EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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Difference in the treatment of landowners' associations set up before and after the creation of an approved municipal hunters' association: the Court replies to the *Conseil d'Etat*'s request for an advisory opinion

The European Court of Human Rights has today delivered, unanimously, an advisory opinion in response to a request (no. P16-2021-002) made by the *Conseil d'État* of the French Republic.

In its request, the *Conseil d'État* asked the Court about the relevant criteria for assessing the compatibility with Article 14 (prohibition of discrimination) of the European Convention on Human Rights taken together with Article 1 of Protocol No. 1 (protection of property) of a legislative provision excluding the possibility for landowners' associations set up after the creation of an approved municipal hunters' association (*association communale de chasse agréée* – ACCA) to withdraw their land from the ACCA's hunting grounds once they had attained the minimum surface area to be able to do so.

In its advisory opinion, the Court replied that the *Conseil d'Etat* would first have to assess whether the difference in treatment – resulting from Article L. 422-18 of the Environment Code, as worded subsequent to the Law of 24 July 2019 – between associations "having a recognised existence prior to the date of creation of the ACCA" and associations set up after that date could fall within the scope of Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1, and if so, whether that difference concerned persons in analogous or relatively similar situations.

If the reply to each of these two preliminary questions was in the affirmative, the Court specified that in determining whether the difference in treatment at issue was "legitimate and reasonable" and, accordingly, compatible with Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1, the requesting court would be required to ensure: firstly, that in making a distinction between categories of owners of land or hunting rights on the basis of the date on which their association had been set up, the legislature had pursued one or more "legitimate aims"; secondly, that the law provided a legal basis satisfying the requirement of lawfulness enshrined in Article 1 of Protocol No. 1; and, thirdly, that there was a "reasonable relationship of proportionality" between the means employed and the legitimate aim(s) sought to be realised.

In that respect, the requesting court's assessment should be carried out in the light of the criterion "manifestly without reasonable foundation" as regards control of the use of property, within the meaning of the second paragraph of Article 1 of Protocol No. 1.

In assessing the proportionality of the measure establishing the difference in treatment at issue, the requesting court should take into account, *inter alia*, the nature of the criterion of differentiation introduced by the law and its impact on the national authorities' margin of appreciation; the choice of means employed to achieve the aim(s) pursued; the appropriateness of the means employed in relation to the aim(s) pursued; and the impact of the means employed.

A legal summary of this case will be available in the Court's database HUDOC (link).

Procedure

On 19 April 2021 the Court received a request for an advisory opinion (no. P16-2021-002) formulated by the French *Conseil d'Etat* in a decision of 15 April 2021.

On 31 May 2021 a panel of five judges of the Grand Chamber decided to accept the request. The composition of the Grand Chamber was determined on 2 June 2021.

The President of the Grand Chamber invited the parties to the domestic proceedings (*Forestiers Privés de France* and the Ministry for Ecological Transition and Solidarity) and the third parties (the *Fédération nationale des chasseurs* (National Hunters' Federation) and the *Association nationale des fédérations départementales et interdépartementales des chasseurs à associations communales et intercommunales de chasse agréée*s) to submit written observations.

Background to the case and the domestic proceedings

The question put to the Court arose in the context of proceedings pending before the *Conseil d'État*, to which an application had been made following an amendment to Article L. 422-18 of the Environment Code by section 13 (point I, no. 16) of Law no. 2019-773 of 24 July 2019 on the creation of the French Agency for Biodiversity (*Office français de la biodiversité*), altering the missions of the hunters' federations and strengthening the environmental protection police.

The *Conseil d'État* asked the Court about the relevant criteria for assessing the compatibility with the European Convention on Human Rights of a legislative provision limiting the possibility for landowners' associations to withdraw their land from an ACCA's hunting grounds.

The Law of 10 July 1964 (known as the "Loi Verdeille") introduced the ACCAs, which were intended to promote the rational management of hunting and of game stocks by encouraging the practice of hunting on territories with a sufficiently large area. Landowners were required to become members of the ACCA set up within their municipality and to transfer their land to it, thus creating hunting grounds at municipal level. Article L 422-10 of the Environment Code nevertheless provided that when an ACCA was created, objections to the compulsory transfer of land could be made by landowners relying on personal convictions, or landowners or landowners' associations holding hunting rights over land forming an area greater than the minimum area referred to in Article L. 422-13 of the Code. Article L 422-18 of the Environment Code, as worded subsequent to the Law of 24 July 2019, provides that whereas individual landowners are entitled to withdraw from the ACCA at any time as long as their land attains the minimum surface area, only those landowners' associations which had a recognised existence prior to the date of creation of the ACCA are entitled to withdraw from the ACCA if their land pooled together reaches that threshold; comparable associations set up after that date are deprived of that right.

