4

The Procedure for Making Claims against Public Authorities

Claims in administrative law cases are called a request (*la requête*) or *recours*. English lawyers familiar with the Privy Council before 1642 will recognise the name from its judicial activity in the Court of Requests. There are a number of important differences from the application for judicial review in English law and their equivalents in Scots and Northern Irish laws. In the first place, a claim or request is not limited to an action seeking to annul an administrative decision. That is the *recours pour excès de pouvoir* (the remedy for misuse of power), which is concerned with the legality of administrative action. But a request can also include claims for breach of contract or administrative liability, or for appeals against administrative decisions (such as on certain social benefits or certain taxes), and the remedy is granted more than merely annulment. This is the *recours de pleine juridiction*, which is dispersed in a variety of different ways in English law.[1] So the request is a one-stop place for all kinds of action brought against the administration. For ease of understanding, this book refers to a 'request' as a 'claim'.

4.1 PRINCIPLES OF THE ADMINISTRATIVE COURT PROCESS

French administrative court procedure is governed by seven principles, some of which are of greater importance than others. Four are fundamental values (the right to effective redress, the principle of contradiction, the principle of openness and the principle of a decision within a reasonable time) and three are operational principles based on experience (principally the written, the collegial and the inquisitorial character of judicial proceedings). These last three are the

[1] For completeness, Guyomar and Seiller also add *le recours en declaration* (covering matters such as a request that a court clarify its decision) and *le contentieux de la repression* (where fines are imposed for administrative infringements such as blocking the highway): M. Guyomar and B. Seiller, *Contentieux administrative*, 5th ed. (Paris: Dalloz, 2019), section 1 §2.

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distinctive features of the French system. They are inherited from pre-Revolution practices, originally canonist procedure. To a great extent, there is a path dependency in these aspects of the French administrative law tradition of a fair trial. By contrast, the first four principles have been shaped in recent years by the shared tradition of liberal democracies represented by the European Convention on Human Rights.

4.1.1 *The Right to Effective Redress* (Le droit au recours)

France recognises a 'right to effective redress'. This is traced back to art. 16 of the DDHC.[2] As the Conseil constitutionnel put it in 1989, 'the good administration of justice requires that the exercise of an appropriate remedy ensures the effective guarantee of the rights of those affected'.[3] The principle was also recognised by the Conseil d'Etat in 1998 as a general principle for any kind of claim (where in 1950 it was done for the *recours pour excès de pouvoir* only).[4] It is a principle found in art. 13 of the European Convention on Human Rights and was considered a general principle underlying the constitutional traditions of Member States by the ECJ in 1986.[5] The Conseil d'Etat brought this thinking together in *Bayrou* in 2006, when it stated that 'the possibility of seeking an effective redress before a judge has the character of a fundamental right'.[6] This principle shapes the structure of the right to bring a claim either for judicial review of a decision or for an appeal or for damages. It also secures a number of other rights, such as the right of the asylum seeker to remain in France until his claim has been assessed by the OFPRA.[7]

4.1.2 *The Principle of Contradiction* (Le principe du contradictoire)

The idea that a party should be able to challenge points raised by the other party or by the judge is a consideration of both fairness and efficiency of

[2] 'Any society in which the guarantee of rights is not assured . . . has no constitution.'

[3] CC decision no. 89–261 DC of 28 July 1989, Rec. 81, para. 29.

[4] CE 29 July 1998, *Syndicat des avocats de France*, no. 188715, Leb. 313. The right to obtain judicial review was recognised as a general principle of law in CE Ass. 17 February 1950, *Minister of Agriculture c Lamotte*, no. 86949, Leb. 110, which admitted the *recours pour excès de pouvoir* against administrative decisions that a law from the 'Régime de Vichy' had said were not subject to any review.

[5] Case 222/84, *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR I-1615. See now art. 47 of the EU Charter of Fundamental Rights.

[6] CE 13 March 2006, *Bayrou and Association de défense des usagers des autoroutes publiques de France*, no. 291118, Leb. 1017.

[7] CE 4 December 2009, *Minister of Immigration c Hammou*, no. 324284, Leb. 781.

proceedings. English lawyers would tend to describe it as 'the adversarial principle'. But it is not so much about giving two parties a say as it is about ensuring that the citizen is able to challenge points relating to their claim. The principle is now laid down in art. L5 CJA: 'The investigation of cases is contradictory. The requirements of contradiction are modified by urgency, the secrecy of national defence and by the safety of persons.' This reflects prior case law of the Conseil d'Etat which had held that there was 'a general principle applicable to all administrative courts according to which procedure should have a contradictory character'.[8] The content of the principle was explained in the Conseil d'Etat's decision in *Esclatine*: 'The principle of contradiction, which aims to ensure the equality of the parties before the court, implies the communication to each of the parties of the totality of the documents in the file, as well as, where applicable, the grounds raised *ex officio* [by the judge].'[9]

As this quotation suggests, the right to contradict includes the right to contradict the judge if she raises a point of law *ex officio*. Article R611-7 CJA requires that the judge notify the parties when she considers that her decision may well be based on a point she wants to raise *ex officio*. This is treated as a general principle and applies to other administrative courts, such as the Cour nationale du droit d'asile.[10] Guyomar and Seiller suggest this rule is based on the idea of equal treatment of the parties (the 'equality of arms') and also on loyalty to the litigation process.[11] Since this *ex officio* power is widespread before administrative courts due to the numerous *moyens d'ordre public* (grounds of public policy which the judge is bound to raise even if they have not been pleaded by the parties), the principle of contradiction has a significant impact on the courts' process.

The principle that documents submitted by one party should be communicated to the other dates back to the *ordonnance* of Chancellor d'Aguesseau in 1738. The result is that the judge is not allowed to base the decision on material which the parties have not seen.[12] The other party must be given adequate time

[8] CE Sect. 12 May 1961, *Société La Huta*, no. 40674, Leb. 313. The Conseil constitutionnel would see this as part of the right of defence: CC Decision no. 89–268 DC of 29 December 1989, *Finance Law for 1990*, Rec. 110.

[9] CE 29 July 1998, no. 179635, Leb. 320. The particular application of the principle in that case (that the conclusions of the *commissaire du gouvernement* (now *rapporteur public*)) do not have to be communicated in advance to the parties) no longer applies, but the principle stated remains valid.

[10] CE 14 March 2011, *Ahmad*, no. 329909, Leb. 83.

[11] Guyomar and Seiller, *Contentieux administratif*, no. 765.

[12] CE Sect. 23 December 1988, *Banque de France c Huberschwiller*, no. 95310, Leb. 464 ; CE ord. 23 December 2016, *Section française de l'observatoire des prisons*, no. 405791.

if a new document or argument is raised. On the whole, this avoidance of surprise is now solved by allowing both parties access to the same folder within the *Télérecours* platform and does not need much manual communication. But, if one party is allowed to submit a new document, then the other has to have reasonable time in which to respond. For example, in *Texier c Le Bail*, three days was judged too short to respond to substantially new points raised by one of the parties.[13] For that reason, apart from emergency procedures, it is often prudent for the judge to close the investigation period some time (usually two weeks) before the hearing of the case, since art. R613-3 CJA provides that documents submitted after this time do not have to be communicated to the other side. Originally, the principle of contradiction had one important limit, which was that the facts put forward by public authorities could not be challenged. In other words, the facts on which an administrative decision was made were deemed true without the possibility for a claimant to challenge the assessment made by public authorities. This changed with the 1916 case of the Conseil d'Etat known as *Camino*.[14]

As art. L5 CJA identifies, there are exceptions to the requirement of the right to contradict – urgency, legally protected secrecy and the safety of persons. The most difficult of these is national security. The exceptions are narrowly construed. In principle, the judge cannot take account of materials legally protected by defence secrecy which are submitted, but not communicated to the other party.[15] So in *Moon sun myung*, a woman was prevented from continuing her journey to Spain on her arrival into France on the basis of data held in the Schengen database which were not given to her.[16] She complained to the CNIL, which refused her access to the relevant documents, and she challenged that decision. The Conseil d'Etat held that it could not make a decision on her complaint without access to the information on her in the database and that the CNIL was obliged to provide the court with it. In its view, 'if, consistent with the principle of the contradictory character of investigation, the administrative judge is bound only to decide on the basis of those documents in the file which have been communicated to the parties, it is incumbent on him in the exercise of his general powers of directing the procedure to obtain for himself, by legal means those elements of the type which will permit him to come to an informed decision on the litigated issues'. In rare cases, a court will read materials not available to the parties. Legislation

[13] CE 28 December 2007 no. 282309.
[14] CE 14 January 1916, *Camino*, no. 51619, Leb. 15, RDP 1917, 463 concl. Corneille, note Jèze.
[15] CE 11 March 1955, *Coulon*, no. 34036, Leb. 149, dealing with the dismissal of an employee.
[16] CE Ass. 6 November 2002, no. 194246, Leb. 380.

on terrorism of 2015 enshrined in art. L773-2 CJA permits the appointment of a special panel of the Conseil d'Etat which is allowed to see defence secrets, but these documents are not available to the parties. Article L773-3 provides for the adaptation of the requirements of contradiction to these circumstances. The Conseil d'Etat considers that these arrangements do not excessively interfere with the requirements of a fair trial under art. 6 of the European Convention on Human Rights.[17]

4.1.3 *The Principle of Openness* (Le principe de la publicité)

Justice is rendered in the name of the French people (art. L2 CJA). In addition, litigation is one of the mechanisms by which public authorities are held to account to show that they have acted within their legal powers. For both these reasons, it is important that litigation is public – it is not simply the resolution of a private dispute between a citizen and an administration. As has been seen, this was established as a matter of practice by the Conseil d'Etat in 1831. Accordingly, art. L6 CJA provides that there be a public hearing of all cases. In addition, art. L10 requires that judgments are rendered publicly and contain the names of the judges. Article 20 of Law n° 2016–1321 of 7 October 2016 added that the public can have access to them for free, and art. 33 of Law n° 2019–222 of 23 March 2019 mandated that it should be done by electronic means. The same law and decree n° 2020–797 of 29 June 2020 introduced exceptions to the naming of courts' members (judges as well as clerks for both administrative and civil courts) when its disclosure is likely to affect the security or privacy of these persons or their entourage, which raised concerns.[18] As we will see, much of the important work in administrative litigation is conducted privately by judges in the stages preceding the formal hearing. Furthermore, it is very common that parties will not attend the formal hearing or will make little contribution to it. All the same, the parties need to be given notice of the hearing date and their right to attend.[19] Obviously, there are a few exceptions, notably in terrorism cases where a special panel is created

[17] CE 8 February 2017, *Ben Abdelhamid*, no. 403040, Leb. 616, 704 and 743.

