

Destruction of kestrels, a protected species, by collision with wind turbines and civil liability of operators

30/11/2022



Ruling No. 825

Dismissal

Summary

1. The admissibility of an action for liability brought by an association before a civil court pursuant to Article L. 142-2 of the Environment Code is subject to the existence of facts likely to be classified as criminal and falling within the scope of

the legislative provisions relating to the protection of nature and the environment, without being conditional on the prior establishment of an offence.

2. The prefectoral decrees authorising the operation of a wind farm in application of the special autonomous policy governing the operation of installations classified for the protection of the environment do not constitute an infringement of the principle of the separation of powers between the administrative authority and the judicial authority if the judicial judge, seised of an action for civil liability, finds that the operators of the wind farm have violated the provisions of Article L.411-2, 1°, of the Environmental Code prohibiting the destruction of protected wild species without holding the exemption provided for by the law.

3. The offence of harming the conservation of non-domesticated animal species is constituted, in its material element, by the violation of the prohibitions on the destruction of protected species provided for by Articles L. 411-1, L. 411-2 of the Environmental Code and its implementing regulations, a fault of imprudence being sufficient to characterise its moral element.

It follows that having noted the destruction of kestrels, a protected species, by collision with wind turbines despite the installation of distance systems, without the operators being able to justify the exemption constituting a justifying fact exonerating them from liability, the Court of Appeal deduced exactly that the offence had been constituted.

4. In accordance with Article 5 of Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 (known as the 'Birds' Directive), which requires Member States to implement concrete and specific measures to ensure effective compliance with the prohibitions mentioned therein, and Article 14, which authorises States to take stricter measures than those provided for by the Directive, national legislation, in Articles L. 411-1 and L. 411-2, 4°, of the Environment Code, has extended to protected wild birds the measures necessary for a system of strict protection laid down by Article 12(1)(a) of Council Directive 92/43/EEC of 21 May 1992 (known as the 'Habitats Directive'), on the interpretation of which the Court of Justice of the European Union ruled in a judgment of 4 March 2021 (CJEU, judgment of 4 March 2021, *Föreningen Skydda Skogen*, C-473/19 and C-474/19).

Consequently, in the absence of a reasonable doubt as to the interpretation to be given to the scope of the prohibition laid down by Article L. 411-1 of the Environment Code in the case of destruction of specimens of a protected species of bird caused by wind turbines, there is no need for a preliminary ruling.

RULING OF 30 NOVEMBER 2022, DELIVERED BY THE THIRD CIVIL CHAMBER OF THE COURT OF CASSATION

[...] On the report by Ms Farrenq-Nési, Judge, the observations of SARL Cabinet Briard, lawyer for EDF Renouvelables France, Parc Eolien de la Conque, Plein Vent Aumelas Clitourps, Parc Eolien de la Pierre, Parc Eolien du Nipleau, Parc Eolien des Trois Frères, Parc Eolien de la Petite Moure and Parc Eolien de la Vallée de l'Hérault, SARL Boré, Salve de Bruneton et Mégret, lawyer for the association France Nature Environnement, and the advisory opinion of Ms Vassallo, First Advocate-General, after debate in the public hearing of 18 October 2022, attended by Ms Teiller, President, Ms

Farrenq-Nési, Judge-Rapporteur, Mr Maunand, Elder Judge, Ms Greff-Bohnert, Messrs Jacques, Boyer, Ms Abgrall, Judges, Ms Djikpa, Mr Zedda, Ms Brun, Judge Referees, Ms Vassallo, First Advocate-General, and Ms Besse, Chamber Registrar, the Third Civil Chamber of the Court of Cassation, composed, pursuant to Article R. 431-5 of the Judicial Code, of the aforementioned president and judges, after deliberating in accordance with law, has delivered this ruling.

