Association of European Administrative Judges

BUCHAREST 3-4 May 2012

"General rules on interim relief in administrative proceedings"

"Interim Relief in Environmental Matters"

The interim relief procedure in France

Dr. Bernard EVEN

President-rapporteur at the Administrative Court of Appeal of Paris (France)
Vice-president of the Association of European Administrative Judges (AEAJ)

THE FRENCH LEGAL SYSTEM

A short overview

The French legal system is organized on the basis of a fundamental distinction between two orders of courts: the judicial order dealing with disputes between private individuals or bodies and the administrative order, dealing with cases involving some form of dispute between citizens and public authorities, a private individual or body (company, association, etc.) and a public body. Each of them are made up of common-law courts and specialized courts.

There are two types of judicial courts: the civil courts and the penal courts.

In first instance, the civil courts are ordinary (regional court) or specialized (district courts, commercial courts, social security courts and the Conseils des prud'hommes for labor relations disputes between employees and employers commercial courts for disputes involving business people or firms, and social security courts, and the court of rural leases).

The organization of criminal courts distinguish three types of offense:
- contraventions (petty offences), tried by police courts,
- délits (misdemeanors), tried by criminal courts,
- crimes (serious indictable offences) tried by the Assize Court (the only court with lay jurors).

There is a specific court for minors, the Youth Court or juvenile courts, for both civil and criminal cases.

All appeals of the civil and penal court judgments are brought before the court of appeal except for the appeals of rulings of the court of Assizes which lies with another court of Assizes. The rulings of the courts of appeal may be subject to appeal before the Court of Cassation, the supreme court of the judicial order. The "Cour de Cassation" is responsible for examining appeals against the judgments of lower judicial courts, which decides appeals on points of law and procedure and can set aside or quash judgments and remit cases for rehearing to one of the 35 courts of appeal for retrial.

The administrative courts are the administrative court of common-law in first instance.

The specialized administrative courts are mainly the National Asylum Court, the financial courts (regional account chambers and Court of Accounts), and the disciplinary courts (Court of budgetary and financial discipline, Higher Council of magistrate, ordinal courts, university courts…). The appeal of their judgments is, in principle, brought before the administrative courts of appeal, whose rulings lie, in appeal, with the Council of State.

The Council of State is the supreme administrative court and court of final appeal on the legality of administrative acts. In addition to its role of cassation, in which capacity, like the Court of Cassation, it only exercises control over the proper application of the rules of procedure and law by the jurisdictional decisions contested before it, the Council of State is also, in certain disputes such as that of the regulatory acts of the ministers, judge in first and second resort. The Council of State advises also the government on draft legislation and on some draft orders.

The concurrence of competence with both orders of courts is determined by the Jurisdictional Conflict Court, made up of an equal number of members of the Court of Cassation and of the Council of State.

The Constitutional Council, composed of nine members, is responsible for ruling on the constitutionality of organic laws and legislation submitted to it and for overseeing the proper functioning of elections. It does not have any competency regarding the administration's acts.

The interim relief procedure in France

Introduction

Before 2000 it was possible to criticize the inability of the administrative judges in France to take into account the urgency in the proceedings. But this situation changed completely after an important reform, partly linked with the Aarhus convention. The Law No. 2000-597 of 30 June 2000 and its implementing Decree November 22, 2000 under No. 2000-1115 gave to administrative courts effective and efficient new tools to take quickly conservatory and provisional decisions.

I am going to make a presentation of the main concepts used in this matter.

I Presentation and classification of the various procedures: emergency and summary proceedings / applications for interim relief: list

The Administrative Justice Code provides several different kinds of summary proceedings. There are particular procedures for petitioning judges hearing interim applications, within a relatively short period, for provisional or precautionary measures to protect the petitioner's rights.

The law draws a clear distinction between an interim relief judge ruling in summary proceedings – in which case, the petitioner must demonstrate the urgent nature of the case in order for the judge to rule on a provisional measure within a few days (summary suspension, summary release, summary relief) – and said judge ruling in what can be referred to as ordinary summary proceedings (summary verification, summary examination, summary judgment).

A Ordinary summary proceedings: summary verification, summary examination, summary judgement:

The "establishment summary proceeding" enables to obtain from the judge the appointment of an expert to quickly establish facts likely to be the cause for a dispute before the court.

The "inquiry summary proceeding" permits ordering an expertise or any other inquiry measure, even in the absence of any administrative decision;

The "provision summary proceeding" allows asking an advance on an amount due by the administration. When the existence of such claim is not seriously disputed.

B Summary proceedings eligible to a condition of emergency - for which the emergency condition is required

These second category of proceedings directly coming from the law published in June 2000, allow to ask a judge to order interim measures to protect the rights in emergencies.

The "conservation summary proceeding" (Article L. 521-3 of the Code of Administrative Justice) enables asking the judge for any useful (or appropriate) measure, even before the administration has made a decision. The requested measure must be necessary and must not oppose an existing administrative decision. So this proceeding is in practice quite narrow. The judge pronounces within a delay ranging from a few days to one month.

The interim stay of execution (the interim suspension: Article L. 521-1 of the Code of Administrative Justice) enables to obtain, in case of emergency, the suspension of

the execution of an administrative decision until a judge has ruled on this decision's legality. The petitioner must demonstrate that there is serious doubt about this legality.

There are some other special regimes of suspension for administrative acts for which the emergency condition is not required, subject to the only condition of existence of a serious doubt about the legality of the act. They are instituted mainly for the benefit of the prefect (the representative of the State in a department in France) in the context of oversight over the local governments' acts public authorities (and some other public authorities).

The freedom summary proceeding (Article L. 521-2 of the Code of Administrative Justice) will enable to obtain from the judge in chambers all the measures required ("all necessary measures") to safeguard a fundamental freedom that the administration is alleged to have seriously and obviously illegally infringed upon. The judge then pronounces within 48hrs. In this proceeding the powers of the judges are the biggest. But the conditions to implement this proceeding are strictly interpreted, so it's difficult for a claimant to get such measures from an administrative court.