The federation *Forestiers privés de France* (Fransylva), the applicant in the proceedings before the *Conseil d'État*, submitted that Article L 422-18 of the Environment Code as currently worded amounted to discrimination in breach of Article 14 (prohibition of discrimination) of the Convention and Article 1 of Protocol No. 1 (protection of property), in that it deprived landowners' associations set up after the creation of an ACCA of the right to withdraw from it even if they pooled together a total area of land satisfying the requirement set out in Article L 422-13 of the Environment Code.

Proceedings before the Conseil d'État

On 18 February 2020 *Forestiers privés de France* lodged an application for judicial review of Prime Ministerial Decree no. 2019-1432 of 23 December 2019, issued in accordance with Law no. 2019-773 of 24 July 2019. The *Fédération nationale des chasseurs* and the *Association nationale des fédérations départementales et interdépartementales des chasseurs à associations communales et intercommunales de chasse agréées* submitted a joint request to intervene in the proceedings.

The applicant federation submitted that the temporal distinction introduced by Article L. 422-18 of the Environment Code, as worded following Law no. 2019-773 of 24 July 2019, between landowners' groups which had been formed prior to or after the creation of the corresponding ACCA was disproportionate and, as such, contrary to Article 14 of the Convention taken together with Article 1 of Protocol No. 1. It contended that the aim of preventing destabilisation of the existing ACCAs could have been attained by other means, for example by introducing the criterion of a minimum threshold of land for collective withdrawal from an ACCA. The public-interest aim which had justified the creation of the ACCAs could have been attained without it being necessary to make any kind of

temporal distinction between the landowners' groups as regards the option of withdrawing their hunting grounds from the ACCA.

The Court's opinion

The Court noted that the question put to it concerned the criteria enabling the requesting court to assess whether or not the difference in treatment authorised by Article L. 422-18 of the Environment Code as currently worded was compatible with Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1.

The Court observed that the requesting court would have to examine two preliminary questions. The first was whether the difference in treatment introduced by the law between various legal entities, a difference based on the date on which they had been formed, could fall within the scope of Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1. In the event of a positive response, the second preliminary question which arose related to the criteria enabling the requesting court to determine whether the difference in treatment in the proceedings pending before it concerned persons in analogous or relatively similar situations, for the purposes of the same Articles.

Next, returning to the criteria enabling the requesting court to assess whether the difference in treatment at issue was compatible with Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1, the Court reiterated that, even when they concerned persons or categories of persons in analogous or relevantly similar situations, differences in treatment were not all discriminatory, and, in consequence, were not all necessarily contrary to Article 14 of the Convention. Only differences in treatment which did not have an "objective and reasonable justification" were discriminatory. In the Court's view, a difference of treatment lacked objective and reasonable justification if it did not pursue a "legitimate aim" and/or if there was not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised"

As to whether one or more "legitimate aims" had been pursued, in enacting the Law of 24 July 2019, as the Government had noted, the legislature had indicated that, in its view, the factual circumstances which had given rise to the restrictions on the right of withdrawal from the ACCAs established by the Loi Verdeille had not substantially changed over time, with the result that it was still necessary to prevent small landowners forming associations, after the creation of an ACCA in their municipality, with a view to circumventing the initial compulsory transfer of hunting rights.

In the Government's view, Article 422-18 of the Environment Code, as worded following the Law of 24 July 2019, was directly related to the public-interest aim of encouraging hunting across sufficiently large territories. They submitted that the restrictions on the right to withdraw from ACCAs, imposed on the more recently formed landowners' associations, had arisen, firstly, from the legislature's wish to avoid an excessive increase in such withdrawals, which was likely to endanger the functioning of the ACCAs themselves. Secondly, those regulations were based on the premise that the number of more recently formed landowners' associations was likely to increase in order to thwart the legislature's wish to ensure the longevity of the current ACCAs.

Assuming that the requesting court were to consider that the arrangements for withdrawal from the ACCAs introduced through the legislative provision enacted in 2019 pursued one or more "legitimate" aims, it would then need to determine whether the means used by the authorities to achieve those aims were consistent with them, so that there was a reasonable relationship of proportionality between the means and the aims.

Without prejudice to the outcome of the proceedings before the *Conseil d'État* regarding whether, in enacting the Law of 24 July 2019, the means employed by the legislature had been proportionate to the general-interest aims pursued by the law, the Court set out the relevant criteria which in its view should guide the *Conseil d'Etat* in its assessment of that issue.