Facts and Procedure

1. According to the ruling under appeal (Versailles, 2 March 2021), Parc éolien de la Conque, Plein vent Aumelas Clitourps, Parc éolien de la Pierre, Parc éolien du Nipleau, Parc éolien de la Petite Moure, Parc éolien des Trois frères and Parc éolien de la Vallée de l'Hérault (the owner-operators) each own a wind farm built and commissioned between 2006 and 2013 for a total of thirty-one wind turbines in several municipalities in the department of l'Hérault.

2. The supervision of the operation and management of the farms were entrusted to EDF Renouvelables France (EDF) under an asset management agreement.

3. The sites of Causse d'Aumelas, Plaine de Villera-y-Montagnac and Plaine de Fabrèges-Poussan, on which the wind turbines are located, are classified as special protection zones under Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (Birds Directive), applicable to the lesser kestrel (*Falco naumanni*).

4. The *Ligue pour la protection des oiseaux* (Bird Conservation League), responsible for implementing the National Lesser Kestrel Action Plan and monitoring the impact of these wind farms on said bird species, reported in 2011 and 2012 that several dead birds had been found at the foot of the facilities.

5. In July 2014, prefectural orders required the installation on all wind turbines of a bird detection and scaring line called "DT-Bird", tested on two devices as from 2013.

6. Despite the installation of the line, more dead lesser kestrels were discovered and the association France Nature Environnement (the association) sued the owner-operators and EDF for compensation for the non-material damage caused by the destruction of specimens of a protected species.

7. The respondents raised the inadmissibility of the association bringing proceedings.

Reviewing pleas

On the first plea

Statement of plea

8. The owner-operators and EDF object to the ruling declaring the association's claims admissible, even though "the violation of laws on the conservation of nature and the environment constitutes grounds for the admissibility of an action brought by an authorised environmental conservation association on the basis of Article L. 142-2 of the Environmental Code"; whereas in this case, in order to set aside the plea of inadmissibility raised by the companies in question, the Court of Appeal stated that the admissibility of the action brought by the association France Nature Environnement on the grounds of a merely "alleged" violation under Article L. 415-3 of the Environmental Code was not conditional on "the prior establishment of the violation"; whereas, in so ruling, where the special legislative power attributed to authorised associations referred to in Article L. 141-2 of the Environmental Code expressly subjects the admissibility of their action to the commission of facts "constituting a violation of laws on the conservation of nature and the environment", which precludes, by way of hypothesis, their action being admissible when the criminal offence relating to the environment in question is only "alleged" and there is doubt as to whether it was committed, the Court of Appeal infringed Article L. 142-2 of the Environmental Code, Article 1240 of the Civil Code and Articles 122 and 31 of the Code of Civil Procedure."

Court's response

9. Article L. 142-2 of the Environmental Code makes it possible for environmental conservation associations authorised under Article L. 141-1 of the same Code to bring actions for damages before both the criminal and the civil courts in the event of facts that have a direct or indirect effect on the collective interests they defend and that constitute a violation of laws on the conservation of nature and the environment and the texts adopted for their application.

10. The admissibility of the action is subject to the existence of facts that can be classified as criminal within the scope of the abovementioned provisions.

11. On its own and on adopted grounds, the Court of Appeal noted that the purpose of the action brought by the authorised environmental conservation association was to seek compensation for non-material damage resulting from the alleged destruction, between 2012 and 2016, of numerous specimens of lesser kestrels, a protected species, in breach of the prohibitions laid down in Article L. 411-1 of the Environmental Code and the regulations adopted under Article L. 411-2, constituting an offence defined in and punishable under Article L. 415-3 of the same code.

12. It concluded, and correctly so, that the admissibility of the action for general civil liability brought by the association in respect of the environmental offence in question was not conditional on the confirmation or prior establishment of the offence, since the admissibility of an action could not be conditional on the prior demonstration of its merits.