C There are urgent proceedings specific to certain disputes.

In these fields the appeal to a court have more or less a suspensive effect.

In the field of asylum and immigration law: the proceeding to oppose rulings of escort to the border is an urgent proceeding enabling foreigners to continue, and, in that event, to obtain without further delay the cancellation of the prefectoral rulings ordering their being escorted to the border due to the irregularity of their situation on the French territory.

In tax matters, the "tax summary proceeding" allows disputing a refusal opposed by the administration to a request for deferment of a debt lodged in case of a contestation of an imposition, particularly with regard to corporation tax or VAT.

In contractual matters, the pre-contractual summary proceeding allows asking the judge to sanction the dereliction of advertising responsibilities and competitive call for bid required in relation to public contracting and public service delegation.

The audiovisual summary proceeding enables the president of the Conseil Supérieur de l'Audiovisuel to ask the president of the Council of State's litigation section to order the companies of the audiovisual sector to comply with their obligations.

In the field of environmental policies (articles L.226-8, L.514-1, L.535-8, L.541-3 of the Environmental Code): article L.514-1: It's a very specific and technical proceeding. This procedure allows the prefect to require the operator remained inactive despite a formal notice to comply with the conditions attached to the operation of a facility to record the hands of a public accountant a sum equal to the amount of work

required. The public accountant shall recover the amount by issuing a binding condition to which the operator may, if it believes founded to oppose. This opposition, according to a classical principle of the procedure for the recovery, the effect of suspending the enforceability of state said. This proceeding is less important than the interim suspension also in this field.

II The interim suspension (Article L 521-1 of the Administrative Justice Code)

It is the most important interim relief in administrative courts in France. Though this proceeding the judge can paralyze the execution of an administrative decision. All categories of decisions are concerned: either express or implied, that grant or deny, admit or reject. Article L. 521-1 of the Code of Administrative Justice: "*When an administrative decision, even rejection, is the subject of a request to set aside, the judge may order the suspension of the execution of this decision, or some of its effects, when it is reported urgent circumstances and a serious doubt about the legality of the decision (...)* ".

A The powers of the judge in this proceeding

The conclusions of suspension may be supplemented by findings of an injunction. The judge may order the suspension of the act, and then, if necessary, order the administration to take action it determines which is the necessary consequence of the suspension. The suspension decided by the judge is provisional. It ceases to have effect once the judge has ruled on the request for cancellation. The judge shall decide within a period varying from 48 hours to a month or more depending on the urgency.

B Jurisdiction of court

The application for interim relief is brought before an incompetent judge when the case cannot be linked to a dispute within the jurisdiction of the administrative courts. It is wide open when the main action may be submitted to an administrative court. Within the administrative order, the request shall be submitted to the Administrative Court, the Administrative Court of Appeal or the Council of State, according to the nature of the act the suspension is sought or the status of the proceedings for the disappearance of this deed.

C La recevabilité du référé suspension - Conditions of admissibility

This request must satisfy several conditions presented below.

1°) No parallel remedies

The interim suspension is not open to an applicant who has an another parallel remedy: this proceeding is closed when the act which is sought the suspension benefits

automatically to a suspensive appeal: especially in the fields of immigration and asylum lax and taxation law.

2°) Existence of a substantive action

The interim suspension is an ancillary proceeding in an action for annulment of an administrative decision (the main action). This referrals is only admissible if the trial judge is already been seized by another main request. It can be validly introduced only after, or at least concomitantly, to a substantive action. Conclusions of suspension can only be made by a separate claim.

3°) An appeal on the merits admissible - Un recours au fond recevable

When the main application is inadmissible the request for suspension is also unfounded.

4°) About the time limits for bringing this proceedings: Raising an act whose performance is not completed

The application for interim suspension can be introduced without delay between the introduction of the main action and before the judge rules on the appeal. However it is inadmissible when the act in question is fully implemented. If the act quarreled produced all its effects, or if a new administration's decision gave satisfaction to the applicant, or if the court decided about the main action for annulment, the stay application is inadmissible.

Time limits to apply to Courts: general conditions

The appeals must be exercised within two months from the official notification measure of the disputed decision (article R. 421-1 of the code of administrative justice). The requirement of an official information measure includes derogations: in case of an implicit decision or when the decision's de facto cognizance is enough to actuate the delay (theory of acquired cognizance). As for regulatory decisions, the delay is actuated in regards to all the interested parties through their publication or posting. As for individual decisions, the delay is actuated, in regards to the addressee, through the notification he/she receives of the decision; and on the condition that this notification mentions both the delay's existence and duration and the appeals that might be exercised against the decision (art. -R. 421-5, -of the code of administrative justice).

This delay is a free delay: neither the day of delay's actuation or that when it ends is counted.

The appeal's delay may be interrupted by three events that can be added but each only coming into play once: the existence of an administrative appeal for consideration or a

hierarchical administrative appeal; the exercise of an appeal before an incompetent court; an application for legal aid.

5°) The locus standi : Legal standing

This interest is assessed under the normal rules. An applicant who has no interest in challenging the legality of an administrative decision is not entitled to seek its suspension.

The requirement of an interest having power to act is at the very head of the conditions for an appeal's admissibility. Except for the exceptional case where a public authority is vested with a legal warrant empowering it to act against the measures it considers as illegal (case of a prefectorial application for judicial review), the interest justifies the exercise of the appeal. This interest, whose existence is assessed at the time of the appeal, may be of a different nature: moral or material, individual or collective.

In all cases, it must be personal, legitimate and pertinent. The first of these requirements prevents a person from acting without warrant on behalf of another, or claims only its quality as a citizen, consumer or elected official to oppose an act's legality. The necessity of a protective interest opposes the fact that an appeal aims to safeguard an irregular or immoral situation. Finally, the status from which the petitioner acts must be related to the disputed decision. In addition, the interest must be direct and certain, that is directly and certainly wronged by the disputed decision.

