Deffairi, M. 2016, 'La reconnaissance de la spécificité de l'intérêt à agir dans le contentieux administratif environnemental: l'occasion (encore) manquée?, *Énergie-Environnement-Infrastructures* No. 2 (February), Commentary 12.

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12 Recognizing the specific nature of legal interest in bringing administrative proceedings in environmental cases: (another) missed opportunity?

An applicant's interest in wildlife and wildlife conservation is not sufficiently distinctive to give him standing to seek annulment of the Ministerial Order implementing Article R. 427-6 of the Environmental Code and establishing the list of species of animals classified as pests, the periods stipulated for their destruction and the methods of destruction to be used.
Article 7 of the Charter for the Environment does not oblige the administrative courts to alter the conditions for their consideration of legal interest in bringing proceedings and article 9 of the Aarhus Convention does not have either the aim or the effect of giving everyone a right to review of any decision likely to affect the environment.

Conseil d'Etat, 26 October 2015, Petition No. 392550: JurisData No. 2015-023663

(...) Whereas Mr A... requests annulment for ultra vires of the Order of 30 June 2015 by the Minster of Ecology, Sustainable Development and Energy implementing Article R. 427-6 of the Environmental Code and establishing the list of species of animals classified as pests, the periods stipulated for their destruction and the methods of destruction to be used;

2. Whereas, in support of his legal interest in bringing proceedings, Mr A... invokes, in the first place, his interest in wildlife and its preservation, which is reflected in his publication of numerous articles in specialized journals, his involvement, over a period of several years, as a founding member or administrator of environmental protection associations, and the fact that he was involved in the public participation procedure on the draft of the contested Order, which took place under Article L. 120-1 of the Environmental Code; whereas, however, these circumstances cannot in themselves be regarded as giving him a definite, direct personal interest in the annulment of the contested Order; whereas Mr A... states, in the second place, that Article 7 of the Charter for the Environment provides that everyone has the right to participate in the process of making decisions likely to affect the environment; whereas, however, contrary to what is maintained, these provisions have neither the aim nor the effect of altering the conditions for an administrative court's assessment of an interest giving standing to bring proceedings against decisions likely to affect the environment; whereas, similarly, the requirements of article 9 of the Aarhus Convention do not on any view have either the aim or the effect of giving everyone a right to review of any decision likely to affect the environment;

3. Whereas it follows from the foregoing that Mr A...'s petition is inadmissible; whereas it should accordingly be dismissed, without there being any need to take a view on his request for the Conseil d'Etat to refer to the Constitutional Council the question of whether Article L. 120-1 of the Environmental Code is consistent with the rights and freedoms guaranteed by the Constitution; (...)

NOTE: By a petition registered on 11 August 2015, Mr A. brought an action before the Conseil d'Etat on grounds of ultra vires, seeking the annulment of the Order of 30 June 2015 by the Minister of Ecology, Sustainable Development and Energy implementing Article R. 427-6 of the Environmental Code and establishing the list of species of animals classified as pests, the periods stipulated for their destruction and the methods of destruction to be used.
However, neither the petitioner's submissions that the Order was unlawful nor his request that the question of whether Article L. 120-1 of the Environmental Code is consistent with the rights and freedoms guaranteed by the Constitution should be referred to the Constitutional Council for a priority preliminary

ruling were considered by the Conseil d'Etat in its capacity as the supreme administrative court.

In its judgment, read on 23 October 2015, the 6th Chamber of the Conseil d'Etat found that Mr A's action on grounds of ultra vires was inadmissible. So no stay of execution for the fox or the weasel...

In the second recital of its judgment, the Conseil d'Etat considered the matter of the petitioner's standing in two stages.

First, despite the evidence supporting the petitioner's manifest interest in wildlife conservation, the supreme administrative court finds that he does not have a definite, direct personal interest giving him standing to bring proceedings against the Order establishing the list of species of animals classified as pests, the periods stipulated for their destruction and the methods of destruction to be used.