[18] See Prof. Thomas Perroud, quoting J. Bentham, 'Where there is no publicity there is no justice', https://blog.juspoliticum.com/2019/03/11/lanonymisation-des-decisions-de-justice-est-elle-constitutionnelle-pour-la-consecration-dun-principe-fondamental-reconnu-par-les-lois-de-la-republique-de-publicite-de-la-justice (accessed 27 April 2021).

[19] Article R712-1 states that lawyers are told four days before a hearing, but this can be reduced to two in urgent cases. A late notice to the parties can lead to the nullity of the judicial decision: CE 30 November 1904, *Allarousse*, Leb. 746.

to examine matters that involve national security. Here the hearing of the case can partly be in private (art. L773-4).

4.1.4 *The Principle of a Decision within a Reasonable Time* (La durée raisonnable de la procédure)

The length of proceedings has been a constant complaint about administrative justice in France, and it has prompted many reforms. It is also the commonest complaint before the European Court of Human Rights for breach of art. 6 of the Convention and also an area where state liability can take place on the basis of a simple fault and not of a serious fault as usually required for the misfunctioning of the justice system (see Chapter 8). In 2002, drawing on art. 6, the Conseil d'Etat declared that 'it results from the general principles which govern the operation of administrative courts that litigants have the right that their claims should be judged within a reasonable time'. In this *Magiera* case, a routine public works case took seven and a half years to decide before the *tribunal administratif* of Versailles.[20] The failure to decide in good time does not affect the validity of the decision, but it does lead to a right to compensation, as in the *Magiera* case.

4.1.5 *The Principle of the Written Nature of Proceedings* (Le caractère principalement écrite de la procédure)

By long tradition, French administrative court procedure is essentially written. That implies that parties will submit their main arguments and evidence in writing. That remains the underpinning structure of the *Télérecours* platform. Parties set out their main claims in writing and upload relevant documents. That is not to say that there are not significant moments which are oral. In ordinary proceedings, either the parties or their lawyers are allowed to speak to make observations during the public hearing. In practice, they will say little or nothing at all at that moment in particular before the Conseil d'Etat. Except for matters which involve more the facts of a case than checking the legal arguments, the *rapporteur public* will often give her opinion (*conclusions*) orally and may, at her discretion, give the written version if asked or deposit them in the Service de diffusion des conclusions where anyone can have access to them. As a result of the *Kress* case discussed in Chapter 1, Section 6, it is now common practice, with the exception of the Conseil d'Etat, that parties or their lawyer again take the floor after the *rapporteur public* has given her

[20] CE Ass. 28 June 2002, *Garde des Sceaux c Magiera*, no. 239575, Leb. 247 concl. Lamy.

opinion to 'respond' to her. Importantly, as will be seen later, during the interim or *référé* procedure, it is very common for parties to make substantial oral observations because there is insufficient time for the parties to exchange written documents when the matter is urgent and because the instruction stage is not closed. More generally, two areas were in the vanguard of increased oral hearings. In 1990, a law provided for a judicial review of the removal of a person refused entry into France within forty-eight hours and, as a consequence, provided for an oral hearing to facilitate the speed of this decision-making. In 1992 and 1993 legislation on public procurement provided for an oral hearing where a person was not permitted to participate in the awarding process. Both of these are the commonest occasions for an essentially oral procedure.[21] But the reform of *référés* by the Law of 30 June 2000 increased the importance of oral hearing in many interim procedures.

4.1.6 *The Principle of the Inquisitorial Character of Proceedings* (Le caractère inquisitoire de la procédure)

The inquisitorial character of administrative litigation has as its principal idea that the judge directs the investigation and decides when a case is ready to be judged. In part, this follows as a way of addressing the essential inequality between the citizen and the administration. For example, it was stated in 1936 in *Couespel de Mesnil* that the court may 'require the relevant administration to produce all the documents needed to convince the court and verify the allegations of the claimant'.[22] A further important example is the *Barel* decision of 1954 in which the failure of the administration to provide the documents explaining a decision involving appointment to the civil service led to the Conseil d'Etat deciding that it had acted unlawfully.[23] In relation to discrimination in civil service appointments, the Conseil d'Etat balanced the need to sanction discrimination and the difficulty of the administration's complex processes. It held that first the claimant must demonstrate sufficient facts that raise a presumption that a breach of the principle of equality before the burden of proof shifts to the defendant administration to disprove any unlawful discrimination.[24]

[21] See A. Monod, 'Le dévéloppement de l'oralité du point de vue d'un avocat aux Conseils', in C. Teitgen-Colly, ed., *Pouvoir et devoir d'instruction du juge administratif* (Paris: Institut des sciences politiques et juridiques de la Sorbonne, 2017), p. 117.

[22] CE Sect. 1 May 1936, no. 44513, Leb. 485.

[23] See text at note 65.

[24] See CE Ass. 30 October 2009, *Mme Perreux*, no. 298348, AJDA 2009, 2385.

More recently, the Conseil d'Etat has repeated that 'it is up to the administrative judge, in the exercise of his general powers to direct the proceedings, to take any measures he thinks fit through legal means of a kind that permit him to be convinced about issues that are being litigated'.[25] In that case, the court insisted correctly that the redacted documents and the reasons for secrecy be included in the case file, even if defence secrecy itself was not breached thereby. The consequence of the judge being in charge of the proceedings is that the reporter judge decides when a case is ready for decision. It is up to the judge to be satisfied with the outcome of the case. All the same, the burden of proof remains on the claimant.

4.1.7 *The Principle of Collegiality (*Le principe de la collégialité*)*

Article L3 CJA provides that judicial decisions are made collegially unless the law provides otherwise. This principle is said by Odent to be associated with the impartiality and independence of judges: 'A serious deliberation leading to a judgment offering the litigant guarantees of independence and impartiality implies necessarily that several persons are consulted, discuss their respective points of view and come to a majority decision.'[26] As will be seen, this principle minimally requires that a judicial decision is reached by a series of individual inputs – at least, those of the reporter judge, the *rapporteur public* and the president of the court. Many court panels will consist of other members who have not read the full file, but whose role is to consider the proposals made for the decision in the case and to decide whether they are broadly consistent with administrative law principles and whether the solution is adequately justified. The decision is the result of the work of more than one individual. His prejudices and weaknesses become less influential in a collective decision. In that way, impartiality of the result is secured. If the decision is the result of a collegial procedure, then there is less scope for putting pressure on the judge to decide in a particular way.

In part, the practice of collegial decision-making is a way of ensuring effective justice. One person may easily be mistaken, but a collegial court is less likely to be mistaken. But there need to be exceptions to be efficient and to avoid delay. Article L222-1 CJA allows for exceptions relating to the subject matter of the litigation or the issues to be tried. The Code then lists a number of types of cases which may be tried by a single judge in the *tribunal administratif*.

[25] CE 20 February 2012, *Ministre de la défense et des anciens combattants*, no. 350382, Leb. 54.
[26] Odent, *Cours*, cited in Guyomar and Seiller, *Contentieux administratif*, no. 721.

More importantly, a collegial decision in France does not mean that all judges deciding a case are involved in all stages of the court process. Indeed, much of the process is managed by a single judge. In the first place, we will see that the hearing and the decision-making which follows is prepared by a single judge, the reporter judge. He or she will oversee the whole file and then draft a judgment for decision. The reading of the evidence of facts and the statements of the law that form the background to that draft judgment will not necessarily be read by all the judges who take part in the decision. Rather like in a committee, the presenter is in full possession of the information and the decision makers ask for such information as is necessary to satisfy them that the decision is right. So the final decision is collective, but, unlike British collective court processes, the earlier parts of the process are individual. We will also see that the interim decisions process (*le référé*) is typically the work of a single judge in both preparing the decision and in taking the decision.

In practice, a lot of decisions are taken by single judges.[27] As will be seen in Section 4.4, the president of a court or chamber may resolve a case by *ordonnance* where the result is obvious or where a party has desisted. Nearly all decisions of the *juge des référés* described in Section 4.3 are taken by a single judge. In addition, there are a significant number of areas of litigation where the *tribunal administratif* may decide through a single judge. In 2018, these first two categories accounted for 26.7 per cent and the last accounted for 38.2 per cent of the cases resolved by the *tribunaux administratifs* – nearly two-thirds of cases.[28] Decision by *ordonnance* accounted for 48.5 per cent of all the decisions of the Conseil d'Etat and for 39.3 per cent of the decisions of the *cours administratives d'appel*. It is neither necessary nor efficient for collegial decisions to be taken in very many cases, even if a collegial decision remains the default approach of French administrative law.

4.2 HOW IS A CLAIM MADE?

Most importantly, the right to an effective redress entails that no permission is required from the court in order to bring a claim, even a claim to annul an administrative decision. The court must come to a formal decision on the merits of all claims submitted to it. Some decisions will be brief, but some form of reason has to be given.

Another way of implementing the right to an effective redress is that bringing a claim against the administration requires limited formality and is free. The most

[27] See Guyomar and Seiller, *Contentieux administratif*, nos. 830–3.
[28] Conseil d'Etat, *Le Conseil d'État et la justice administrative en 2018* (Paris, 2019), p. 17.

common form, which is used by citizens and companies and is obligatory for lawyers and all but the smallest public authorities, is the online *Télérecours citoyens*. Once registered, the litigant completes a note of the complaint about the administrative decision and attaches a copy of the decision and additional documents if necessary such as proof of residence. Alternatively, private parties (individuals and companies) can simply use the post or leave their claim at the court. There is no formal structure to the content of a claim, but it must have the essential elements. Thus it must have the name and details of the claimant, a clear statement of what is being claimed (nullity of a decision, damages for breach of a contract, etc.), what are the facts of the case and what are the legal arguments on which the claimant relies to justify the claim. The claimant can upload documents electronically to the site or send them subsequently by post. This 'dematerialised' system enables the claimant to communicate electronically with the court and to monitor easily the progress of a claim, since she will be notified by email of any new procedural act. Whereas judicial review in England is expensive, the cost is free in France.[29] Since 1 January 2014, the *droit de timbre* (stamp duty), amounting to €35 and imposed some years before, is no longer required.

So how is a potential flood of claims prevented? First, there is the possibility of administrative redress. Second, in some cases, there is need for legal representation.