As artificial persons, groups may lodge an appeal against the measures affecting their own interests (existence, estate, activity, operating conditions) as well as asking for damages for the material and moral damage they suffer. But they also may go to court to defend the collective interest of those they represent, insofar as the regulatory or individual disputed measure harms this collective interest.

The admissibility of the intervention

An Intervention of a third party, both as plaintiff or defendant, is admissible only if it was also introduced in the main action.

The representation of parties

Representation of the parties is the same as for the main action. The article R.522-5 cja does not exempt applications for suspension of the necessity of a lawyer in matters that are not exempt from this obligation by art.R.421-2 and R. cja 421-3.

6°) The forme of the request for suspension

The form of the appeal is free but it must be written in French. It indicates the particular elements to identify its author (name, address) and the appeal's object (statement of facts, arguments, as well as statement of conclusions submitted to the judge). And the request must be sign, by the petitioner him/herself or by his/her agent.

7°) The request must contain three categories of elements, necessary for the judge to decide

-The conclusions, that is to say precisely what you are asking to the judge: the suspension of a decision, the injunction to the administration to end illegal actions, a communication of a specific document.... The judge may not rule beyond what is asked to him.

-The statement of facts.

-The means of law, that is to say the legal arguments tending to establish the merits of the application: a situation of emergency and a doubt on the legality of the decision;

Attachments (pièces jointes) - The request must be accompanied by:

a) A copy of the challenged decision.

b) A copy of the administrative appeal when this appeal is mandatory and still under investigation at the time of referral to the Judge in Chambers.

c) A copy of the main application (cja art.R.522-1).

d) And as in all proceedings before the administrative courts, all pertinent documents pertinent in order to understand the dispute and establish the facts and the means may be submitted with the application. The burden of proof is on the applicant.

B The two conditions

The applicant must establish the emergency and the seriousness of the doubt that weighs on the legality of the act which it requests the suspension.

1°) The first condition: urgency in the interim suspension

The mere invocation of the illegality of an administrative act is not sufficient to justify the urgency. The applicant must satisfy the serious and immediate consequences for him of the act. The judge must study this condition and analyse if the applicant's situation warrants that the effects of the act justify its suspension, pending the main ruling.

What does it mean urgency?

a) The contents of the emergency: diversity of the interests involved

The requirement of urgency is essential and powerful. According to a formula widely reproduced by the courts, "The urgency justify the suspension of an administrative act

only when its executing threats, seriously and immediately, to a public interest or the situation or the interests of the applicant intends to defend. "

b) The emergency is taken into account in order to protect a private or a public interest.

A private interest: Some administrative decisions have serious and immediate consequences. For example, the impact of a permission to build. The judge study the actual elements that made the statement in his file.

The intensity of the damage is taken into account

Only when it the implementation of the decision is "sufficiently serious and immediate." Whatever the severity of the damage to private interest, the urgency is not allowed when the suspension threat of public interest.

The weight of public interest in assessing the urgency to suspend or not an act

Public interest and private interest can combine or oppose.

c) The judge engages in a comprehensive and objective assessment of circumstances of the case

It does not take into account other considerations under pain of committing an error of law. For example there is no reason in principle for the judge to rely solely on the prospect that problems could create a possible cancellation of the contested decision.

The judge evaluates the conditions of the emergency rather than the date of submission of the request for suspension, but that at which it is pronounced.

d) A demonstration at the expense of the applicant

The applicant has the burden of proof of the emergency (see Art. R. cja 522-1). He must convince the judge that the administrative decision prejudice sufficiently serious and immediate threat to their circumstances or interests that he intends to defend (if group, union or association). Specifically, it must invoke the particular circumstances of his case and the effects of the contested act on his condition. It must bring back all the concrete elements useful, for example, specific costed. But the burden of proof is on the administration when it claims a general interest which opposes the suspension.

e) The alleged emergency

In some matters the emergency is accepted in principle by the jurisprudence. But the administration can always plead special circumstances, particularly involving the urgency to implement the decision, or demonstrate the absence of gravity of the damage to the interests of the applicant.

f) The attitude of the applicant, of the administration and even the main judge is taken into account to analyse if there is or not a situation of emergency

The judge is particularly attentive to the behavior of all stakeholders of the case. There is no urgency to suspend when the judge is reasonable to assume that the trial court will decide in due time, before the act undertaken could prejudice the interests of the applicant.

Exemple about "Protection of nature and the environment, sites and landscapes":

There is an emergency to preserve the integrity of a natural area and landscape awaiting the judgment on the legality of the refusal of permission to build a wind turbine whose suspension was requested (CE, 25 November 2002, Minister of Equipment, No. 248423).

2°) Second condition : Serious doubts about the legality of the act

What are the legal means to argue the illegality of an administrative act? There is a classification, which is also used in the main proceeding against an administrative decision, called in France the request for abuse of power (recours pour excès de pouvoir). The administrative judges distinguish several types of illegality: classification. The first distinction is made between means of external and internal illegality.

Summary:

1 External Illegality:
1.1 Incompetence
1.2 The procedural
1.3 The flaw
2 Internal Illegality:
2.1 Illegality because of the content of the measure
2.2 Illegality because of the reasons for the act
2.2.1 Error of law
2.2.3 Mistake of fact
2.2.2 Error characterization of the facts
3.3 Illegality because of the purpose of the act

There is a possibility of substitution: the administration may seek to establish the legality of the decision with reasons of law or fact, other than those relied on by it when making this act. The judge may determine whether to suspend it by looking, not the original reasons but those that the administration proposes to substitute.

a) External illegality : this is not an illegality on the content of the decision, but on how it was taken

Incompetence

An administrative authority is incompetent when it is acting beyond its power given by the legal regulations. There are three different variety of incompetence: we are using latin words for that:

Ratione materiae (incompetence material): when the authority is involved in a matter unrelated to his duties. This is the case when the authority makes a decision in the field of competence of another administrative authority.

