



**Le juge administratif
et
le droit communautaire
de l'environnement**

**National administrative courts
And
Community
Environmental law**

REACTIONS

**Information et participation en matière d'environnement
Public information on and involvement in environmental issues**

**SEMINAIRE 28-01- 2008
Bruxelles-Brussels**

Mr. Kari KUUSINIEMI

(Judge – Supreme Court of Finland)

As the Finish case concerning this cd was mentioned by the President and the reporter, it is fair to say a couple of words about the case, which I took here just as a curiosity.

Why the appeal was not accepted grounded : it was because of the national act on openness of the government activities which says that as a rule the one who wishes to have a document may himself say in what form he wishes to have it. But there is an exception that acces to information in an official document in a computerised form is at the discretion of the authority, and in this very case the authority -the minister of the environment- has had rejected the wish to have the document in cd, because they said it is possible to have certain information concerning the threatened species of their sites disclosed which are sacred when having this in cd-form and also there is an exception at the Argus Convention and also in the directive which give grounds for that kind of interpretation.

José ROSENDO DIAS

(Juge - Cour administrative suprême-Portugal)

Une précision m'a été demandée concernant le rapport portugais.

La procédure d'injonction de communication d'informations consiste en un procès très simplifié si on le compare avec le procès mené sur la base d'une action « de droit commun ». C'est un procès qui implique donc que l'administration réponde dans des délais excessivement brefs.

Il ne s'agit donc pas d'une procédure en annulation.

Le juge va examiner si le demandeur a droit ou non à l'information qu'il demande et va prendre position sur toutes les questions posées.

Le délai pour prendre la décision est aussi très bref. On peut donc considérer qu'il s'agit d'une procédure spéciale mais il n'en demeure pas moins que le procès est effectif. C'est une procédure qui a bien fonctionné jusqu'à présent et qui existait déjà, dans ses caractéristiques fondamentales, avant même que la réforme de notre contentieux ne soit opérée.

Cette procédure n'est pas une procédure d'extrême urgence mais elle est soumise à des délais comme en extrême urgence.

Les procès relatifs à ces questions sont d'autant moins nombreux que fonctionne, auprès du Parlement, une commission à laquelle les intéressés peuvent s'adresser avant d'entamer la procédure d'injonction.

Hanna SEVENSTER

(State Councillor – Council of State of the Netherlands)

I think Mr. Pâques posed a question regarding the Netherlands. It concerned the new procedural requirements for standing, whether or not they would be in conformity with the standstill requirement of the Aarhus-convention. Actually, whether that issue was considered at all was your first question.

I can't answer the question whether it was considered at all when introducing this law, but as you may have seen from our country report it was very much debated and much discussed. We do have case law on the compatibility of these new requirements with the EIA-directive and also with Article 6 of the European Convention on human rights, but not on the relation with the standstill requirement.

But perhaps I can provide you with some comfort because I don't think it would be in conflict. The new law is in our country not considered to be a deterioration of the standing rights of citizens and NGO's.

Before this change, the system used to be such as to require people to go to the judge on the same grounds as they had invoked before the administration. There is a two-step system : first there is review within the administration and then appeal to a court. Both review and appeal previously had to be on the same grounds, which was interpreted in the case law as to require appeal on the same legal grounds.

This case law has been overturned by our Council of State in case of EC-law because it was considered to be in conflict with the idea of direct effect of EC-law. If an argument of EC-law, let's say a project is in conflict with the Bird's directive, hadn't been raised before the administration then strictly speaking according to the law you were not allowed to raise it before the court. This was considered to be in conflict with EC-law and hence overturned by the Council of State

Mr. Stefan ROSENMAYR

(Judge – Administrative Court of Austria)

When talking about information on the environment, it has to be distinguished there is one right to get information on the environment upon request and in some cases there is the obligation of the authorities to give information on the environment without request. That is true in those cases where there are dangerous installations and such information has to be given according to the Servesso Directives already. In this context the general reporter made a very interesting remark concerning the right to information upon the environment as a right of the third generation. In this context I would like to point out that in some cases to receive information may be considered as a right of the first generation. And in this context I would like to refer to the case law of the European Court of Human Rights who explicitly stated such

a right namely in the Italian case “Gara vs. Italy” where it is said that the authorities have a positive obligation to actively inform a neighbouring population of the danger of an industrial installation, with very dangerous emissions of chemical substances that puts them, their health and their homes in danger. The same reasoning was also applied by the European Court of Human Rights in the case of “Eunayildits” where there was an explosion of a site, a waste collection site, and the authorities had not informed the neighbouring population actively of such a danger and in this context it was the right to live under the European Convention of Human Rights which came into play. So I only wanted to make this short comment.

Mr. Nial FENNELLY

(Judge – Supreme Court of Ireland)

Because of that I fall into the second category of participants that comes from a court of general jurisdiction rather than being a specialist in environmental law.

The observations I make relate to the two categories of subject matter, firstly on the information issue. There is in Ireland as in the common law countries generally the longstanding tradition, such as was in the Scandinavian countries, of automatic right of access to public information. Nonetheless, a very comprehensive freedom of information legislation has been introduced since the mid-1990's. That, without going into unnecessary detail, includes an obligation on an authority when refusing access to make a reasoned decision, a point that arosen the discussion, a timelimit and a deemed decision to ground the information if the decision was not made in time and than an appeal procedure to an information commissioner. Therefore, in parallel with our neighbours in the UK, we have very little case law, but there are a small number of cases on the marginal issues. But that general right to freedom of information, nonetheless, needs to be distinguished from the right which exists independently and by way of longstanding legal provision in the context of planning, development, construction and other projects of every kind based on the principle laid down by the Irish courts that there are three parties in the case of any such project, there's the public authority, there's the applicant and there's the public. And every member of the public has the right to object, doesn't need to establish any particular standing to do so and the person participating has the right to receive information within that context relating to the project, entirely independent from freedom of information act rights.

It must be recognized that there is a balance there because of those parties. There's an interest in protecting the public, but there is also an interest in protecting another public endorsed which is ensuring that the decisions are made relatively quickly and efficiently and that desirable public projects are not delayed. That leads to legislation restricting access to the courts to those who can show firstly that they have an interest in the matter. Any member of the public will have an interest if the project hasn't been properly notified and it's an automatic ground for annulment if an application is made within time and is shown that proper notice has been given. But subject to that, every member of the public must establish an interest in the subject matter and it's very likely that other than the type of person I mentioned, a person

who didn't participate in the administrative status of the process, would not be regarded as having the sufficient standing to go to court.

There's a second important criterium apart from a strict timelimit of two months and that is that you must show that you have a substantial case to establish the invalidity of the planning decision. That's all in recognition of the balance of two public interests that are involved.

Those are general provisions that exist in Irish law. In our answers to the questionnaire we refer to quite a number of points in the case law, some detailpoints were raised. A particularly interesting one was discussed, I think, by M. Pirot concerning the question of the environmental impact assessment and the point that wich in application could be made to the court. We indeed had in the supreme court a discussion of this point only last week. It didn't for other reasons have to be decided, but it was an interesting point. Somebody said that the environmental impact approach of the authority was incorrect. But this party hadn't taken any part whatever in the procedure in any event so we felt he wasn't entitled to make the point. But it could be, I suppose, that you would have a deemed decision at the early stage to say here is something that could be initially reviewed. Because I take the point it could be inefficient to wait until the end of the entire planning procedure and the determination by the authority and perhaps even on appeal before then saying well now we have a decision that could be reviewed by the courts. But that hasn't been decided yet.