4.2.1 *Prior Administrative Redress*

The person affected by any administrative decision has a right to request the decision maker or her superior to review it (art. L411-2 Code des relations entre le public et l'administration (CRPA)). Whilst such a request is being considered, the time limit is interrupted against any claim brought to the courts until the request has been rejected or accepted (art. L410-1 CRPA), which means that the time limit starts again entirely after the rejection, contrary to what happens when the time limit is simply suspended. There are obvious advantages of speed, cost and simplicity in encouraging the administration to correct its mistakes. For that reason, the law provides that, in a large number of cases, the citizen is required to bring a request for administrative review before commencing litigation (the so-called *recours administratif préalable obligatoire* (RAPO)). Such a request must be made within the time limit for bringing the claim or sometimes in a reasonable time.[30] In this case, taxpayers sought in

[29] Public Law Project, *An Introduction to Judicial Review* (London, 2019), p. 3.

[30] CE Sect. 31 March 2017, *Ministre des finances et des comptes publics c Amar*, no. 389842, Leb. 105.

2011 to have reviewed their tax for the years 1987 and 1989, which had been the subject of discussion with the tax authorities in 1992 and 1993. It was held that such administrative decisions could not be reopened indefinitely. Normally, the time limit is two months from the date when the administrative decision was properly notified to the claimant. But if it was not properly notified – that is, with no mention of the timing for bringing a claim against it and the necessity of a RAPO, if ever, the Conseil d'Etat ruled that by principle the time limit is one year.[31] But the citizen does not suffer prejudice whilst an administrative review is going on because the time limit for bringing a claim in the courts only starts to run from the decision in relation to the request for an administrative review. This is different from alternative dispute mechanisms, but it is the simplest for avoiding litigation.

4.2.2 *Alternative Dispute Resolution*

There have been efforts over many years to set up mechanisms for alternative dispute resolution, but with limited and patchy success. The *tribunaux administratifs* were given the power to encourage conciliation in 1986. The Conseil d'Etat produced reports in 1980, 1988 and especially in 1993 when it was the theme of its annual report. A circular from the Prime Minister in 1995 encouraged the administration to resolve disputes before they become court cases and, especially, to respond to complaints in good time. Many complaints are based on the implied rejection of a request for redress. There was a rule that silence by the administration for more than four months (then, since 2000, two months) amounts to a rejection of the request. Since the Law of 12 November 2013, the principle is reversed with many exceptions laid down in decrees.[32] But it has really taken until the Law of 18 November 2016 and its implementing decree of 18 April 2017 for a more systematic approach to develop. The results of this so far are more experimental than embedded. There are three distinct areas for the focus on alternative dispute resolution: within the administration itself, within the court process and on settlement agreements made by the administration.

(i) *Solutions within the administration*: As the Prime Minister's circular of 1995 made clear, the largest scope for alternative dispute resolution is

[31] CE Ass. 13 July 2016, *M. Czabaj c Ministre de l'Economie*, no. 387763, AJDA 2016, 1479.

[32] According to a Senate report, the 2013 law extended the number of administrative procedures where silence amounts to an agreement from four hundred to twelve hundred, but there are still twenty-four hundred administrative procedures where silence amounts to a rejection of the request (www.senat.fr/rap/r14-629/r14-6293.html).

within the administration, once it receives a complaint from a citizen. Certain branches of the administration have long had schemes for trying to settle complaints amicably before litigation begins. This is particularly true for areas of administrative action that are subject to RAPO. A major area is tax. The French tax authorities receive 3.5 million complaints per year, relating to about 2.8 million contested assessments. About 96 per cent of these are handled within three months and 82 per cent are (wholly or in part) in favour of the taxpayer.[33] For those cases in which the taxpayer is not satisfied, there is an internal conciliation system which deals with some 65,000 complaints a year, giving a 60 per cent success rate to the taxpayer. There is then an institutional mediator for the tax service who receives about 1,500 cases, again with a 60 per cent success rate for the taxpayer, and the *Défenseur des droits* (the national mediator) also receives some 600 cases. Tax cases account for 8.4 per cent of the claims made to the *tribunaux administratifs*, and these were 10 per cent down in 2018 compared with the previous year.[34] Conciliation has also been obligatory since 1996 in medical negligence cases, but it is used more widely in the hospital sector to include employment cases. For example, the large Paris Hospital receives 800 claims a year and resolves 130 to 180 through mediation.[35] Other areas include education and public service, especially personnel issues.

(ii) *Solutions within the court process*: Article R213-5 CJA permits the *tribunal administratif* to propose the parties resort to mediation. The initiative may also come from the parties under the supervision of the court (art. R213-4 CJA). Since 2017, there have been some experiments with compulsory mediation (*médiation préalable obligatoire* (MPO)). But the numbers involved have been small – 1,500 out of the 300,000 claims presented in a year. All the same, there is a high rate of settlements resulting from these interventions (80 per cent in the experiments).[36] So this may be a line of direction to pursue in the future. For the moment, mediation is normally conducted with the consent of both parties. In addition, art. R621-72 CJA provides

[33] Conseil d'Etat, *Assises nationales de la médiation administrative* (Paris, 2019), p. 51. See also S. Boyron, 'Mediation in Administrative Law: The Identification of Conflicting Paradigms' (2007) 13 *European Public Law* 263; and Boyron, 'The Rise of Mediation in Administrative Law Disputes: Experiences from England, France and Germany' (2006) *Public Law* 320.

[34] Conseil d'Etat, *Rapport d'activité 2019*, p. 38.

[35] Conseil d'Etat, *Assises nationales*, p. 90.

[36] Ibid., p. 122.

that an expert can try to conciliate the parties during the litigation process.

Certain fields lend themselves particularly to mediation. Public service employment is a large area and one where mediation has proved successful, covering 23 per cent of cases in the experiments.[37] It involves issues such as bullying and sexual harassment, as well as incapacity for work.

(iii) *Settlement agreements* (*la transaction*): French administrative law has traditionally been wary of private agreements between the administration and private parties, even to resolve disputes. As the Conseil d'Etat ruled in *Mergui* in 1971, 'a public body should never be condemned to pay a sum which it does not owe'.[38] In other words, the liability of the public body must be clear, unlike in private law where a settlement might be reached even where the defendant does not accept liability.[39] Furthermore, arbitration clauses are not accepted by law in contracts with the administration and more generally for public authorities (art. 2060 of the Civil Code), except for certain *établissements publics* considered public enterprises (such as EDF until it was transformed into a private company), in international agreements or in public–private partnership contracts. For example, the contract to create Eurodisney at Marne-la-Vallée was permitted to contain arbitration clauses (*avis* of the Conseil d'Etat, 6 March 1986). But the ban, on principle, of arbitration for public bodies is considered to avoid the risk of parties evading administrative courts and administrative law. In 2007, a commission led by Président of the Section du Contentieux Daniel Labetoulle suggested reversing the principle, but no government dared to endorse the proposal since an arbitration between a public company and a famous businessman hit the headlines and ended in its annulment by a civil court. Furthermore, the Minister of the Economy, who had given her consent to it, was found guilty of a criminal offence.[40] In cases where arbitration is permitted, the Conseil d'Etat allows for its review by administrative courts.[41]

[37] Ibid., pp. 69 and 77.

[38] CE Sect. 19 March 1971, *Mergui*, no. 79962, Leb. 235.

[39] See A. Lyon-Caen, 'Sur la transaction en droit administratif', *AJDA* 1997, 48; Brown and Bell, p. 30.

[40] Ultimately Christine Lagarde was dispensed from criminal sanction and this permitted her to stay as the head of the International Monetary Fund and then as head of the European Central Bank.

[41] CE Ass. 9 November 2016, *Société Fosmax*, no. 388806.

The change in the attitude of French law towards mediation was influenced by way of a 'spillover effect' from Directive 2008/52/EC on mediation in civil and commercial matters. Although the Directive was limited to cross-border disputes and specifically excluded state agreements (art. 1(2)), it provided a momentum for reconsidering France's approach to mediation not only in civil and commercial law (by way of a 2010 law), but also in relation to public law. But since 2017, art. L213-4 CJA gives legal force to agreements resulting from mediation, but requires the settlement agreement to be registered by the public body with the *tribunal administratif* and the *tribunal administratif* can refuse its consent to this *homologation*.[42] Such a settlement can be refused registration, for example, where the undertakings by the public body are unclear or where the contract breaches rules of public policy, such as the rules on public procurement.[43] The courts do not take a narrow view of what is an acceptable settlement. As long as it is genuinely designed to put an end to litigation, the courts will not insist that there is a reciprocity in the concessions provided by each side, which is the rule for settlements in private law under art. 2044 of the Civil Code. For example, if a public employee has already withdrawn his complaint as a result of the mediation but before the settlement agreement was approved by the court, the agreement is sufficiently justified to be approved.[44] The Conseil d'Etat has made clear that such settlements can not only relate to contractual or public employment claims or claims for compensation, but they can include the withdrawal of a claim for the judicial review of a decision on the ground that it is illegal.[45]

4.2.3 *Obligatory Legal Representation*

In certain types of litigation, notably those where the claimant seeks to recover money from a public body for a wrong done or a contract breached, the claimant is required to be represented by a lawyer (art. R431-2 CJA). But for many important types of litigation, such as the *recours pour excès de pouvoir* and immigration, there is no such requirement, especially in the first instance. The counterpart of this requirement is the obligation on the state to make available legal aid. The Conseil d'Etat has ruled that, because legal aid is a mechanism which contributes to the constitutionally protected right to

[42] This power to refuse *homologation* was already recognised in case law: see CE Ass. avis 6 December 2002, *Syndicat intercommunal des Etablissements du second cycle du second degré du District de L'Hay-Les-Roses*, no. 249153.

[43] For example, TA Bordeaux 15 July 2019, *Bordeaux Métropole*, no. 1902219, AJDA 2019, 2381.

[44] TA Lyon 27 March 2019, *B*, no. 1704535, AJDA 2019, 1296 concl. Lacoste Lareymondie.

[45] CE 5 June 2019, *Centre hospitalier de Sédan*, no. 412732.

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effective redress, any application for legal aid suspends time limits within administrative litigation proceedings.[46] The Conseil d'Etat has also widened the scope of what counts as administrative litigation covered within legal aid to include the refusal of asylum or entry into France.[47]

4.3 INTERIM MEASURES (*LE RÉFÉRÉ*)

The *juge des référés* is, in principle, the judge of interim orders. As art. L511-1 CJA states, he 'decides by means of measures which have a provisional character'. But this simple description does not give the full picture. Some decisions are genuinely provisional – a stay of execution in a deportation, interim payments in a contract action for damages where the outcome is not seriously contestable. For example, art. L521-1 CJA empowers the judge to order the suspension of an administrative decision where there is urgency and serious doubt about the legality of the administrative decision in question, this *référé-suspension* being the main weapon to act urgently before administrative courts, and the claimant must lodge an ordinary claim simultaneously. If suspended, the court must rule on the ordinary claim within one year in order to avoid blocking the administrative action for too long. But a significant number of decisions will, in practice or in law, be final. This applies especially in cases concerned with fundamental rights but not only with them. Article L522-1 CJA provides that in the *référé-liberté* the judge may make an order to safeguard a fundamental freedom which the decision of a public body or a private body carrying out a public service has seriously and manifestly unlawfully infringed or in case of *référé précontractuel* for breach of public procurement and concession award rules where the courts are granted power of annulment by law.