Ratione loci (territorial jurisdiction): when the authority is acting outside of his constituency.

Incompetence temporal (temporal jurisdiction): when the authority was not competent, or conversely it no longer is

The procedural defect - Le vice de procedure

When the administrative act was adopted in breach of procedural rules. The procedural defect affects the process of developing a standard. Jurisprudence rejects excessive formalism. Ignorance of "insubstantial formalities" (procedural requirements that do not affect the content of the decision and / or who do not give guarantees to those that concern the decision) is not subject to cause the illegality of the decision taken. On the contrary, are called "essential procedural requirement" a provision to guarantee the rights of citizens.

Ignorance of the rules of the form: the motivation of the act

The formal rules concerning administrative acts are relatively few: mainly the signing of the act by its author and the motivation of the act. It is possible in an emergency or exceptional circumstances not to justify the act.

b) Internal illegality: because of the content of the act: about its reasons

There are three different reasons:

Error of law

This is a mistake about the legal basis for the decision: implementation of an illegal standard, or an unenforceable standard, or a regular and applicable standard but misinterpreted.

Mistake on the facts

The judge controls the facts, if they are accurate or not?

An error about the legal characterization of the facts - Erreur de qualification juridique des faits

Through this control, the judge substitutes its own appreciation to the one of the administration. To give an example: the control this error goes back to a famous case-law (CE, 1914, Gomel): an application for planning permission on the edge of the place Beauveau in the center of Paris was refused by the prefect of the Seine on the grounds that the construction project would affect a "monumental perspective". The Council of State said that the place Beauvau is not a monumental perspective, and therefore annuled the decision of the prefect.

About the intensity of this control : normal control or restricted control

When the administration has a choice between enacting a decision and abstaining from any decision or between two or more decisions of different content but equally compliant with the law, the judge is not always bound to oversee the appropriateness of the choice made by the administration.

In addition, subjection to the rule of legality is more or less rigorous depending on whether the jurisdictional oversight is introduced as a "normal control" or a "restricted control". It will be restricted in the case where the decision whose legality is to be assessed was made in exercising discretionary power, that is, when the legality of the decision that the administration chose as most expedient has to be assessed. In this case, the administrative judge will control whether the decision is based on a factual error, legal error, or of abuse of power, but the control of the facts' legal qualification will only consist of censure of the obvious mistakes of assessment. On the contrary, in the usual cases where the administration's decision is guided by legal criteria and where, therefore, the judge carries out a normal control, all the errors in the legal qualification of the facts will be censured.

In certain cases, normal control and restricted control are exercised according to specific terms. Thus, the restricted control does not include the search for an obvious error of assessment when the decision results from a sovereign administration's assessment (example of examination juries).

On the contrary, the normal control can be detailed by applying the theory of the audit which allows confronting a decision's advantages and disadvantages; the decision will only be legal if it is adequately proportional to the facts (example of the legality's assessment regarding statements of public utility in relation to expropriation).

Illegality because of the purpose of the act - Illégalité en raison du but de l'acte

The simplest form consists of the performance of an act because of a private aim. But sometimes there is also an illegality when taking into account a wrong public interest.

C The main elements of the interim suspension proceedings

1. The interim relief judge is a single judge

In each of the courts, the judge hearing the interim application is a magistrate ruling alone. The interim relief judge pronounces within a delay ranging from 48 hours to one month or more, depending on the emergency.

2. The proceeding must respect the adversarial principle - Une instruction contradictoire

Article L. 522-1 of the Code: "The judge decides after an adversarial procedure, written or oral. When asked to pronounce the measures referred to in Article L. 521-1…, to modify or terminate, it shall promptly inform the parties of the date and time of the public hearing (...) ".

The litigation administrative proceeding is both written and oral. It is inquisitorial: it means that the judge controls the legal proceeding and leads the inquiry.

3. With or without an hearing

Article L. 522-3 of the Code provides: "If the request does not present an urgent nature or where it appears obvious, given the demand, that it is not within the jurisdiction of the administrative court, that it is inadmissible or is unfounded, the judge may dismiss it though a reasoned order without an hearing ".

4. The interim order

The court issue an order.

5. The aftermath of the order declaring a suspension

A party to the legal proceeding of first instance who is not satisfied with the administrative court's judgment (or ordinance) may appeal against this judgment within two months from the decision's notification.

The administrative courts of appeal are most often judges of appeal of the administrative tribunals. However, the Council of State is judge of appeal for decisions made by a summary proceedings judge. In this matter the Council of State is not acting as a cassation judge but as an appel judge.

For certain types of disputes, restrictively listed in the code of administrative justice, there is no appeal and the only possibility of opposing the judgment is the appeal to the Supreme Court before the Council of State. As a judge of cassation, the Council of State does not judge the case again. It settles for verifying the respect for rules of procedure and ensuring that the inferior courts properly apply the rules of law.

FRENCH CASE

This real case is not very complicated and it's interesting to study it in order to discover how the interim suspension works in administrative courts in France.

THE FACTS

The city of Créteil, 90.000 inhabitants, is a municipality and also the préfecture (capital) of the "Val-de-Marne" department (the first geographical area for the administrations of the State), situated at 12 km from the center of Paris, in the southeastern suburbs and is watered by the "Marne" river.

The mayor of this city of Creteil decided by an administrative act signed on July 3, 2007 to subject to certain conditions the installation of mobile phone masts, within a radius of 100 meters around structures for babies and young children (kindergarten), schools, open air stadiums and care facilities for elderly.

Some technical definitions

The "Global System for Mobile Communications" (GSM), historically "Group Special Mobile", is a digital standard for second generation (2G) mobile telephony. It was established in 1982 by the European Conference of Postal and Telecommunications Administrations (CEPT).