13. The plea is therefore unfounded

On the second plea

Statement of plea

14. The owner-operators and EDF object to the ruling that declares them liable for non-material damage caused to the association and that orders them to pay the association a certain sum, when:

"1. whereas the principle of the separation of administrative and judicial powers precludes the ordinary judge from substituting his/her own assessment with that made by the administrative authority, in the exercise of its special policing powers, on the dangers or inconveniences of installations subject to the conservation of the environment for any of the interests referred to in Article L. 511-1 of the Environmental Code, in particular with regard to the risk of accidental destruction of specimens of a protected species as a result of their operation; whereas by holding, in this case, that the mere fact that the ordinary judge, seised on the basis of Article 1240 of the Civil Code, found that there had been a violation of Article L. 411-1(1) of the Environmental Code, without the parties in violation providing proof of a waiver having been granted by the administrative authority, did not constitute an infringement of the principle of separation of administrative and judicial powers or interference by the ordinary judge in the exercise of the powers conferred on the administrative authority, even though it had also found that, by orders of 9 July 2014, the Prefect of l'Hérault, who had been specifically informed of the collisions between wind turbines and specimens of the lesser kestrel, a protected species, had authorised the continued operation of the wind farms in question without making it conditional on the prior granting of a waiver, subject to the implementation of special requirements with which the operating companies had strictly complied, the Court of Appeal infringed the principle of separation of powers, the Law of 16-24 August 1790 and the Decree of 16 Fructidor Year III;

2. whereas the principle of separation of judicial and administrative powers precludes the ordinary judge from being able to substitute his/her own assessment with that made by the administration, in the exercise of its special policing powers, on the appropriateness and sufficiency of reduction measures intended to mitigate the likelihood of a risk of accidental destruction of specimens of a protected species as a result of the operation of installations classified as subject to the conservation of the environment; whereas, in this case, the special requirements adopted by the Prefect of l'Hérault in the orders of 9 July 2014 were intended to "reduce the impact of the installations on biodiversity", in other words, to minimise the risk of death of specimens of the lesser kestrel species caused by collisions with wind turbines; whereas, in order to uphold the action of the association France Nature Environnement, the Court of Appeal held that the accidental collisions between the wind turbines and the specimens of the lesser kestrel species had continued despite the installation of the "DT-BIRD" line and therefore, as no waiver had been applied for or obtained by the operating companies, both the material and the moral elements of the offence defined in Article L. 415-3 appeared to be constituted; whereas, in so doing, the court implicitly but necessarily assessed the appropriateness and effectiveness of the special requirements adopted by the Prefect of l'Hérault in the context of the orders of 9 July 2014, which sought to make the installation of the "DT-BIRD" line general on all wind turbines in the farms concerned according to a schedule determined on the basis of its observed effectiveness; whereas, by thus substituting its own assessment with that made by the administration on the appropriateness and effectiveness of the reduction measures to be adopted in order to mitigate the likelihood of occurrence of accidental collisions between wind turbines and specimens of the duly identified lesser kestrel, the Court of Appeal further infringed the principle of separation of powers, the Law of 16-24 August 1790 and the Decree of 16 Fructidor Year II;