(a) Compliance with the requirement of lawfulness enshrined in Article 1 of Protocol No. 1

It was for the *Conseil d'État* to assess, firstly, whether section 13(1-16) of the Law of 24 July 2019 constituted, through its accessibility, clarity and the foreseeability of its effects, a basis capable of satisfying the requirement of lawfulness inherent throughout Article 1 of Protocol No. 1 as a whole.

To date, the Court had not found a violation of any of the rights guaranteed by the Convention or the Protocols thereto when it had examined, for example, parliamentary legislative intervention affecting a future dispute which had not yet been submitted to the courts when the law in question had been enacted, or legislative intervention performed "on clear and compelling public-interest grounds" either to fill a legal vacuum or to establish and reaffirm its original intention.

(b) Criterion of "manifestly without reasonable foundation"

In the specific context of the organisation and practice of hunting in France, the Court had already examined, under Article 1 of Protocol No. 1 taken alone or in conjunction with Article 14 of the Convention, legislative measures entailing the loss of exclusive hunting rights affecting certain landowners as a result of the system introduced by the Loi Verdeille. In the Court's view, obliging only small landowners to pool their hunting grounds with the aim of promoting better management of game stocks had not in itself been disproportionate. The Court held that the statutory provisions in question were "the expression of a legitimate institutional wish" to avoid the proliferation of hunting entities and to ensure strict supervision of a leisure activity which could pose a danger to property and people and had a significant environmental impact.

(c) Nature of the criterion for the distinction established by law and its impact on the margin of appreciation enjoyed by the national authorities

In the factual context of the present request for an advisory opinion, the national authorities enjoyed a wide margin of appreciation. The first reason for this related to the subject matter and the background to the measure introducing the difference in treatment in question. The second reason related to the nature of the ground underpinning the difference in treatment being challenged in the proceedings before the *Conseil d'État*. The difference in treatment was based on a temporal criterion provided for by the legislature, namely the date on which a landowners' association had been formed, whether before or after the ACCA. Such a criterion referred indirectly to the criterion of the size of the plot of land, in other words to that of immovable "property". The Court had previously held that the very nature of that criterion justified a considerably wider margin of appreciation than if the distinction in question resulted from a ground regarded by the Court as unacceptable as a matter of principle, such as racial or ethnic origin, or as unacceptable in the absence of very weighty reasons, such as gender or sexual orientation.

(d) Choice of the means employed to achieve the aim(s) sought to be realised and appropriateness of the means used in relation to the aim(s) sought

The Court had had occasion to stress that measures of economic and social policy often involved the introduction and application of criteria based on making distinctions between categories or groups of individuals. It had found that although such temporal restrictions might to a certain extent appear arbitrary for the individuals affected, the differences in treatment to which they gave rise were an inevitable consequence of introducing new regulations, and that the creation of a new scheme sometimes necessitated the introduction in domestic law of cut-off points which applied to large groups of people.

The Court noted that under French law, the creation of an association on the basis of the Law of 1 July 1901 was a rapid and relatively inexpensive matter, thus rendering plausible the risk referred to by the Government that, following the development in the *Conseil d'État*'s case-law, a multiplicity of associations bringing together small landowners could have been formed with the primary aim of enabling their members to withdraw their land from the existing ACCAs. Were that the case, the

temporal distinction adopted by the legislature between the different landowners' associations depending on the date of their creation could be viewed as corresponding to the legislature's wish to preserve the existing ACCAs.

Lastly, as the Court had had occasion to reiterate, the possible existence of alternative solutions did not in itself render the means employed by the national legislature unjustified. Provided that it remained within the bounds of its margin of appreciation, and therefore that the measures chosen corresponded to the legitimate aims pursued by the law, it was not for the Court to say whether the legislation represented the best solution for dealing with the problem or whether the legislature's discretion should have been exercised in another way.

(e) Impact of the means employed

Under this provision of Protocol No. 1 to the Convention, the national authorities enjoyed a wide margin of appreciation, not only in determining the measure of control that should be imposed to meet a public-interest imperative but also in selecting, from among the different types of loss that such a measure could entail, those which could give rise to an entitlement to compensation.

The Court thus concluded that it was, *inter alia*, in the light of the above considerations that the *Conseil d'État* would have to determine whether or not the difference in treatment introduced by the legislative provision being challenged in the proceedings before it satisfied the requirement of proportionality and, accordingly, whether or not such a difference in treatment could be considered compatible with Article 14 taken in conjunction with Article 1 of Protocol No. 1.

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