The "Universal Mobile Telecommunications System" (UMTS) is a third generation mobile cellular technology for networks based on the GSM standard. Developed by the 3GPP (3rd Generation Partnership Project), UMTS is a component of the International Telecommunications Union IMT-2000 standard set and compares with the CDMA2000 standard set for networks based on the competing cdma one technology. UMTS employs Wideband Code Division Multiple Access (W-CDMA) radio access technology to offer greater spectral efficiency and bandwidth to mobile network operators. UMTS specifies a complete network system, covering the radio access network (UMTS Terrestrial Radio Access Network, or UTRAN), the core network (Mobile Application Part, or MAP) and the authentication of users via SIM cards (Subscriber Identity Module). The technology described in UMTS is sometimes also referred to as Freedom of Mobile Multimedia Access (FOMA) or 3GSM. Unlike EDGE (IMT Single-Carrier, based on GSM) and CDMA2000 (IMT Multi-Carrier), UMTS requires new base stations and new frequency allocations.

THE FIRST INSTANCE JUDGMENT

What happened at the first instance level?

The FRENCH SOCIETY OF RADIOTELEPHONE (SFR), whose registered office is 42 Avenue de Friedland, Paris (75008), represented by the CPS lawyers Jeantet & Associates, lodged an application, on 6 September 2007, registered under the number 0706982/1 by the Administrative Court of Melun (first instance Court) in order to cancel the decision taken by the mayor of Créteil on the 3d July 2007.

The SFR (Société Française de Radiotéléphonie) is a French mobile phone company. It has over 20 million customers, and provides over 4.6 million households with high-speed internet access. SFR is currently 100% owned by the French group Vivendi. The other French mobile phone companies are Orange SA (originally a public company linked with France Telecom), Bouygues Telecom and Free mobile.

The claimant is SFR and the defendant is the city of Créteil.

The same company SFR decided also to ask the Administrative Court of Melun to suspend the effects of the decision taken by the mayor of Créteil by a second request registered on September 26, 2007, under No. 0707252/1.

More precisely, this company asked to the Court:

a)- To suspend the effects of the administrative decision on the basis of Article L. 521-1 of the Code of Administrative Justice, until the final judgment on the merits of the legality of that decision.

b)- And also to condemn the town of Creteil to pay a sum of 5,000 euros for the justice fees (cost of the lawyer) on the basis of Article L.761-1 of the Code of Administrative Justice.

The Administrative Court of Melun took a judgment (ordinance from a single judge) on October 19, 2007, FRENCH SOCIETY OF RADIOTELEPHONE, No. 0707252/1

The Administrative Court of Melun held that the emergency condition, necessary for a possibility of suspension of an administrative act, was not fulfilled.

The judge of the Administrative Court of Melun based his decision on two elements:

He observed that the territory of the town of Créteil was already covered with relay stations for satisfactory use of adequately cellular mobile phone network, such as GSM-type.

And he noted that the challenged decision would not, alone, prevent the FRENCH SOCIETY OF RADIOTELEPHONE to meet deadlines imposed by the State for opening of commercial UMTS.

Main extracts of the judgment

Considering, first, that the territory of the town of Creteil is already covered by base stations, allowing the use adequately of cellular network like GSM ; thus the need for improve service to users is not sufficient to characterize the emergency;

Considering, secondly, that if the FRENCH SOCIETY OF RADIOTELEPHONE invokes both the public interest that attaches to the provision in the national territory of the new UMTS service, as its own interests resulting from authorizations that were given and commitments relating to national coverage by the new network, defined by the specifications attached to the Governmental Order of 18 July 2001 authorizing the operation of a network of the third generation, however, the company does not give the evidence that the execution of the administrative act of the mayor of the town of Creteil, imposing certain conditions on the

installation of antennas, is sufficient, alone, to place the applicant in a situation where he is unable to meet deadlines for opening of commercial UMTS service;

Whereas, under these conditions, the execution of the administrative act does not threat seriously and immediatly the public interest, and prejudice the situation of the FRENCH SOCIETY OF RADIOTELEPHONE or the interest she intends to promote ; thus the condition of emergency required by Article L. 521-1 of the Code of Administrative Justice can't be regarded as fulfilled ; consequently, its application should be rejected;

Whereas under the provisions of Article L. 761-1 of the Code of Administrative Justice, the town of Creteil, which is not the losing party in these proceedings for interim relief, can't be ordered to pay the sum that the applicant company claimed for justice costs incurred by it;

DECIDE:

Article 1: The Application of the FRENCH SOCIETY OF RADIOTELEPHONE is rejected.

Article 2: This Ordinance shall be notified to the FRENCH SOCIETY OF RADIOTELEPHONE and the town of Creteil.

THE APPEAL

The FRENCH SOCIETY OF RADIOTELEPHONE decided to bring an appeal against this judgment.

NB: directly before the Council of State (Conseil d'Etat: name of the French Supreme Administrative Court), because this proceeding concerns an interim measure.

Through a summary appeal, supplemented by a second brief, registered on 9 and 26 November 2007 by the clerk of the Conseil d'Etat, the FRENCH SOCIETY OF RADIOTELEPHONE asked:

1°) To set aside the ordinance of 19 October 2007 whereby the judge of the Administrative Court of Melun rejected his request to suspend the execution of the decision of the mayor of Créteil signed on the 3d July 2007 imposing conditions on the installation of antennas within a radius of 100 meters around certain buildings;

2°) To suspend the execution of this decision;

3°) And to charge the town of Creteil to pay the sum of 3000 euros for expenses of legal costs pursuant to Article L. 761-1 of the Code of Administrative Justice;

The arguments of the applicant company

The applicant alleges five arguments against the judgment and the administrative decision:

1°) - The condition of urgency is met with respect to the public interest that attaches to the national coverage by the GSM (Global System for Mobile Communications) and UMTS

(Universal Mobile Telecommunication System) and self-interest of society. The company says it has commitments to fulfill with respect to the State on this point.