The Covid-19 crisis in 2020 illustrated the use that can be made of this procedure to undertake a definitive and not merely a provisional challenge to government decisions. During the first twelve months of the pandemic, the Conseil d'Etat handed down 647 decisions, quashing central and local government measures in 51 of them.[48] In a further 200 cases, the government withdrew or altered measures related to the 'confinement' (the more elegant French term for 'lockdown'). In *Bicycles*, at the beginning of the period of 'confinement', different local administrations interpreted the rules laid down

[46] CE 6 May 2009, *Khan*, no. 22713.

[47] CE ord. 8 February 2012, *Ministre de l'Intérieur c Koné*, no. 355884, Leb. 29.

[48] Conseil d'Etat, 'Communiquée de Presse', 21 April 2021 (from Conseil d'Etat website). www.conseil-etat.fr/actualites/actualites/covid-19-retour-en-chiffres-sur-un-an-de-recours-devant-le-conseil-d-etat-juge-de-l-urgence-et-des-libertes (accessed 11 October 2021).

in the government decrees in different ways. The prefects and police in various parts of the country interpreted art. 3 n° 5 of the decree of 23 March 2020 as excluding cycling and closed cycle lanes, and a number of cyclists were fined for breaching the decree. That article provided, inter alia, that, until 11 May, people should stay in their homes except for 'brief excursions, limited to one hour a day and within a maximum of one kilometre around their home, connected with individual physical activity'. Other parts of the article talked about 'walks' with others in their household or with animals, so local officials considered that 'excursions' should be of the same kind. This was challenged by the national cycling federation on 21 April, which sought an order directed to the Prime Minister that he issue an interpretative circular clarifying the scope of the rule so as to include cycling. The competence of the *juge des référés* under art. L521-2 CJA was based on interference with a 'liberty', the freedom of movement. After an oral hearing on 29 April, the President of the Section du Contentieux ordered on the following day that the Prime Minister issue a clarification to be disseminated widely on conventional and social media within the next twenty-four hours that people were free to use their bicycles for their daily exercise.[49] This ruling was consistent with the interpretation agreed at an inter-ministerial meeting on 24 April, but had not been widely publicised and was only given to the court on the day of the hearing. Although satisfying the cycling federation for the future, the Conseil had no power under art. L521-2 CJA to quash any fines imposed on cyclists, who were left to appeal through the normal channels of the criminal process. Nor could the court, in this case, direct public authorities to reopen cycle routes.

Enforcement of the very strict rules imposed in France from 4 March 2020 was obviously a problem, especially the very restricted movements permitted to people outside their homes, which came into force on 17 March before the law of 23 March 2020, based on the general power to protect public order recognised by the Conseil d'Etat to the head of the executive since a famous case related to the first driving licenses regulation before the First World War.[50] On 18 March, the prefect of Paris decided to use drones fitted with CCTV cameras to assist in enforcement of confinement rules, especially to identify possible group gatherings. Although not fitted with recording equipment, the cameras on the drones were fitted with zoom lenses and could transmit pictures enabling police units to be despatched to potential trouble spots. They were also fitted with a loudspeaker which could warn people to disperse or go home. This use of drone surveillance became publicly discussed

[49] CE ord. 30 April 2020, *Fédération française des usagers de la bicyclette*, no. 441079.
[50] CE 8 August 1919, Labonne, no. 56377, Leb. 737.

on 25 April and was challenged by civil liberties groups as unauthorised in law. The claim was rejected on 5 May by the *juge des référés* of the TA Paris, but the appeal was allowed by the *juge des référés* of the Conseil d'Etat on 18 May.[51] In light of police explanations of the use made of the drones, the Conseil d'Etat found that the purpose of law enforcement was legitimate and that the surveillance without recording as such was not manifestly unlawful. But the drones did enable the collection of personal data in the form of images of people observed. The lack of prior authorisation of this activity by regulation breached the EU General Data Protection Regulation of 2016 and domestic French legislation of 1978. Accordingly, the state was ordered to stop the use of drones forthwith in Paris. The decision was of more general significance as the Ministry of the Interior had already launched a tendering process for 650 drones for police purposes on 12 April.[52]

Once 11 May 2020 was reached, the government issued a number of 'deconfinement' measures. Various Catholic organisations and their leaders, including the President of the Christian Democrat Party, immediately challenged the decision not to allow churches to reopen for religious services.[53] After an oral hearing on Friday, 15 May 2020, the Vice President of the Conseil d'Etat quashed the outright ban on services in religious buildings (other than funerals), but not with immediate effect and issued an *ordonnance* on Monday, 18 May, requiring the Prime Minister within a week to amend the decree n° 2020–548 to permit gatherings within religious buildings.[54] In fact, a new decree was issued on Friday, 22 May, setting out restrictions within which such religious events could take place, and church services began the following day. The interferences with freedom of the individual were related to the freedom of religion under the European Convention, but also to the rights protected under the Concordat with the Pope of 26 Messidor An IX (which still applies in Alsace-Lorraine) and arising from the law of 1905 on the

[51] CE ord. 18 May 2020, *Association 'La Quadrature du Net'*, nos. 440442 and 440445, AJDA 2020, 1552.

[52] See 'Drones: une ombre chinoise derrière l'appel d'offres du ministère de l'intérieur', *Le Monde*, 16 April 2020, which specifically mentions the use of drones in enforcing the confinement. See also 'Le Conseil d'Etat ordonne à la Préfecture de police de Paris de laisser ses drones au sol', *Le Monde*, 18 May 2020.

[53] Churches had been allowed to remain open, but without services, except for funerals: see art. 8 IV of decree no. 2020–293. The 'deconfinement' rules were set out first in decree no. 2020–545 of 11 May 2020 and were altered later that day by decree no. 2020–548. A number of claims filed too quickly with the Conseil d'Etat were declared inadmissible because they only challenged decree no. 2020–545, which had been replaced in certain relevant particulars by decree no. 2020–548!

[54] CE ord. 18 May 2020, *W and others*, no. 440366 (and seven other decisions), AJDA 2020, 1733.

separation of church and state (which relates to the rest of France with the exception of some overseas territories). Basically, the court found the continuing outright ban on religious services disproportionate in its interference with a fundamental freedom. The disproportion in the balance between risk and interference with freedom was shown by comparison with other permitted activities which were riskier than meetings in religious buildings. For example, travel on public transport could not be limited to ten or fewer people in the same way as other permitted public gatherings. People were to be allowed to go to shops, schools and libraries where they were able to operate allowing a personal space of at least four square metres. Other activities which remained prohibited did not involve the same kind of fundamental freedom as the freedom of the practice of religion. Furthermore, there was inadequate evidence to support the view that religious gatherings would cause serious harm. The main reason the government offered for the ban was that rules could not be designed for social distancing nor they could not be enforced effectively by the authorities in question, or that decontamination measures could not be taken. There had been no investigation of whether these concerns were sufficiently justified by the evidence to support the absolute ban on gatherings, other than funeral services for twenty persons or fewer. The Minister of the Interior had pointed to an outbreak which had followed a religious gathering of more than a thousand people in Mulhouse from 17 to 24 February. But the evidence that this was a cause of the outbreak was insufficient.

There was a clear attempt in these cases to challenge the decisions of the government by means of rapid judicial review, rather than relying on political means to determine the right way forward. In the *Church Gatherings* case, the *juge du référé-libertés* had to reject an attempt to challenge the political declaration made by the Prime Minister on 28 April 2020 and the reasons he gave to the Assemblée Nationale for not opening churches for services. Only actual decisions such as the decrees of 11 May could be challenged. But the *juge du référé-libertés* is limited to interfering where the administrative decision *seriously and manifestly* infringes fundamental freedoms or there are serious doubts about its legality. This is a high threshold, but it may apply to the exercise of discretionary powers. For example, the claim by the union of junior doctors that the state should take additional steps to provide personal protective equipment to medical staff in hospitals failed.[55] Very detailed evidence was provided by the Ministry of Health that it had acquired and made available large stocks of such equipment. As a result, the court

[55] CE ord., 22 May 2020, *Syndicat Jeunes Médecins*, no. 440321.

concluded that, although there were problems in the availability of equipment in some locations, there was not a serious and manifest failure to act to prevent a threat to the lives of the medical staff. But a claim to challenge the adequacy of the protection of public health at the very beginning of the Covid-19 outbreak did succeed in relation to decisions to impose rules which still permitted jogging and open markets.[56]

The other high threshold is 'urgency'. The interpretation of this concept is often influenced by the substance of the case. For example, the 2016 case on the 'burkini' in which the Conseil d'Etat considered a local ban of showing religious belief by the attire worn when bathing in the sea at Cagnes-sur-mer was urgent enough to allow a *référé-liberté*.[57] It is clear that the discriminatory nature of the ban encouraged the court to accept that there was an *urgence caractérisée*. (This term is found in the case law whereas the law itself only requires *urgence* sufficient to require that the judge decide the matter within forty-eight hours (art. 521–2 CJA).) This is more stringent a standard than the urgency required in practice for *référé-suspension*, which sometimes allows suspension by the judge within three or four weeks.

Indeed and by contrast, in the case of the *référé-suspension*, the standing for action is closer to *recours pour excès de pouvoir*. But it is also to be noted that this *référé-suspension* action may be taken not only to challenge legislation, but also to challenge 'any document of general application issued by a public authority, in physical or other form', 'when these are capable of having serious effects on the rights or situation of people other than those who have to implement them'.[58]

All these cases illustrate the way the interim decision procedure effectively enabled definitive decisions to be reached. In none of these cases would there be a later, final decision on the matter in hand. At the same time, the court respects the legitimate freedom of the executive by giving the administration time to produce new rules.

