I saw the court functioning. In fact if one is not supposed to be rude in court, there are a lot of attitudes one can take from that point till being courteous.

It is rather new the introduction of information technology there since the first file of the Court to be wholly created, managed and stored electronically was produced on 14 July 2014 in Adelaide. It is a very different experience from my own because in my country we started that proceeding more than 15 years ago.

At the Federal Court of Australia I attended as a member of the public several hearings and other public proceedings but had no direct contact with judges.

I also attended, as a member of the public, several proceedings in the Supreme Court of New South Wales.

The difference between the operation of one court and the other is remarkable given the issues, the ritual, and the clothing. The Federal Court has a more youthful and informal appearance without neglecting the most important aspects of the judicial function, also in its symbolic function. I would dare to say that it matches better the idea we have of Australia as an informal country. In spite of this, in both courts, people do not leave the courtroom without bowing. They do so as a sign of respect for the Australian Coat of Arms - consists of a shield containing the badges of the six Australian states symbolising federation,

and the national symbols of the Golden Wattle, the kangaroo and the emu - which is placed in all the courtrooms on the wall on the backs of the judges.

In the Federal Court of Australia, I focused my attention mainly on the method of management in implementation the case management approach regarding practice, procedure and case management within the court which aims to reduce costs and delay and to make the court a national streamlined and efficient court.

Case management is there intended to be flexible and not process-driven and engaged with parties and practitioners that are expected to take a common-sense and co-operative approach to litigation. In order to achieve that they express in their website, they aim to have:

- fewer issues in contest
- in relation to those issues, no greater factual investigation than justice requires
- as few interlocutory applications as necessary for the just and efficient disposition of matters

Going again to the website of this court, I allow myself to transcribe from it the imperatives defined therein for case management:

> a. identifying and narrowing the issues in dispute, including in any possible cross-claim, as soon as possible and the early identification and joinder of any further necessary parties and whether any Constitutional issue arises that would involve a notice under s78B of the Judiciary Act 1903 (Cth);
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> b. taking to trial only the critical point(s) in issue;
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> c. considering whether the proceeding is more appropriately heard in the Federal Circuit Court or whether the matter should, or is required, to be heard by a Full Court;
>
> d. considering the use of, and timing for, any alternative dispute resolution, including mediation;

e. considering how best to manage justiciable issues, such as possible separation of liability and quantum or penalty, preliminary issues of fact and law and whether or not some or all issues are susceptible to being referred to a referee under s 54A of the Federal Court Act and Division 28.6 of the Federal Court Rules;

f. considering how best to manage lay and expert evidence efficiently and how to limit it to what is necessary; and considering how best to put forward relevant evidence - whether by affidavit, statement, oral evidence or a combination thereof;

g. setting an appropriately early trial date and maintaining that date;

h. eliminating or minimising the number of interlocutory hearings, and any interlocutory disputes being determined "on the papers" wherever possible;

i. eliminating or reducing the burden of discovery;

j. using collaborative tools to minimise the length of the trial hearing, including:

i. using cross-party statements of agreed facts or law or an agreed chronology;

ii. agreeing on the time of trial and how it may be divided (eg. a "chess-clock" approach);

k. making appropriate admissions in relation to the facts and matters which are not seriously in dispute;

l. capping the amount of costs to be recoverable; and

m. receiving short-form reasons for judgment to facilitate the expeditious delivery of any judgment.

This case management experience that takes into account not only the physical and economic resources but is also based on human resources management - judges and staff - and is guided by commonly accepted management principles and objectives might be applied to continental law systems.

At the present time they already have a lot of experience, and an amount of good practices in this area of management of courts that can be very useful for other countries, allowing them to skip some of the difficulties and so to easily *adapt, implement and embed solutions to problems common to all courts committed to good governance, accessibility and the rule of law.*

The broad experience of the Federal Court in cooperation between superior courts around the world - with 52 countries - to promote respect for the rule of law, judicial independence and the development of judicial services, particularly in the Asia and Pacific region using a combination of project management and technical expertise deal with *access to justice, efficiency in the administration of justice, transparency, accountability and governance, the availability of technical resources and local capacity to lead and manage change.* Those programs use the leadership and expertise of judges and judicial administrators and experienced judicial development specialists.

Their areas of Experience & Materials are:

Governance

Independence

Integrity

Accountability and transparency

Leadership and change management

Access to justice

Substantive law

Systems, practice, and procedure

Court and judicial administration

Case management

Court-annexed mediation

Judicial bench books

Professional development

It was for me a very profitable experience to be able to know how much they have already Achieve in the area of management of courts.

In the Federal Court of Australia, one breathes a serene, pleasant work environment, with space properly dimensioned to its function, establishing an adequate compromise between the availability of the means and the needs of its users. It is located on one of the top floors of a large building housing several courthouses, with courtrooms and offices encased in natural light over Sydney Bay. In the middle of the day anyone can go make a run in the neighboring botanical garden and return, take a refreshing shower and work again. It feels good to work there.

There too I felt mostly welcome.

The exchange program

It was a delightful experience that globally allowed me to get to know a country I did not know, to immerse myself in a judicial system other than my own, to find many differences regarding my country and my court and to come back with the firm conviction that despite the differences in unimportant things we are, after all, very similar in essence - the rule of law, and the judicial independence.

So I want to end this report by publicly express my deep thanks to IASAJ who made this exchange possible and to each and every Australian person at the AAT and Federal Court for the availability, warmth and joy with which they received me and the opened way they shared with me their work, their time, and their knowledge.

Finally, a word of encouragement to my colleagues so that more judges will want to know how other judges live and work in other countries because, for sure, they will come home much enriched in legal and human terms.

Lisboa, 07/02/2017

Ana Paula Lobo

Justice of the Supreme Administrative Court of Portugal