2°) - The challenged administrative decision was not signed by a competent authority: the mayor of Créteil committed a mistake against law by intervening in the field of a special police vested in the Minister of Posts and Telecommunications.

3°) - The mayor could not exercise its general police powers in the absence of an imminent or exceptional circumstances, or a deficiency in the exercise of the police of the Minister for Telecommunications.

4°) - The mayor could not base its ruling on the precautionary principle, because it can not be implemented in health. The company adds that this principle may be invoked by the administrative authorities only in their own field of competence.

5°) - The electromagnetic waves transmitted and received by mobile phone base stations are not dangerous to the health of people living nearby.

Framework - Legal provisions

French Constitution

Article 34 of the Constitution: extract: "The law (act of the Parliament) determines the basic principles (...) of the preservation of the environment."

Article 5 of the Environmental Charter (introduced into the Constitution by the Constitutional Act of 1 March 2005): "When the occurrence of any damage, albeit unpredictable in the current state of scientific knowledge, may seriously and irreversibly harm the environment, public authorities shall, with due respect for the principle of precaution and the areas within their jurisdiction, ensure the implementation of procedures for risk assessment and the adoption of temporary measures commensurate with the risk involved in order to preclude the occurrence of such damage."

NB: The Council of State by a decision "City of Annecy" of October 3, 2008, fully recognized the constitutional status of all the articles of this charter: «*... these provisions, as all rights and duties defined in the Charter of the environment, and like all those written in the Preamble to the Constitution, have constitutional value ; the Government and all administrative authorities are requested to respect this Charter in their respective fields* ».

General Code of public territorial and local authorities

Article L 2212-1: "Under the control of the representative of the State in the department (prefect), the mayor is responsible of the municipal police, the rural police and to implement the police acts of the State".

Article L 2212-2: "The municipal police is to ensure order, safety, security and public safety."

Article L 2212-5: "Without prejudice to the general jurisdiction of the national police and gendarmerie, municipal police officers carry out, to the limits of its authority and under the

authority of the mayor, tasks within its jurisdiction that he entrusted to them for prevention and monitoring of good order, peace, security and public safety.”

Post and Electronic Communications Code

Articles L.32 and following of the Post and Telecommunications Code empower the Minister for Telecommunications to authorize the installation and operation of telecommunications networks open to the public, which includes the obligation to ensure compliance by operators of their facilities to the technical standards which regulate the matter, especially regarding public exposure to electromagnetic fields.

Code of Administrative Justice

Article L. 521-1 of the Code of Administrative Justice: "When an administrative decision, even rejection, is the subject of a request to set aside, the judge may order the suspension of the execution of this decision, or some of its effects, when it is reported urgent circumstances and a serious doubt about the legality of the decision (...) ".

Article L. 522-1 of the Code: "The judge decides after an adversarial procedure, written or oral. When asked to pronounce the measures referred to in Article L. 521-1…, to modify or terminate, it shall promptly inform the parties of the date and time of the public hearing (...) ".

Article L. 522-3 of the Code provides: "If the request does not present an urgent nature or where it appears obvious, given the demand, that it is not within the jurisdiction of the administrative court, that it is inadmissible or is unfounded, the judge may dismiss it though a reasoned order without an hearing ".

Article L. 761-1 of the Code of Administrative Justice, "The judge sentence the losing party to pay the other party the amount he determine in respect of costs incurred; the judge has to take into account the equity or the economic situation of the convicted party; the judge may from its own motion, or for reasons based on the same considerations, say that there are no grounds for this condemnation".

QUESTION

You have to prepare a draft judgement for the Council of State on the basis of the legal framework and the arguments of the claimant company.

SOLUTION: EXTRACTS: Council of State, 2 July 2008, SFR, n° 310548

1°) About the ordinance

Question to solve: was it possible to reject the request only after studying the emergency condition?

a) About the prooves

1. "It emerged from the evidence submitted to the first judge by the parties and especially the claimant",

b) There is both a public interest and a private interest of the claimant the private company

2. Given the public interest that attaches to the national coverage by the mobile phone network, as well as GSM than UMTS,

3. That to the interests of the COMPANY'S FRENCH RADIOTELEPHONE, which has made commitments in this regard to the State, written in the specification of its contract,

c) No risk for health

4. In the absence of evidence, in the state of current scientific knowledge, about risk to public health that may result from public exposure to electromagnetic fields emitted by the antennas of mobile phone on the territory of the municipality of Créteil,

- No problem regarding the public interest of the municipality to protect the health of the population.

d) About the condition of emergency

5. The emergency condition requested for granting a suspension of the challenged administrative act was fulfilled.

NB: thus it was impossible to reject the request only after studying this condition.

e) Solution: cancellation of the first instance ordinance

6. The applicant is consequently entitled to request cancellation of the ordinance.

2°) The Council of State decided to take a new judgment after cancellation the ordinance

7. It is appropriate, pursuant to Article L. 821-2 of the Code of Administrative Justice, to settle the case under the summary proceedings initiated.

The analysis of the Council of State

a) About the emergency condition

8. First, it follows from what has been said above, that the emergency condition must be regarded as fulfilled.

b) There is a serious doubt on the legality of the administrative decision

9. Secondly, due to absence of serious risks to public health resulting from the electromagnetic waves emitted by stations antennas of mobile telephony, this context does not allow the mayor of Créteil to use its powers of general police under the general code of local authorities or to invoke the precautionary principle,

Due to the existence of a special police vested in the Minister for Telecommunication by the Post and Electronic Communications Code, the exercise of the general police powers available to the Mayor under the provisions of the General Code of public territorial and local authorities, Article L 2212-1, may be applicable only in the case of emergency or serious and imminent threat to public order, safety, peace or public safety.

- The mayor of Créteil was incompetent to act (ratione materia).