Although the decision of the *juge des référés* is normally taken individually by the president of the court or other senior judges, the judge can refer the matter to a full court because of the seriousness of the issue in question. The clearest example of this is *Lambert*.[59] Vincent Lambert had a motor accident in 2008 which left him tetraplegic. After investigation and various attempts at treatment, it was concluded in 2011 that he was in a vegetative state with minimal

[56] CE ord., 22 March, *Syndicat Jeunes Médecins*, no. 439674.
[57] CE ord., 26 September 2016, *Association de défense des droits de l'homme – Collectif contre l'islamophobie en France c Commune de Cagnes-sur-Mer*, no. 403578.
[58] CE Sect. 12 June 2020, *GISTI*, no. 418142.
[59] CE Ass. 24 June 2014, *Mme Lambert*, no. 375081, AJDA 2014, 1669.

consciousness. His parents and some members of the family wished for care to continue. His wife, other members of the family and the hospital wanted the treatment ended and hydration stopped. In the absence of an agreement within the family, the authorised consultant exercised powers under art. 1110–5 of the Code de Santé Publique on 11 January 2014 to bring his treatment to an end two days later. His parents requested judicial review of this decision and the suspension of its implementation from the *juge des référés* of the TA of Châlons en Champagne. That court granted the suspension on 16 January on the grounds that the decision would be irreversible. Lambert's wife challenged this to the Conseil d'Etat. The *juge des référés* remitted the matter to the Assemblée du Contentieux in view of the significance of the issue. The judge ordered a group of experts to report on Lambert's physical condition under art. R621-1 CJA. He also commissioned the Académie nationale de médecine, the Comité consultatif national d'éthique and the Conseil national de l'Ordre des médecins, as well as Jean Leonetti, *rapporteur* in Parliament on the 2005 law on the rights of sick people and the end of life under which the doctor's decision in this case was taken to produce written observations as *amicus curiae* under art. R 625-3 CJA. They were asked to report generally on the scientific, ethical and moral questions arising from the litigation, in particular on the interpretation of the concept of 'unreasonable obstinacy' and artificially keeping someone alive within the meaning of art. L1110-5 of the Code de la santé publique. Given Lambert's vegetative state and the way the legislative provision should be interpreted, the Conseil concluded that the steps the doctor had taken in coming to the decision did not demonstrate that, on the facts of this case, the doctor had reached an illegal decision. Although technically an interim decision on whether an administrative decision should be suspended, the practical reality was that this was a substantive hearing of the issue of whether the doctor acted lawfully in deciding to stop medical treatment. The matter continued through the European Court of Human Rights and back through the French courts until Lambert died on 11 July 2019 due to the stopping of treatment.[60] This included a decision in *référé* on 24 April 2019, seeking to quash the repeated decision to end treatment taken by the doctors. The whole saga of decisions in the courts was conducted by way of interim decision. There are many similarities with the *Bland* case in England, not least the resort to *amicus curiae* briefs to clarify the moral issues at stake.[61] But there it was the doctors who were seeking judicial approval for their decision, rather than relatives contesting it.

[60] Decision 5 June 2015. See generally www.lemonde.fr/societe/article/2019/04/24/affaire-vincent-lambert-le-conseil-d-etat-juge-legale-la-decision-d-arret-des-traitements_5454289_3224.html (accessed 11 October 2021).

[61] *Airedale NHS Trust v Bland* [1993] A.C. 789.

4.4 THE INVESTIGATION (*L'INSTRUCTION*)

The French procedure is essentially written. The documents uploaded by the litigant are then supplemented by the administration and form a file (*le dossier*). Traditionally, the file was a cardboard folder into which were put the various documents from the parties and assembled by first by the *greffe* of the court and then by the reporter judge. These days, it is an electronic folder shared on the *Télérecours* platform. In this way, the litigant is able to follow the progress of his or her case. There are specific rules about when communications are deemed to have been made on this system. As has been said, the investigation phase (*l'instruction*) is managed by the judge.[62] The purpose of the *instruction* is to clarify the facts and to research the applicable law with a view to preparing the case for hearing. Because the hearing (*l'audience*), as we shall see, is often so short, the preparation phase is far more significant than in common law systems.

The *instruction* is carried out differently in different administrative courts. In the *tribunal administratif* or the *cour administrative d'appel*, the file is first sent by the *greffe*, the court office, to the president or delegate responsible for assigning work to members of the court (art. R611-9 CJA). Unlike in Germany, which has a very strict rule that cases simply go to the next qualified judge, the president does enjoy discretion in the choice of the reporter judge (*juge rapporteur*) entrusted with the preparation of the file for the hearing. The reporter judge may be chosen because of particular expertise in a field, or because he or she has already a number of similar files on the same topic. In practice, the reporter judge will be responsible for liaising with the parties and determining a timetable for a decision, as well as identifying measures to be taken.

In the Conseil d'Etat, the *instruction* is carried out by a collegial chamber of the court which will review the file and potential draft judgment before recommending in which formation of the court the case should be decided. This more elaborate process is started only when the file has been completed by the parties (art. 611–20 CJA). This stage is called the *mise en état*, and whether a file is ready is determined by the president of the chamber to which the case is assigned. The President of the Section du Contentieux of the Conseil determines which subject matter is assigned to each chamber (*chambre jugeant seule*) or to two chambers (*chambres réunies*). The president of the chamber may order investigatory steps to be taken, such as requiring the parties to provide further documents, before the file is judged ready. Only

[62] See generally Teitgen-Colly, *Pouvoir et devoir d'instruction*.

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where the case is 'good for a reporter' (*bon pour rapporteur*) does the president of the relevant chamber appoint one of its members as a reporter judge. The chamber will review the case collectively at the end of the *instruction* phase.

In the case where a claim is obviously inadmissible or otherwise the solution to the case is obvious, the president of the court or chamber can decide that there will be no *instruction* phase and that he or she can proceed to decide the case by way of *ordonnance* (art. R611-8). He or she can also require one of the parties to provide a summary of the arguments contained in the submitted documents, which will clarify the nature of the complaint or defence. The *ordonnance* is not delivered in public.

The procedure before the lower administrative courts, which hear the bulk of cases at first instance, is more inquisitorial than before the Conseil d'Etat.[63]

A number of investigatory steps might be taken in order to get the file ready to be decided. Most of these involve clarifying the facts beyond the detail provided by the parties in their initial submissions and complementary documents. Although it is for the reporter judge to decide what measures are necessary, the parties play a significant role in the procedure, but rarely themselves ask for particular measures to be taken.[64]

4.4.1 *Request for Information*

A request for information can be addressed either to one of the parties or to an administration, depending on who is likely to hold it. As the Conseil d'Etat explained in *Erden*:[65]

> It is incumbent on the administrative judge in the exercise of his general powers of directing the procedure to order any investigatory measure which he considers necessary for the solution of litigation submitted to him, and especially to require the parties as well as, in appropriate circumstances, third parties and especially competent administrative authorities to communicate documents which enable him to verify the allegations of the claimant and that will permit him to come to an informed decision.

One party will be given a deadline to produce a response to the allegations of the other. If the claimant fails to respond in time, he or she is deemed to have desisted in their claim (art. R612-5 CJA). If the defendant fails to respond in time, he or she will be taken to have accepted the claimant's version of the facts

[63] See Guyomar and Seiller, *Contentieux administratif*, nos. 838 and 839.

[64] See L. Poupot, 'Le rôle des parties dans la prescription des mesures d'instruction', in Teitgen-Colly, *Pouvoir et devoir de l'instruction*, pp. 63–4.

[65] CE Sect. 1 October 2014, *Erden*, no. 349560.

(art. R612-6). A request for information may be addressed to a public administration other than one of the parties. A famous example is the *Barel* decision, in which it was alleged that a number of applicants for the civil service college (ENA) were being rejected on grounds of their political beliefs, especially their relationship to the Communist Party.[66] The Conseil d'Etat requested the files on a number of candidates, not just the claimants. When the administration refused to provide these, the Conseil inferred they had been refused for unlawful reasons. More recently, two employees of private companies were refused permits to enter a naval dockyard on the ground that, as a result of a security inquiry, their behaviour was incompatible with defence interests. The employees challenged this non-renewal of their security passes and the *tribunal administratif* sought the documents relating to these individuals. The matter was referred to the Commission consultative du secret de la défense nationale (CCSDN), which recommended in favour of partial declassification of the documents. But by a curt letter to the court the Ministry of Defence simply stated that it would not be following the advice of the CCSDN and would not hand over the documents. In the absence of a proper explanation, the *tribunal administratif* quashed the refusal by the head of the naval dockyard (run by a private-sector company) to renew the claimants' security passes.[67] In the absence of access to the documents setting out the complaints against the claimants, the administration had failed to satisfy the court about the reality of the complaints against them.[68]

4.4.2 *Expert Report* (L'expertise)

The principle of the inquisitorial nature of the proceedings has the consequence that the judge is responsible for appointing an expert (art. R621-1 CJA). The parties may suggest that this happen and they are allowed to comment on the suggested names of experts, but it is the judge's decision. The expert reports to the court. This contrasts with the way common law experts are appointed by the parties and, unless they agree to a common expert, then the judge is left to arbitrate. An example is the *Lambert* case, where the hospital and the wife considered the injured man in a vegetative state and his parents

66 CE Ass. 24 May 1954, *Barel*, no. 28328, Leb. 308, concl. Letourneur.

67 TA Poitiers, 19 December 2018, no. 1800409, AJDA 2019, 418 concl. Guiard.

68 See more generally C. Vigouroux, 'Les secrets de la défense nationale, de la sûreté de l'Etat et de la sécurité publique', in Teitgen-Colly, *Pouvoir et devoir de l'instruction*, 149, especially at p. 154, citing CE 25 Mai 2005, *Associations Reporters sans frontières*, no. 260926 as an example of excessive use of classification of information as a defence secret which was quashed by the Conseil d'Etat.

disagreed and argued that he should continue to receive treatment.[69] To determine whether to uphold the doctor's decision to cease treatment, the Conseil d'Etat appointed its own panel of experts to determine the state of Lambert's health.

Experts are used particularly in the assessment of damages. For example, in the liability of public hospitals, an expert will be used typically to report on the extent of the injury of the claimant and the likely cost of future medical treatment. But they can also be used for searching for the cause of any damage, such as in public contracts, where the questions relate to the technical methods used.

In one sense, the presence of the expert reduces the adversarial nature of the proceedings – the parties are not responding to the arguments of the other side, but feeding into an independent process. But, at the same time, the parties have a vital role in providing the expert with information, sometimes meeting with the expert under judicial supervision, and in responding to the findings the expert presents to the judge.

4.4.3 *Site Visit* (La visite des lieux)

Under art. R622-1, the judge may order a site visit. This process is frequently undertaken in areas such as planning, where the configuration of a site is under dispute. But it can occur in other cases. For example, in a case concerning the compatibility of the compulsory retirement age of air traffic controllers with age discrimination law, the Conseil d'Etat arranged for the judges of the relevant chamber to visit an air traffic control centre so as to understand the work the controllers undertook and why an age limit might be relevant to their performance.[70] In another case, dealing with the creation of a racing circuit in the Cevennes area as part of a conversion from coal mines, the judges made the trip to assess the level of noise made by cars and motorcycles and eventually quashed the decision authorising the opening, although the regulations insisted merely on assessments of safety but not of the potential for private nuisance.[71] Eventually, the race circuit was reopened after public works mitigating the noise were done (to limited effect, as one of the authors can tell from his home).