3. whereas, in accordance with the principle of separation of administrative and judicial powers set forth in Article 13 of the Law of 16-24 August 1790 and the Decree of 16 Fructidor Year III, subject to matters reserved by nature to the judicial powers and unless provided otherwise by law, it is for the administrative courts alone to hear actions for the annulment or reformation of decisions taken by the administration in the exercise of its powers as a public authority; whereas, likewise, the administrative judge has, in principle, exclusive jurisdiction to rule, where appropriate, by means of a request for preliminary ruling, on any challenge to the lawfulness of such decisions, raised in a dispute that is primarily a matter for the judicial authority; whereas it is finally apparent from Article 49(2) of the Code of Civil Procedure that, where the outcome of a dispute depends on a matter raising a serious difficulty and falling under the jurisdiction of the administrative courts, the court seised initially shall refer said dispute to the competent administrative court and shall stay the proceedings until issuance of the decision on the request for a preliminary ruling; whereas, in this case, in order to assess the merits of the action for damages brought by the association France Nature Environnement, the Court of Appeal found that 26 specimens of lesser kestrel were killed between 2011 and 2016 by collisions with wind turbines at Parc du Causse d'Aumelas and that the operating companies did not produce any waiver to that effect, whereby it inferred that there had been an infringement of Article L. 411-1 of the Environmental Code; whereas, by so ruling, although it was clear from the orders of 9 July 2014 expressly authorising the continued operation of the installations without making it subject to the prior granting of a waiver or to the absence of the duly identified risk of accidental collisions that, in the light of Article L. 411-1 of the Environmental Code, the competent administrative authority had accepted the lawfulness of accidental destruction likely to occur in connection with the operation of the installations in accordance with the procedures said authority itself had laid down specifically to mitigate said risk of occurrence, the Court of Appeal, which should have deduced that the resolution of the dispute was subject to the preliminary ruling and that it was to refer to the administrative judge by means of a request for preliminary ruling on the lawfulness of said orders, which involved serious difficulty, disregarded the scope of its authority and infringed the principle of separation of powers, the Law of 16-24 August 1790, the Decree of 16 Fructidor Year III and Article 49(2) of the Code of Civil Procedure."

Court's response

15. On the one hand, wind turbines are subject to the special legislation applicable to installations classified as subject to environmental conservation in Articles L. 514-44 et seq. of the Environmental Code, according to which installations for the production of electricity using mechanical wind energy must be operated in accordance with the requirements laid down in the administrative operating permit.

16. On the other hand, the special, autonomous legislation relating to the conservation of natural heritage prohibits, under Article L. 411-1 of the Environmental Code, the destruction of protected non-domestic species of animals; however, Article L. 411-2(4o) reserves the possibility for the competent administrative authority to grant waivers of said prohibition.

17. Indeed, the Court of Appeal held that the orders of 9 July 2014 issued by the Prefect, whose specific measures imposed for the protection of the lesser kestrel are claimed to have been strictly complied with by the owner-operators, had not been adopted pursuant to Article L. 411-2 on protected species.

18. It also found that no application for waiver or ruling by the administration authorising the destruction of the said protected specimens had been produced.

19. The Court of Appeal, which did not substitute its assessment for that of the administration with regard to the requirements attached to the permits to continue operation issued in 2014 under the specific control measures for classified installations applicable to wind turbines, correctly held that the principle of separation of administrative and judicial powers had not been infringed and that there had been no interference by the ordinary judge in the exercise of the powers conferred on the administrative authority as a result, for the ordinary judge, seised on the basis of Article 1240 of the Civil Code, of an action for liability based on the destruction of a protected wild species, confirming violation of Article L. 411-2(1) of the Environmental Code without the infringers providing proof of a waiver having been granted by the administrative authority.

20. The plea, ineffective in its third part, since the lawfulness of the prefectural orders of July 2014 has no impact on the solution of this dispute, is therefore unfounded for the remainder.

The first and second parts of the third plea

Statement of plea

21. The owner-operators object to the ruling declaring them responsible for the damage suffered by the association and ordering them to pay said association sums in compensation for non-material damage:

"1. whereas the offence defined in and punishable under Article L. 415-3 of the Environmental Code presupposes the combination of a material and moral element constituted by recklessness; whereas, in order to characterise such recklessness, the court must examine whether recklessness or negligence was committed by the person concerned by comparison with the behaviour of a person who is normally prudent and diligent; whereas, in this case, in order to uphold the action for damages brought by the association France Nature Environnement, the Court of Appeal first held that it was not disputed that 28 specimens of lesser kestrels, a non-domestic animal species protected under Article L. 411-2 of the Environmental Code, had perished as a result of collisions with the wind turbines on the farms in question, even though it is prohibited by the Environmental Code, and, second, that the operating companies did not provide proof of "either an administrative permit for the destruction of protected specimens or an administrative waiver as defined in Article L. 411-2 of the Environmental Code", so that proof of both the material and the moral element, of the negligence of the offence of damage to the conservation of protected non-domestic animal species, provided for in Article L. 415-3 of the Environmental Code, was established; whereas, by so ruling, despite the fact that the plaintiff companies had expressly so requested, to ascertain whether the operating companies had or had not adopted prudent conduct and applied the usual diligence required of them given their mission, their competencies, their powers and the means at their disposal, the Court of Appeal deprived its ruling of a legal basis in the light of Article L. 415-3 of the Environmental Code;