10. These elements are likely to raise serious doubt about the legality of the challenged decision.

SOLUTION

11. It is appropriate to grant the stay requested.

On the application of Article L. 761-1 of the Code of Administrative Justice

12. These provisions preclude to charge the FRENCH SOCIETY OF RADIOTELEPHONE, which is not the losing party in this proceeding, for the payment of the sum requested by the town of Creteil about the costs incurred by it.

13. It should be put to the burden of the municipality of Créteil the payment to the FRENCH COMPANY OF RADIOTELEPHONE a sum of 3,000 euros for costs incurred by it.

DECIDE

Article 1: The ordinance of the judge of the Administrative Court of Melun taken on October 19, 2007 is canceled.

Article 2: The execution of the decision of the mayor of Créteil 3 July 2007 imposing conditions on the installation of mobile phone antennas within a radius of 100 meters around certain institutions is suspended.

Article 3: The town of Creteil will pay a sum of 3,000 euros to the FRENCH SOCIETY OF RADIOTELEPHONE on the basis of Article L. 761 1 of the Code of Administrative Justice.

Article 4: Findings from the town of Creteil aimed at implementing the provisions of Article L. 761-1 of the Code of administrative justice are denied.

Article 5: This Decision shall be notified to the FRENCH SOCIETY OF RADIOTELEPHONE and the town of Creteil.

The main part of the decision of the Council of State: extracts

1. "It emerged from the evidence submitted to the first judge by the parties and especially the claimant",

2. Given the public interest that attaches to the national coverage by the mobile phone network, as well as GSM than UMTS,

3. That to the interests of the COMPANY'S FRENCH RADIOTELEPHONE, which has made commitments in this regard to the State, written in the specification of its contract,

4. In the absence of evidence, in the state of current scientific knowledge, about risk to public health that may result from public exposure to electromagnetic fields emitted by the antennas of mobile phone on the territory of the municipality of Créteil,

5. The emergency condition requested for granting a suspension of the challenged administrative act was fulfilled.

6. The applicant is consequently entitled to request cancellation of the ordinance.

7. It is appropriate, pursuant to Article L. 821-2 of the Code of Administrative Justice, to settle the case under the summary proceedings initiated.

8. First, it follows from what has been said above, that the emergency condition must be regarded as fulfilled.

9. Secondly, due to absence of serious risks to public health resulting from the electromagnetic waves emitted by stations antennas of mobile telephony, this context does not allow the mayor of Créteil to use its powers of general police under the general code of local authorities or to invoke the precautionary principle,

10. These elements are likely to raise serious doubt about the legality of the challenged decision.

11. It is appropriate to grant the stay requested.

12. These provisions preclude to charge the FRENCH SOCIETY OF RADIOTELEPHONE, which is not the losing party in this proceeding, for the payment of the sum requested by the town of Creteil about the costs incurred by it.

13. It should be put to the burden of the municipality of Créteil the payment to the FRENCH COMPANY OF RADIOTELEPHONE a sum of 3,000 euros for costs incurred by it.

French version - Version française

http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000019159551&fastReqId=772377296&fastPos=1

Conseil d'État

N° 310548
Publié au recueil Lebon

2ème et 7ème sous-sections réunies

M. Daël, président
Mme Catherine Chadelat, rapporteur
M. Lenica Frédéric, commissaire du gouvernement
SCP PIWNICA, MOLINIE ; SCP ROCHETEAU, UZAN-SARANO, avocats

Lecture du mercredi 2 juillet 2008

REPUBLIQUE FRANCAISE
AU NOM DU PEUPLE FRANCAIS

Texte intégral

Vu le pourvoi sommaire et le mémoire complémentaire, enregistrés les 9 et 26 novembre 2007 au secrétariat du contentieux du Conseil d'Etat, présentés pour la SOCIETE FRANÇAISE DU RADIOTELEPHONE, dont le siège est 42, avenue de Friedland à Paris (75008) ; la SOCIETE FRANÇAISE DU RADIOTELEPHONE demande au Conseil d'Etat :

1°) d'annuler l'ordonnance du 19 octobre 2007 par laquelle le juge des référés du tribunal administratif de Melun a rejeté sa demande de suspension de l'exécution de l'arrêté du maire de Créteil du 3 juillet 2007 imposant des conditions à l'installation d'antennes relais dans un périmètre de 100 mètres autour de certains établissements ;

2°) réglant l'affaire au titre de la procédure de référé, de suspendre l'exécution de cet arrêté ;

3°) de mettre à la charge de la commune de Créteil la somme de 3 000 euros en application de l'article L. 761-1 du code de justice administrative ;

Vu les autres pièces du dossier ;

Vu le code de l'environnement ;

Vu le code général des collectivités territoriales ;

Vu le code des postes et des communications électroniques ;

Vu le décret n°2002-775 du 3 mai 2002 ;

Vu le code de justice administrative ;

Après avoir entendu en séance publique :

- le rapport de Mme Catherine Chadelat, Conseiller d'Etat,

- les observations de la SCP Piwnica, Molinié, avocat de la SOCIETE FRANÇAISE DU RADIOTELEPHONE et de la SCP Rocheteau, Uzan-Sarano, avocat de la commune de Créteil,

- les conclusions de M. Frédéric Lenica, Commissaire du gouvernement ;

Considérant qu'aux termes de l'article L. 521-1 du code de justice administrative : « Quand une décision administrative, même de rejet, fait l'objet d'une requête en annulation ou en réformation, le juge des référés, saisi d'une demande en ce sens, peut ordonner la suspension de l'exécution de cette décision, ou de certains de ses effets, lorsque l'urgence le justifie et qu'il est fait état d'un moyen propre à créer, en l'état de l'instruction, un doute sérieux quant à la légalité de la décision » ;