Secondly, the Conseil d'Etat refuses to see in Article 7 of the Charter for the Environment and in article 9 of the Aarhus Convention any reasons either to amend the conditions for consideration of standing or to find that everyone has a right to review of any decision likely to affect the environment.

The rules noted and applied by the court to consideration of the petitioner's standing are clear – and they come as no surprise.

Despite a generally very liberal attitude, the administrative courts refuse to make it too widely possible to bring actions for ultra vires by considering the definite, direct or personal nature of petitioners' standing, and environmental matters are no exception in this regard. In addition, these courts constantly circumscribe and/or restrict the scope of Article 7 of the Charter for the Environment and of the Aarhus Convention.

The decision is all the more questionable because it means that the Conseil d'Etat has missed an opportunity to recognize the specific features of individual legal interests in bringing environmental proceedings and, consequently, has embroiled itself in an approach that is increasingly foreign to trends in the rules of law relating to environmental justice.

1- Although the administrative courts have, through the development of case-law, defined certain presumptions and criteria intended to facilitate and frame the assessment of individual legal interests in bringing proceedings on grounds of ultra vires, everything still depends on the particular case (Guyomar, V. M. & B. Seiller, *Contentieux administratif [Administrative litigation]*: *Hypercours*, Dalloz, 3rd ed*.,* 2014, No. 622, p. 278). The judgment under discussion here is evidence of this.

The Conseil d'Etat has consistently held that in order to be able to bring an action against a unilateral administrative measure, a petitioner must in principle prove a sufficient definite, direct – or, at least, not unduly indirect or unduly indefinite – personal interest in the annulment of the measure concerned.

In the present case, the petitioner relied on three factors to establish "his interest in wildlife and its preservation" – that is, in support of his legal interest in bringing proceedings against the contested Order on the destruction of species of animals classified as pests: his publication of articles on environmental topics, his involvement as an administrator or a founding member of environmental protection associations and his participation in the public consultation on the draft of the Order under Article L. 120-1 of the Environmental Code.

Although the petitioner did not prove a material interest in the annulment of the Order, these different factors might appear to establish his non-material interest. His personal activities clearly meant that he belonged *a priori* to an 'interest group' concerned by the outcome of the contested Order.

Nevertheless, if the supreme administrative court had found that an individual's interest in wildlife was

sufficient to give him standing to bring proceedings against the contested Order, it would also have introduced a risk of departing from its settled case-law, which has prevented access to the courts becoming too widely available.

Although Mr A had an interest in the contested decision, the Order did not appear to have any direct impact on his personal situation. Moreover, the petitioner's abstract general interest in protecting wildlife, expressed through his publications and his activities in associations, might not be considered sufficiently specific, detailed and appropriate, since the scope of 'environmental protection' is extremely broad.

Finally, the Conseil d'Etat reasoned that while it is easy to maintain that all citizens may participate in the consultation procedures on a draft order, such participation cannot be sufficient to establish legal standing that fulfils the conditions required by the court.

This – on the whole, conventional – assessment of standing brings to environmental law a certain imbalance in access to the courts as between natural persons and legal persons – notably where the latter are environmental protection associations, for which the legislature has ensured easy access to the courts, with even a presumption of standing (Environmental Code, Article L. 142-1).

Consequently, when reading the judgment, one cannot fail to wonder why Mr A, 'founding member and administrator of environmental protection associations', did not bring an action through the latter in order to seek the annulment of the Order of 30 June 2015, knowing that proceedings brought by associations would in all probability be more easily allowed.

But any answer to this question is ultimately much less important than that of whether natural persons and associations should be treated differently when it comes to access to the courts in environmental litigation. Is an association not ultimately a grouping of natural persons who, like Mr A, take an interest and 'play an active role' in environmental protection?

2- In its consideration of the petitioner's standing, the second part of the Conseil d'Etat's reasoning is new; but, equally, it hardly comes as a surprise, in that it also questions the need to take a bolder approach to the unique procedural features of environmental law.