[69] See note 59.

[70] CE Ass. 4 April 2014, *Ministre de l'Ecologie, du développement durable et de l'énergie*, no. 362785 (and eight others), Leb. 83.

[71] CE Sect. 1 July 2005, *Abgrall*, no. 256998.

4.4.4 *Witness Hearing* (L'enquête)

Only since 2001 has the witness hearing (*l'enquête à la barre*) revived in significance.[72] In a case concerning tariffs for prescription drugs, the ministry presented details of the way in which the tariff had been calculated. The *sous-section* of the Conseil d'Etat did not find the ministry's explanation for reducing the tariff sufficiently clear and it arranged for an oral hearing before the *sous-section* in its *instruction* formation to hear the representatives of the ministry with the participation of representatives of the claimants.[73] They were then able to comment on the minutes of that meeting produced by the reporter judge. In the end and on the basis of this information, the Conseil did not find that the ministry had committed an error of law in basing its tariff on actual expenditure in the preceding year. This form of oral hearing of the parties or witnesses is of particular significance in urgent proceedings. Where decisions have to be made quickly in relation to removal on refusal of entry into France, then the court can benefit from information particularly from the claimant. It has been suggested that such an oral hearing can be a speedy way of assisting the court to clarify the facts and the areas in dispute between the parties, as well as helping the litigants to understand how the judge is approaching the question.[74]

4.4.5 Amicus Curiae

A 2010 decree created the opportunity for a court to invite any external person to provide written or oral information (now contained in art. R625-3 CJA). A good example is the *Lambert* decision. The law also provides for a court to consult specific external bodies in their areas of competence, such as the Haute Autorité de la Concurrence. For instance, the Conseil d'Etat in the *Société Lacroix Signalisation* case sought the opinion of the Autorité de la concurrence before ruling on a request to annul a public procurement contract which was concluded by a *département* after a collusion between firms.[75] It ruled not entirely in conformity with the views of the latter, which was claiming the contractor should reimburse the entire payment made upon the public procurement contract but decided it should be deprived of any

[72] See Guyomar and Seiller, *Contentieux administratif*, no. 848; Guyomar in Teitgen-Colly, *Pouvoir et devoir de l'instruction*, p. 123.

[73] CE 16 February 2001, *Centre du château de Gleteins*, no. 220118, AJDA 2001, 296.

[74] Note by Claire Landais in AJDA 2001, 296; also Guyomar, in Teitgen-Colly, *Pouvoir et devoir d'instruction*, p. 123.

[75] CE 10 July 2020, no. 420045.

profits as a consequence of the retroactive effect of the annulment, the termination of the contract for the future having no sense under the contract as entirely executed. Mainly the opinion sought from an *amicus* is on a legal issue. It may well be a matter for a specialist legal historian. For example, in one case, an *amicus* was appointed to explain whether an *aveu et dénombrement* (a recognition of *seigneury* accompanied by a list of the property involved) on 1 May 1542 could be considered as creating title to a property before the Edict of Moulins of February 1566, thereby blocking a ruling that the property could not be alienated because it was public property.[76] The court must form its own judgment on the issues before it and cannot simply servilely follow the view of the *amicus curiae*.[77] Without appointing officially an *amicus curiae*, the Conseil d'Etat and, less often, lower administrative courts, may take the advice of experts in the field, including professors of law, as in the *Société Lacroix Signalisation* case.

4.5 *RAPPORTEUR PUBLIC*

In Chapter 1, Section 6, it was noted that the operation of the *rapporteur public* (previously called the *commissaire du gouvernement*) has undergone significant change as a result of decisions by the European Court of Human Rights. This section considers the current functions of the *rapporteur public* in administrative litigation.

Once the reporter judge has completed the *instruction* and has the case ready for hearing, the file is passed to the *rapporteur public*. The file will contain the reporter judge's draft judgment. The ability of the *rapporteur public* to view the draft judgment before the hearing when the parties could not was challenged unsuccessfully before the European Court of Human Rights, which found that the practice was not contrary to the equality of arms in court proceedings, since the *rapporteur public* was not a party to the case.[78] The intervention of the *rapporteur public* can be dispensed with in a number of cases. Some are laid down in specific legislation, such as was the case in relation to the Covid-19 crisis. More generally, art. R732-1–1 CJA provides that the opinion of the *rapporteur public* can be dispensed with in a number of routine cases (challenges to removal of driving licences, to the refusal by the police to assist in enforcing court judgments, to the rejection of naturalisation, to immigration cases on refusal of entry or removal (other than

[76] See H. Muscat in Teitgen-Colly, *Pouvoir et devoir d'instruction*, p. 140.
[77] CE 6 May 2015, *Association tutélaire d'Ille-et-Vilaire*, no. 375036, Leb. 163.
[78] ECHR 4 December 2013, Application no. 54984/09, *Marc-Antoine v France*.

deportation), and to decisions on certain property taxes or on certain social welfare payments to private-sector employees), as these cases are mainly dealing with fact-checking rather than legal reasoning.[79] The *rapporteur public* does not produce an opinion on *ordonnances* except in the case of some *référé* matters. He may also suggest that it is not necessary to express an opinion on a specific case, and the president of the court or chamber may accept this (art. R776-13 CJA). In any case, even if the *conclusions* of the *rapporteur public* have to be given, they do not need to be written, but can be oral. In practice, most of the *conclusions* in all but the most straightforward cases are written and available, when it comes from *rapporteurs publics* of the Conseil d'Etat, at the *Service de diffusion des conclusions* of the Conseil d'Etat or directly at the official website of the Conseil d'Etat called ArianeWeb. It may not always be the case because the *rapporteurs publics* may reserve them for publication in legal journals or not publish opinions for decisions of lower importance such as those decided by a single chamber.

The purpose of the *rapporteur public*'s intervention is to view the solution proposed by the reporter judge from a broader legal perspective than that offered by the parties and to do so in public, unlike the private pleadings (art. L7 CJA). These *conclusions* provide a kind of counterpart to the relative brevity of the judgments. The *rapporteur public* examines the individual case in the context of the law as a whole. She expresses her view independently, which marks her out from the collegial decision makers in the formation of judgment. The common law reader will find the style both more detailed and more personal than the judgment of the court. But the style is not really that of a common law advocate, but much more that of the Advocate General of the Court of Justice of the European Union, which was based on the *rapporteur public* in the first place. Like the Advocate General, the *rapporteur public* will give greater detail about the facts of the case and will also provide the broad legal framework in which the issues in the case belong. This opinion will help the court to avoid being misled by the particular facts of a case or by the way it has been argued by the parties.

Both the style and the function of the opinion of the *rapporteur public* make it more of a scholarly dissertation than a judicial judgment. French administrative law has been shaped by a series of *conclusions* of famous *commissaires du gouvernement*, especially David, Romieu and Léon Blum in the early period and Letourneur, Braibant and Genevois in the second half of the twentieth century. For that reason, Deguergue considered the *commissaire*

[79] This compares with the earlier idea that the *commissaire du gouvernement* should offer an opinion in all cases: CE Sect 13 June 1975, *Adrasse*, no. 93747, AJDA 1975, 477; N. Rainaud, *Le Commissaire du gouvernement près le Conseil d'Etat* (Paris: LGDJ, 1996), pp. 52–6.

du gouvernement (now *rapporteur public*) similar to a doctrinal legal writer.[80] Indeed, former President of the Section du Contentieux Bernard Stirn stated that the function of the *rapporteur public* was to make the link between the work of the administrative judge and legal scholarship, although the reality of the assessment may vary from one *rapporteur public* to another depending on her ability to read and quote academics.[81] At the same time, the argument has to be focused on the case at hand and cannot range as widely as the scholarly writing which many *rapporteurs publics* have published in extrajudicial writings. As Guyomar and Seiller remark, there is no prescribed length for these *conclusions*. In a simple case, the oral presentation can last a couple of minutes. In other cases, it can last up to forty-five minutes or an hour. 'But it is recommended to know how to be brief or at least not too long, so that you do not exhaust the attention span of the members of the formation of judgment.'[82]

In the Conseil d'Etat, the *instruction* is completed by a meeting of the chamber to which the case has been assigned. Here the reporter judge will introduce the case. His report will have already been seen and discussed with another senior member of the chamber as *réviseur*. Other members of the chamber can contribute to the discussion, and the *rapporteur public* will also take part in this debate and sometimes invited experts will do the same. Particularly where the reporter judge and the *rapporteur public* disagree, there may be a lively discussion and even a change of initial positions. The purpose of this meeting is to produce a draft judgment (not two, in contrast to the practice of the Cour de cassation) to be taken forward to the hearing and the decision-making formation of the Conseil. In the *tribunal administratif* or a *cour administrative d'appel* which does not operate the *instruction* through chambers, there is no formal mechanism for the reporter judge and the *rapporteur public* to discuss their disagreements, especially since *rapporteurs publics* have a very limited time to write their conclusions (generally two weeks for several cases), in contrast to the *rapporteurs publics* before the Conseil d'Etat who have a say on the timing of instruction. But this may well happen informally. They will often have offices in the same building and eat in a common canteen, so it becomes natural to discuss the work they share.

The opinion of the *rapporteur public* is delivered orally at the hearing. In advance of the hearing, the parties are given 'the sense of the conclusions'

[80] M. Deguergue, *Jurisprudence et doctrine dans l'élaboration du droit de la responsabilité administrative* (Paris: LGDJ, 1994), pp. 729–32 and 738. See also D. Fairgrieve and F. Lichère, 'Style and Form of Judgments in France: enter the Rapporteur public' in Liber *Amicorum for Mads Andenas* (forthcoming Springer, 2022).

[81] B. Stirn, 'Les commissaires du gouvernement et la doctrine', *La Revue Administrative 1997: numéro spécial: Le Conseil d'Etat et la Doctrine*, p. 41.

[82] Guyomar and Seiller, *Contentieux administratif*, no. 860.