2. whereas, although Article L. 411-1(1) of the Environmental Code prohibits any destruction of specimens of non-domestic animal species, the criminal penalty attached to the violation of said prohibition, established by Article L. 415-3 of the same code, applies only insofar as harm has been caused to the conservation of the species concerned; whereas, therefore, the conditions of the administrative prohibition laid down in the first of said texts, to which only a waiver granted under Article L. 411-2(4) of the Environmental Code can apply, are not identical to those to which the legislator

intended to govern application of the criminal penalty associated with the infringement of the abovementioned administrative prohibition; this implies not only that Article L. 411-1(1) of the Environmental Code has been infringed, but also that the "conservation" of the species has been harmed; whereas in this case, in order to find that the material element of the offence defined in and punished by Article L. 415-3 of the Environmental Code was constituted, the Court of Appeal merely stated that "28 lesser kestrels, a non-domestic animal protected under Article L. 411-2(1) of the Environmental Code, were killed between 2011 and 2016 following collisions with wind turbines on the Causse d'Aumelas farms, while this was prohibited by the Environmental Code" and that "the respondents do not provide proof of either an administrative permit for the destruction of protected species or an administrative waiver as defined in Article L. 411-2 of the Environmental Code"; whereas, in so ruling, when it was also for the Court of Appeal to characterise the damage caused to the "conservation" of the protected species in question by the effect of said destruction, said court deprived its ruling of a legal basis under Article L. 415-3 of the Environmental Code."

Court's response

22. On the one hand, it follows from Articles L. 411-1 and L. 415-3 of the Environmental Code that the offence of causing harm to the conservation of non-domestic animal species constitutes an infringement of the prohibitions given in Article L. 411-1 and in the regulations adopted under Article L. 411-2 of the same code (Crim., 5 April 2011, appeal No. 10-86.248).

23. The Court of Appeal was therefore not required to characterise the harm caused to the conservation of the protected species in question, since said damage resulted from confirmation of the destruction of a specimen of the lesser kestrel species, in breach of the prohibition provided in Article L. 411-1(1) of the Environmental Code.

24. On the other hand, it is held that negligence is sufficient to characterise the moral element of the offence of causing harm to the conservation of protected non-domestic animal species, provided for in Article L. 415-3 of the Environmental Code (Crim, 1 June 2010, Appeal No. 09-87.159, Bull. crim. 2010, No. 96).

25. The Court of Appeal found that twenty-eight lesser kestrels, a non-domestic animal species protected under Article L. 411-1(1) of the Environmental Code, had been killed between 2011 and 2016 by collision with wind turbines on the Causse d'Aumelas wind farms, that said destruction continued despite the installation of the DT-BIRD line, and that the owner-operators had not applied for a waiver from the prohibitions laid down by said article, which would have been evidence for exemption from liability.

26. Indeed, the court inferred from this, without being required to follow the details of the parties' arguments regarding the procedure followed by the owner-operators, that the offence of causing harm to the conservation of a protected non-domestic animal species, provided for in Article L. 415-3 of the Environmental Code, was characterised in both its material and its moral element.