Considérant que, pour estimer que la condition d'urgence n'était pas remplie, le juge des référés du tribunal administratif de Melun s'est fondé, d'une part, sur ce que le territoire de la commune de Créteil était déjà couvert de stations relais permettant une utilisation satisfaisante du réseau de téléphonie mobile de type GSM, d'autre part, sur ce que cet arrêté ne suffisait pas, à lui seul, à placer la SOCIETE FRANÇAISE DU RADIOTELEPHONE dans l'impossibilité de satisfaire à des délais d'ouverture commerciale du service UMTS qui s'imposeraient à elle ; qu'en statuant ainsi, alors qu'il ressortait des pièces du dossier soumis à son examen qu'eu égard à l'intérêt public qui s'attache à la couverture du territoire national par le réseau de téléphonie mobile tant GSM qu'UMTS ainsi qu'aux intérêts propres de la SOCIETE FRANÇAISE DU RADIOTELEPHONE, qui a pris des engagements à ce titre envers l'Etat dans son cahier des charges, et en l'absence d'éléments de nature à accréditer l'hypothèse, en l'état des connaissances scientifiques, de risques pour la santé publique pouvant résulter de l'exposition du public aux champs électromagnétiques émis par les antennes de relais de téléphonie mobile sur le territoire communal, l'urgence justifiait la suspension demandée, le juge des référés du tribunal administratif de Melun a dénaturé les pièces du dossier ; que la société requérante est, par suite, fondée à demander l'annulation de l'ordonnance qu'elle attaque ;

Considérant qu'il y a lieu, par application de l'article L. 821-2 du code de justice administrative, de régler l'affaire au titre de la procédure de référé engagée ;

Considérant, en premier lieu, qu'il résulte de ce qui a été dit ci-dessus que la condition d'urgence doit être regardée comme remplie ;

Considérant, en second lieu, qu'en l'état de l'instruction, les moyens tirés de ce que l'absence de risques graves et avérés pour la santé publique résultant des ondes électromagnétiques émises par les stations antennes-relais de téléphonie mobile ne permettait au maire de Créteil ni de faire usage des pouvoirs de police général qu'il tient du code général des collectivités territoriales ni d'invoquer le principe de précaution, sont de nature à faire naître un doute sérieux quant à la légalité de la décision attaquée ;

Considérant qu'il résulte de ce qui précède qu'il y a lieu de prononcer la suspension demandée ;

Sur les conclusions tendant à l'application de l'article L. 761-1 du code de justice administrative :

Considérant qu'il y a lieu, dans les circonstances de l'espèce, de faire application des dispositions de cet article et de mettre à la charge de la commune de Créteil le versement à la SOCIETE FRANÇAISE DU RADIOTELEPHONE d'une somme de 3 000 euros au titre des frais exposés par elle et non compris dans les dépens ; qu'en revanche, ces dispositions font obstacle à ce que soit mis à la charge de la SOCIETE FRANÇAISE DU RADIOTELEPHONE, qui n'est pas la partie perdante dans la présente instance, le versement de la somme que demande la commune de Créteil au titre des frais exposés par elle et non compris dans les dépens ;

D E C I D E :

Article 1er : L'ordonnance du juge des référés du tribunal administratif de Melun du 19 octobre 2007 est annulée.

Article 2 : L'exécution de l'arrêté du maire de Créteil du 3 juillet 2007 imposant des conditions à l'installation d'antennes relais dans un périmètre de 100 mètres autour de certains établissements est suspendue.

Article 3 : La commune de Créteil versera à la SOCIETE FRANÇAISE DU RADIOTELEPHONE une somme de 3 000 euros au titre de l'article L. 761-1 du code de justice administrative.

Article 4 : Les conclusions de la commune de Créteil tendant à l'application des dispositions de l'article L. 761-1 du code de justice administrative sont rejetées.

Article 5 : La présente décision sera notifiée à la SOCIETE FRANÇAISE DU RADIOTELEPHONE et à la commune de Créteil.

Analyse

Abstrats : 54-035-02-03-02 PROCÉDURE. PROCÉDURES INSTITUÉES PAR LA LOI DU 30 JUIN 2000. RÉFÉRÉ SUSPENSION (ART. L. 521-1 DU CODE DE JUSTICE ADMINISTRATIVE). CONDITIONS D'OCTROI DE LA SUSPENSION DEMANDÉE. URGENCE. - EXISTENCE - DÉCISION ADMINISTRATIVE IMPOSANT DES CONDITIONS À L'INSTALLATION D'ANTENNES-RELAIS DE TÉLÉPHONIE MOBILE DANS UN PÉRIMÈTRE DÉTERMINÉ - CONDITIONS - INTÉRÊT PUBLIC S'ATTACHANT À LA COUVERTURE DU TERRITOIRE NATIONAL PAR LE RÉSEAU DE TÉLÉPHONIE MOBILE UMTS ET ENGAGEMENTS PROPRES DE DÉPLOIEMENT PRIS PAR LES OPÉRATEURS ENVERS L'ETAT EN CONTREPARTIE DE L'OCTROI DE LA LICENCE, EN L'ABSENCE, EN L'ÉTAT DES CONNAISSANCES SCIENTIFIQUES, DE RISQUES POUR LA SANTÉ PUBLIQUE [RJ1].

Résumé : 54-035-02-03-02 Eu égard à l'intérêt public qui s'attache à la couverture du territoire national par le réseau de téléphonie mobile tant GSM qu'UMTS ainsi qu'aux intérêts propres de l'opérateur de téléphonie mobile ayant pris des engagements à ce titre envers l'Etat dans son cahier des charges, et en l'absence d'éléments de nature à accréditer l'hypothèse, en l'état des connaissances scientifiques, de risques pour la santé publique pouvant résulter de l'exposition du public aux champs électromagnétiques émis par les antennes-relais de téléphonie mobile sur le territoire communal, l'urgence justifie la suspension de la décision du maire imposant des conditions à l'installation d'antennes-relais dans un périmètre de 100 mètres autour de certains établissements.

[RJ1] Cf. 22 août 2002, Société française du radiotéléphone, n° 245625 ; 13 novembre 2002, Société française du radiotéléphone, n° 244773.