(arts. R711-3 and R712-1 CJA). They are not given the full text in advance, but the outcome, which is proposed. As a guide to good practice, the Conseil d'Etat has suggested that the *rapporteur public* explain the main reasons for the proposed solution, without necessarily going into great detail.[83]

Since 2006, the *rapporteur public* in the *tribunal administratif* and the *cour administrative d'appel* does not retire with the judges to be present at their deliberations (and, indeed in the past, to take an active part in their discussion but not in the voting). But art. R733-3 CJA retains the possibility for the *rapporteur public* to be present during the deliberations in the Conseil d'Etat as he or she is considered to be building up the case law of the supreme administrative court. The parties are advised that they can ask for him not to be present since the *rapporteur public*, although not a party per se, has become the objective ally of one party in public. But, in practice, they very rarely do so.[84] So, even today, the *rapporteur public* will learn why the judges came to their decision, though he is no longer allowed to speak in the deliberation stage.[85] This specific organisation of functions was eventually ruled as compatible with the European Convention of Human Rights after the 2001 *Kress* decision led to the conclusion that the presence in the deliberation of the *commissaire du gouvernement* was probably incompatible with art. 6 of the Convention (see the discussion on the change from the *commissaire du gouvernement* to the *rapporteur public* in Chapter 1, Section 6).[86]

4.6 PRELIMINARY REFERENCES

There are five different situations in which an administrative court may suspend its consideration of a case and refer an issue to a preliminary decision of another court.

Reference for an opinion of the Conseil d'Etat: The *tribunal administratif* or the *cour administrative d'appel* may refer a preliminary question for the opinion (*avis*) of the Conseil d'Etat under art. L113-1 CJA. The request for such an opinion is restricted to questions of serious difficulty which will apply in a number of cases. In 2019, twenty-eight of these were submitted to the Conseil d'Etat.[87]

[83] CE 28 March 2019, *Consorts Bendjebel*, no. 415103.

[84] Guyomar and Seiller, *Contentieux administratif*, no. 867.

[85] Some thirty-five years ago, one of the authors was allowed to be present at some deliberations in both *tribunaux administratifs* and in the Conseil d'Etat. He can testify that the *commissaire du gouvernement* at that time did often play an active part in the discussion of cases.

[86] *Marc-Antoine v France*, note 78.

[87] Conseil d'Etat, *Rapport public: L'activité juridictionnelle et consultative des juridictions administratives en 2019* (Paris, 2020), p. 54 (hereafter: '*Rapport public 2019*').

Public law and private law: Because of the clear separation between administrative and ordinary courts, the most established category of reference is a conflict of jurisdiction between administrative and civil courts. This is discussed at length in Chapter 5. In brief, art. R771-2 CJA provides that where litigation in an administrative court raises a serious question lying within the competence of the ordinary courts, the court should suspend proceedings and refer the relevant question for a ruling by the civil court. In addition, since 1960, there has been a procedure to allow the Conseil d'Etat (as well as the Cour de cassation) to obtain a preliminary ruling from the Tribunal des Conflits where there is a serious question about the jurisdiction of the administrative or ordinary courts over a case before it. This is explained further in Chapter 5, Section 6.3.

European Union law: Since the Treaty of Rome of 1957, there has been a procedure for national courts to refer questions of EU law by way of the preliminary reference to the CJEU. Article (now) 267 TFEU provides that any court of a member state may refer a question necessary for the decision in a case to the CJEU, but that courts with final jurisdiction must refer such a case. Initially, the Conseil d'Etat was reluctant to send preliminary references, but this reluctance ended the year after the *Nicolo* decision[88] in *Fédération nationale du commerce extérieur des produits alimentaires*.[89] More recently, the CJEU criticised the Conseil d'Etat for failing to make a reference. In *Commission v France*, a number of issues had arisen before the Conseil d'Etat in relation to the taxation of companies with receipts from subsidiaries abroad.[90] The Conseil d'Etat decided that it did not have to apply a recent CJEU decision to the case in hand on the ground that the arrangement between the companies was not the same. The CJEU did not consider that the law was clear and decided the issue in a different way, although it agreed with the Conseil d'Etat on other points of interpretation. The CJEU held that the Conseil d'Etat was obliged to make a reference in such a situation where it was a final court and the point of European law was not clear.[91]

In 2019, the Conseil d'Etat made eleven references to the CJEU and the *tribunaux administratifs* made one. In turn, the CJEU handed down three decisions on French references in that year, leaving a significant stock of seventeen pending cases.[92]

[88] Discussed in Chapter 1, Section 5.
[89] CE Ass. 26 October 1990, no. 69276, Leb. 294.
[90] Case C-416/17, ECLI:EU:C:2018:811.
[91] Ibid., paras. 105–14.
[92] Conseil d'Etat, *Rapport public 2019*, p. 39.

Constitutional law: As noted in Chapter 1, Section 4, since 2010 the Conseil d'Etat has been able to refer a *question préalable de constitutionnalité* (QPC) to the Conseil constitutionnel. The request that a question be sent to the Conseil constitutionnel is often raised at first instance. In 2019, the *tribunaux administratifs* received 662 such requests and they decided 572. But they only referred 25 (4.4 per cent) to the Conseil d'Etat for consideration. The *cours administratives d'appel* decided 97 such requests and referred 9 (9.3 per cent) to the Conseil d'Etat. The Conseil d'Etat received 123 requests directly (because it has jurisdiction over legislative acts of the administration). Of all the requests received directly or from the lower courts, it referred 44 (28 per cent) to the Conseil constitutionnel.[93]

European Convention: With the entry into force of Protocol 16 of the European Convention on Human Rights in 2018, it has become possible for national courts to make a preliminary reference to the European Court in Strasbourg. The first reference was made by the Conseil d'Etat in 2021.[94]

4.7 THE HEARING

The hearing before the decision-making panel of the court (a single judge or several) takes place in public. But because of the written preparation, it is usually shorter than comparable hearings in the common law or even before the Court of Justice of the European Union. It is not uncommon for thirty cases to be scheduled for a morning in front of the *tribunal administratif*. The purpose of the hearing in ordinary cases is to give a formal presentation of the issues to be decided and to garner any final observations from the parties that are not already in the file (which they have seen). Except in urgent cases where there may be oral questions, there will rarely be surprises. But they do occur. The presence of an unrepresented applicant may be particularly valuable. Given that the initial claim will often not be clearly structured around the legally pertinent issues, the oral hearing may give the judges the chance to ask a few questions and to form a clearer picture of what happened. In one case that one of the authors observed in a *tribunal administratif*, a schoolgirl complained that she had been asked questions in an oral exam for the baccalaureate which were off the syllabus and sought the quashing of her examination failure. The oral hearing enabled the court to understand more

[93] Ibid., pp. 36–7. The number of requests for a QPC before the *tribunaux administratifs* is a mere 3 per cent of all cases they receive.

[94] CE 15 April 2021, *Fédération Forestiers privés de France (Fransylva)*, no. 439036, concerning the conventionality of rules governing the withdrawal of land from compulsory local hunting area plans.

clearly what had gone on in the *viva* and enabled the judges to form an impression of the truthfulness of the applicant. In the end, her case was believed.

Since 2011, the hearing of a case begins with the reporter judge reading the summary of issues to the court. The *rapporteur public* then presents his opinion orally in full. It then falls to the parties (or their lawyers) to make any final comments (see art. R732-1 CJA). Often, they will just refer the court to the written submissions. But they may wish to add comments on the opinion of the *rapporteur public*. Comments can be oral or can be written in the form of a *note en délibéré*, a hastily written comment which the judges can read at the beginning of their deliberations. In major cases, the arguments may be longer. In many cases, particularly on appeal to the *cour administrative d'appel* or to the Conseil d'Etat, the parties may not attend and may not decide to send a legal representative. After all, why go to the expense of travelling to a regional centre or to Paris when you have little, if anything, to add? If no parties are present, the case is postponed to the next hearing date.

The judgment panel is drawn from within the court. Particularly in the *cour administrative d'appel* or the Conseil d'Etat, the court may sit in different formations, depending on the difficulty of the case. A straightforward case may well be heard by a single chamber consisting of at least three judges. A more complex case or one where there is going to be a departure from established case law will often be heard by two or more chambers sitting together and involving at least two members of each chamber, an external member of the court and, as president, one of the assistant presidents of the Section du contentieux – at least five judges. A more plenary formation of a court can involve more judges. In the Conseil d'Etat, there are two plenary formations. The Section du Contentieux will have fifteen judges consisting of all the presidents of the chambers together with the President of the Section du Contentieux and his three assistant presidents, and the reporter judge (art. R122-18 CJA). The Assemblée du contentieux is reserved for the most difficult cases of principle. In this case, the presidents of each section of the Conseil will sit, together with the three assistant presidents and the four most senior presidents of chamber in the Section du Contentieux, the president of the chamber in which the *instruction* took place and which is proposing a draft judgment, and the reporter judge. It is then presided over by the Vice President of the Conseil – a total of seventeen judges (art. R122-20 CJA). The decision to refer a case to the Section or the Assemblée is taken by the President of the Section du contentieux depending on the importance of the case, the necessity to ensure harmony between chambers and the likelihood to overrule an established case law. He is assisted by the three assistant presidents,

and this informal committee created in 1959 is internally called the 'Troïka' in spite of their number (four), so named at a time when the assistant presidents were only two. There is thus a hierarchy of decision-making panels, and this has an impact on the authority of the decision as a precedent. Decisions handed down by the Section or the Assemblée du contentieux have very great authority, even if they are not formally binding on lower courts.

4.8 THE DELIBERATION

The deliberations of the court take place in private and all present have to respect the secrecy of deliberations. In the Conseil d'Etat, its members, including the *rapporteur public*, have a right to attend the deliberation in order to learn how decisions are taken. They are spectators, but it is often a useful learning experience, especially for the *auditeurs* who are in formation. Exceptionally external members are invited, such as professors of law, and they may be invited to give their opinion on the case at this stage too.

It is often suggested that common law and French judges reason differently. That might appear to be true if you simply look at the style of the justifications produced for decisions. But, as one of us has written, actually you can find all the forms of reasoning used by common law judges in the debates between French administrative judges as they come to their decisions.[95] For example, they may not cite previous decisions in their formal judgment with the exception of the 2014 *Dieudonné* case[96]), but the *dossier* prepared by the reporter judge will be full of copies of previous decisions and the *rapporteur public* will make extensive use of such cases in his opinion. As one of the authors wrote elsewhere,[97]

> The practice of drafting judgments shows a special respect for precedent. The French style of judgments is very precise in its formulations. *Rapporteurs* are told to reproduce a precedent word for word unless they intend to depart from it. There is no question of following the common law judicial habit of paraphrasing a precedent but meaning the same thing. If an expression different from the precedent is used, this indicates a change in the case-law.

[95] J. Bell, *French Legal Cultures* (London: Butterworth's, 2001), chapter 5, section D 3; J. Bell, 'Reflections on the Procedure of the Conseil d'Etat', in G. Hand and J. McBride, eds., *Droit sans frontières* (Birmingham: Birmingham Faculty of Law, 1991), p. 211.