27. The Court of Appeal thus provided legal justification for its ruling.

On the third part of the plea

Statement of plea

28. The owner-operators make the same objection to the ruling, "even if the conditions of the administrative prohibition under Article L. 411-1(1) of the Environmental Code are the same as those which determine the application of the criminal penalty provided for in Article L. 415-3 of the Environmental Code, such that an infringement of the conservation of the species would not be required for the offence to be classified as defined in and punishable by the second of said texts, there is doubt as to the interpretation of the scope of the prohibition set by the legislator under Article L. 411-1 of the Environmental Code, where the destruction of one or more specimens of a protected bird species has been caused by lawful human activity whose purpose is manifestly not the killing or disturbance of animal species; whereas it is therefore for the Court of Cassation to remove that doubt in accordance with Article 267 of the Treaty on the Functioning of the European Union and to refer the following matter to the Court of Justice of the European Union for a preliminary ruling: "Is Article 5(a) to (d) of the Birds Directive to be interpreted as precluding a national practice according to which, where the object of a lawful human activity, such as timber harvesting or land use, as in the operation of a wind farm, is manifestly not the killing or disturbance of animal species, where the prohibitions laid down in said provision apply only when there is a risk of a negative impact on the conservation of the species concerned and, on the other hand, the protection afforded by said provision ceases to apply to species that have achieved a favourable conservation status?"

Court's response

29. As provided for in Article 12 of Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (the Habitats Directive), Article 5 of the Birds Directive requires Member States to adopt a comprehensive and effective legislative framework by implementing specific and concrete measures for the protection of all species of wild birds which must ensure effective compliance with the prohibitions referred to in said Article, in particular the prohibition on intentional killing, where Article 14 authorises Member States to take measures stricter than those provided for in the directive.

30. Articles L. 411-1 and L. 411-2(4) of the Environmental Code prohibit the destruction of all non-domestic animal species, including birds, and provide for the conditions and grounds for waiver from those prohibitions as provided in Article 16 of the Habitats Directive.

31. Article 3 of the Order of 29 October 2009, which, pursuant to said legislation, provides the list of protected birds throughout the national territory and the arrangements for their protection, includes the lesser kestrel, whose intentional destruction is prohibited.

32. National legislation has thus included protected wild birds in the measures necessary for a strict protection system as laid down in Article 12(1)(a) of the Habitats Directive.

33. The Court of Justice of the European Union has ruled that the abovementioned Article must be interpreted as precluding a national practice according to which, where the object of a human activity, such as timber harvesting or land use, is manifestly not the killing or disturbance of animal species, the prohibitions laid down in that provision apply only when there is a risk of a negative impact on the conservation of the species concerned, and, on the other hand, the protection afforded by said provision does not cease to apply to species that have achieved a favourable conservation status (CJEU, ruling of 4 March 2021, Skydda Skogen, C-473/19 and C-474/19).

34. It follows that, in the absence of reasonable doubt regarding the interpretation of the scope of the prohibition set by the legislator under Article L. 411-1 of the Environmental Code in the event of destruction of specimens of a protected bird species by wind turbines, there are no grounds to request a preliminary ruling from the Court of Justice of the European Union on the matter stated in the plea.

ON THESE GROUNDS, the Court:

DECLARES that a request for preliminary ruling is not fitting;

DISMISSES the appeal;

Orders Parc éolien de la Conque, Plein vent Aumelas Clitourps, Parc éolien de la Pierre, Parc éolien du Nipleau, Parc éolien de la Petite Moure, Parc éolien des Trois frères, Parc éolien de la vallée de l'Hérault and EDF Renouvelables France to pay the costs;

In accordance with Article 700 of the Code of Civil Procedure, rejects the application made by Parc éolien de la Conque, Plein vent Aumelas Clitourps, Parc éolien de la Pierre, Parc éolien du Nipleau, Parc éolien de la Petite Moure, Parc éolien des Trois frères, Parc éolien de la vallée de l'Hérault and EDF Renouvelables France and orders them to pay the association France Nature Environnement the sum of EUR 3,000.

Thus done and judged by the third civil chamber of the Court of Cassation and delivered by the president in public hearing on the thirtieth day of the month of November of the year two thousand and twenty-two.

President : Ms Teiler

Reporting Judge : Ms Champalaune

Advocate-general : Ms Vassallo

Lawyer(s) : SARL Cabinet Briard – SARL Boré, Salve de Bruneton et Mégret



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