Unsurprisingly, the Conseil d'Etat holds that Article 7 of the Charter for the Environment – according to which 'Everyone has the right, in the conditions and to the extent provided for by law, to have access to environmental information held by public bodies and to participate in public decision-making likely to affect the environment' – does not oblige an administrative court to alter the conditions for its consideration of petitioners' standing in actions brought against administrative measures likely to affect the environment.

This approach is consistent with the existing case-law on Article 7, which unambiguously acknowledges its constitutional value but interprets its scope strictly (Plenary ruling of the Conseil d'Etat, 3 December 2008, Petition No. 297931, *Commune d'Annecy*, Rec. CE 2008, p. 322) and rejects, in the majority of cases, any plea alleging that it has been infringed (see, for example, ruling of the Conseil d'Etat, 28 March 2011, Petition No. 330256, *Collectif contre les nuisances du TGV de Chasseneuil-du-Poitou et de Migne-Auxances*, Rec. CE 2011, p. 967).

However, by resisting more flexible consideration of standing on the basis of Article 7 of the Charter, the courts refuse to forge the missing link between participation, information and access to justice in national law, even though this is essential if environmental justice is to be attained.

The right of access to justice is one of the three pillars – the indivisible elements, alongside public participation and access to information – of environmental justice as enshrined in the Aarhus Convention of 25 June 1998, signed and ratified by France.

Yet only the rights of access to information and public participation have been specifically enshrined in national law, where environmental litigation is to a large extent absorbed into the procedures of ordinary law.

However, it is difficult not to see the judgment of 26 October 2015 as intended not only to thwart an individual litigant whose involvement in the advance public procedure during preparation of the contested Order is restricted to the exercise of a right to information and to procedural participation, with no direct impact on the decision taken, but also to prevent the risk of overloading the administrative courts if this type of remedy were to be generally accepted…

This is the same barrier to recognizing the specific features of individual legal interests in bringing environmental proceedings that the Conseil d'Etat upheld when, reading its judgment on 23 October 2015, it ruled on Article 9 of the Aarhus Convention, finding that the latter does not have "either the aim or the effect of giving everyone a right to review of any decision likely to affect the environment".

From a legal point of view, this decision is perfectly permissible and has the merit of not calling into question the direct effect and the applicability of the article cited. Article 9 of the Aarhus Convention does not expressly require national authorities and courts to simply accept that any individual has legal standing to bring proceedings against any decision likely to affect the environment, but rather entrusts each Party with responsibility for ensuring that members of the public having a sufficient interest have access to a review procedure to challenge the legality of any such decision. The question then remains of what is meant by 'sufficient interest' to bring proceedings.

In this regard, the wording used by the Conseil d'Etat is in line with earlier case-law on Article 2 of the Charter for the Environment, initiated by the administrative courts and confirmed by the Conseil d'Etat, which has held that this provision – according to which 'Everyone is under a duty to participate in preserving and enhancing the environment' – cannot in itself give all those who invoke this provision standing to bring an action on grounds of ultra vires against any administrative decision that they seek to contest (Ruling of the Conseil d'Etat, 3 August 2011, Petition No. 330566, *Mme B. et autres*: *Environnement et développement durable* 2011, Commentary 124, P. Trouilly).

Although the stability of rulings that constitute national case-law has been maintained, it may be a matter of regret that, as in the above-mentioned judgment of 3 August 2011, the Conseil d'Etat has not seen fit to recognize the specific nature of the facts before it and to permit a significant development in its approach to considering individual legal interests in bringing environmental proceedings, so as to give due effect to the existence of particular provisions on this point without introducing any form of *actio popularis*.

On the other hand, should the consistency and cohesion of the case-law on standing really be sacrificed in order to achieve this?

Since individual litigants genuinely wish to participate effectively in the process of making decisions likely to affect the environment, this is undoubtedly a question that will be asked of the Conseil d'Etat again in years to come… **Meryem DEFFAIRI**

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