[96] CE ord. 9 January 2014, *Dieudonné*, no. 374508 (precedents cited in the visas of the decision).

[97] Bell, *French Legal Cultures*, chapter 5, section 3 D c, offering CE Sect 28 February 1986, *Akhras and Bouhanna*, no. 50277, AJDA 1986, 320 concl. Denoix de St Marc as an example.

Similar remarks can be made about the use of policy arguments and consequentialist reasoning. Examples can be found in the preparatory materials made by the reporter judge and the *rapporteur public* or in the oral debates, but they do not find their way into the judgment.

At the end of the deliberation, the reporter judge drafts the final version of the judgment which reflects the decision taken and this is signed off by the president of the court before it is published and sent to the parties and to the relevant ministry or public authority. A minute of the deliberation is also kept for the internal files of the court. It is possible for members of the court to consult these minutes at a later date in order to understand the decision more clearly.

The style of French judgments has long been a subject of comment and puzzlement by both common law and French lawyers. The canonist form of writing the text as a single sentence with each main idea being expressed in the form of a recital beginning 'Considering that . . . ' has long bemused French litigants and foreign observers alike, although the style of the Cour de cassation (starting each paragraph with 'attendu que') appeared to be even more obscure for non-lawyers. It was with relief that the working group headed by Bernard Stirn, the President of the Section du contentieux, steered through a reform which led to a major change in the style adopted by the administrative courts from 1 January 2019. Gone is the 'Considérant que . . . ' formula and also writing the judgment as a single sentence.[98]

The *Vade-mecum* produced by the Stirn working group in 2018 now provides detailed guidance on the drafting of administrative court judgments.[99] The booklet advises those drafting a judgment that it should be 'readable, intelligible, and convincing' for the parties.[100] It also notes that there are other audiences for a judgment: citizens and journalists, those interested in the development of legal doctrine, as well as the judges involved in earlier stages of the case.

4.9 ENFORCEMENT

The judgment is sent to the parties and their representatives. The judgment has an executory formula which orders the ministry or other relevant public authority (and *huissiers* if measures are to be taken against private persons) to ensure the enforcement of the decision (art. R751-1 CJA).

[98] See *Vade-mecum*, note 99, and C. de Montecler, 'Adieu considérant', AJDA 2018, 2420.

[99] Conseil d'Etat, *Vade-mecum sur la rédaction des décisions de la juridiction administrative* (Paris, 2018), accessible on the Conseil d'Etat website.

[100] Ibid., p. 4.

In the case of orders against the administration to pay money, the judgment itself constitutes authority to pay (an *ordonnancement*) (art. L911-9 CJA). As long as the judgment is final and specifies the exact sum to be paid, then the claimant who has not been paid within two months of the decision by the state can take the judgment to the accounting officer of the relevant public authority and request payment. If the public body in question is a local authority or other non-state body, the claimant addresses herself to the prefect or the supervisory body for that authority. That supervisory authority has power to substitute their decision for the authority in question and to use its resources to pay the judgment. Thus, a prefect in Corsica claimed he had no power to sell property of the commune of Santa Maria Poggio in order to satisfy a judgment debt resulting from a decision of the *tribunal administratif* of Bastia in favour of the claimant. He committed an error of law and his refusal was quashed by the Conseil d'Etat.[101]

When a decision requires the administration to act or refrain from acting, the court may issue an injunction (*injonction*) to act which, as a matter of principle, must be requested by the claimant. For example, in the *Church Gatherings* case discussed in Section 4.3, the Prime Minister was required to produce a new set of regulations within a week which dealt with the question of religious organisations holding services and other activities in their buildings. As in England, there was a long reluctance to allow the courts to issue injunctions against the administration. But this was permitted by legislation in 1995 (now enshrined in arts. L911-1 and L911-2 CJA) and it has become commonplace. Interestingly, such a power injunction did exist in until the Law of 24 May 1872 when the *justice retenue* was abandoned. A former President of the Section du Contentieux explained that, within the system of the *justice déléguée*, since judgment did not have the signature of an executive body anymore, the courts refrained from issuing injunctions since they did not have a means to enforce them. As Rivero famously wrote, 'le juge ne saurait brandir la hache de guerre contre l'autorité qui la porte à la ceinture'.[102] But things have evolved due to two pieces of legislation enacted at the end of the twentieth century.

Since 1980, the Conseil d'Etat has been able to attach a monetary penalty, an *astreinte*, to any order for the enforcement of a judgment (art. L911-4 CJA) after the inexecution of a judgment is established. The Law of 8 February 1995 gave similar powers to lower administrative courts and also gave the possibility

[101] CE Sect. 18 November 2005, *Société fermière de Campoloro*, no. 271898.

[102] J. Rivero, 'Le Huron au Palais-Royal ou réflexions naïves sur le recours pour excès de pouvoir', D. 1962, chr. 37.

to give injunction at the time of the ruling (and not only once the inexecution is established) and eventually *astreintes* if the injunction does not come into effect, which is quite rarely the case since the injunctions (the function of which is also to enlighten parties about the consequences of a court decision) are generally respected. Regarding *astreintes*, they usually take the form of a sum of money for each day on which the judgment is not enforced. At the end of the process, the court then converts this into a final sum of money due, and it determines how much of the money is paid to the parties and how much is paid to the state (arts. L911-6 to L911-8 CJA). The penalty can be substantial. For example, the *tribunal administratif* of Polynesia quashed the implicit refusal by the local administration to approve an operator of mobile telephony in its territory. It then required the administration to grant it an operator's licence within a month subject to an *astreinte* of €1 million a day for non-compliance.[103] The number of *astreintes* ordered for the enforcement of decisions is small. In 2018, the *tribunaux administratifs* ordered seventy-four *astreintes*, the *cours administratives d'appel* ten, and the Conseil d'Etat sixteen. These are out of a total of 3,555 complaints of non-enforcement.[104] That said, half of these complains concern cases which the administration is appealing against the finding in favour of the complainant and so these are not proper instances of non-enforcement of judgments by the administration. Three-quarters of the complaints are resolved at an administrative stage in the courts, and these do not require judgments.[105] In the end, only fifteen *astreintes* were liquidated (i.e. confirmed) by the administrative courts in 2018, which shows ultimately a low level of non-enforcement.[106]

As is illustrated by the *Church Gatherings* case and the Polynesian mobile telephony case, a court order may specify a time period within which the administration must act to rectify the situation.[107] In order to protect legal certainty, the Conseil d'Etat in the *Church Gatherings* case did not annul the existing regulation banning gatherings in churches and religious buildings. It just gave the government time to produce a rule which better reflected the proper balance between the protection of health and the freedom of religious practice. In some cases, the result will be different from the quashed decision, but where there has been a procedural irregularity, it will allow the administration to reach the same result by a proper process. This technique of

[103] TA French Polynesia, 12 June 2018, *SAS ViTi*, no. 1700414, Conseil d'Etat *Rapport d'activité 2019*, p. 141.
[104] Ibid., pp. 178–9, 180–1.
[105] Ibid., p. 179.
[106] Ibid.
[107] See notes 54 and 95, respectively.

adjusting the effects of a decision in time can meet concerns of legal certainty. This is easiest in the *plein contentieux*, where the decision examines the legal situation of the parties at the day of judgment. In the case of the *recours en annulation*, the court examines the issue of legality at the date of the administrative decision and so any annulment should have retrospective effect. But this might upset the interests of third parties as well as of the administration.

In the *Association AC!*, administrative rules implementing a collective agreement relating to employment law had been taken having consulted a committee some of whose members had not been properly appointed.[108] As a result, the new rules were invalid, but were being implemented by the administration. The Conseil d'Etat quashed the invalid rules, but only gave the annulment prospective effect, as is done sometimes by the CJEU but without a text as a legal basis. As it said, the court had to exercise a balancing judgment:

> Considering that the annulment of an administrative act implies in principle that this act is deemed never to have been made; that, however, if it appears that this retroactive effect of the annulment is such as to cause manifestly excessive consequences both in relation to the effects it could produce and to the situations which could have arisen whilst it was in force so that the public interest might lie in the temporary maintenance of its effects, it is proper for the administrative judge … to take into account on the one hand the consequences of the retrospective nullity for the various public or private interests in the case and, on the other hand, the disadvantages which would arise from a limitation of the temporal effects of the nullity with regard to the rule of law and the right of litigants to an effective remedy.

In this case, it was declared that some rules should only be annulled prospectively. But, even if other rules were to be annulled retrospectively, this should not affect the validity of payments already made by the administration to individuals in application of the invalid rules.

A similar protection of the situation of individuals from the effects of a nullity operating retrospectively applies in areas like civil service appointments and promotions. If a competition for promotion is annulled for an irregularity, then the civil servants who have been assigned already to new posts do not automatically lose their new jobs.

Very occasionally, the administration may ask a court to clarify its judgment. This enables the administration to determine what it has to do in order to comply with the judgment. It is not a different route to contest the outcome.

[108] CE Ass. 11 May 2005, *Association AC! and others*, no. 255886, Leb. 917 concl. Devys; RFDA 2004, 438.

One suspects that most such problems are resolved informally. But in 2018, fourteen such decisions were rendered – two by the Conseil d'Etat, one by the *cours administratives d'appel* and eleven by the *tribunaux administratifs*.[109]

4.10 CONCLUSION

The procedure of French administrative courts is a distinctive approach to doing justice to the parties, particularly to the citizen who wishes to complain about an administrative decision. The written procedure in particular is a distinctive mode of dealing with a case. It has advantages in focusing any oral hearing on precise issues, and making it less expensive for litigants at a distance to obtain justice. But, as has been seen, this process may result in considerable delay. France is not alone in having a mainly written procedure. Indeed, the common law procedures are becoming more similar in their requirements of written submissions. All the same, the common law procedures are more oral. Most systems now have interim decision procedures which are more oral, simply as a matter of practicality. Particularly in controversial policy areas, there is pressure to use the interim procedure to achieve results which would matter far less if they waited for a full hearing – for example, the decisions on restrictions of public liberties during the Covid-19 epidemic.[110] As has been seen, the rules of procedure have developed in the light of the European Convention on Human Rights and in the light of changes in technology. Social expectations have also changed with greater demands for transparency and accountability. The process of change has been one of organic development rather than radical change.

[109] See Conseil d'Etat, *Rapport d'activité 2019*, pp. 181–2.

[110] Compare the *Church Gathering* decision (note 54) with *Rev. Dr J.U. Philip and others* [2021] CSOH 32 (Lord Braid).