

## Lebanese Council of State: Post-hoc modification of exam rules violates equality principles

Thursday, November 12, 2009

***Editors note:*** The Council of State (French Conseil d'Etat), known in Lebanon as Majlis al-Shura (in some Arab countries it's called Majlis al-Dawla), has a dual role. It advises government on legislation and legislative drafting, and it sits as the high administrative court in cases where the government, or one of its agencies, is party to a dispute. Since the appointment of Chucri Sader as its president last year, it has been active in the protection of basic rights against administrative measures harmful to the citizen. In the decision below, a government-organized contest was annulled because of the violation of the equality principle, as the rules of the contest were changed without proper notification of participants, and after the closure of candidacy. Note in the following excerpts the significant use by the Council of French precedents and legal scholarship. Explanations in brackets are by The Daily Star.

Council of State  
Sitting in litigation

Decision 236/2008-9  
Date: 22/1/2009

Petition 14250/2007  
488/2007 (litigation)

Petitioner/Plaintiff: Principal Inspector Nagib Nasr and colleagues  
Defendant: The State

Court members: President, Chucri Sader; Chamber President Andre Sader; Chamber President Albert Serhan; Member Yusif Nasr; Member Fatima al-Sayegh Uwaidat.

In the name of the Lebanese people

The Council of State, sitting in cases [i.e. litigation, as opposed to its advisory role in legislation]

After taking cognizance of the petition file, and the report of the rapporteur [in the Council of State proceedings, a rapporteur is usually assigned to a case. His report is often the basis for the final ruling, though not always] and that of the government delegate [the government defends itself through its lawyers, but there are cases where the administrative structure being sued has its own "government delegate"], and the comments thereupon,

After deliberation in accordance with the rules,

The plaintiffs, principal inspectors Najib Nasr, Qozhaiyya Hatem, Danny Daher, Hussein al-Musawi, Hasan Serhane, Ahmad Abu Daher, Munir Muawwad, Muhammad Dhib, Suhail Shabbao, Abbas al-Harshi, Majdi Abbas, Sasin al-Khuri Hanna, Walid Abu Shdid, Ali Ahmad, Mahmud Abu Daher, Sharbel Doumit, Tony Maqdisi, Tanius Saad, Marwan al-Jamil, Joseph Aad, Nasib Rihan, George Mina, Malek Rustum, Ghassan Daher, Diab al-Qaaqur, brought a case before this Council on 23/4/2007 through their legal counsel. The case, registered under number 14205/2007, requests a freeze in the implementation of Employment Memo 11/a's/m dated 24/2/2007, the cancellation of the exam [a governmental contest where only candidates who receive a certain score are admitted] and results of the aforementioned Memo 11, the retaining by the plaintiffs of all their rights, and costs to the defendant for all expenses and dues.

[The Council of State then reports in detail the main arguments of the two parties in all the briefs exchanged by the parties' legal representatives.]

On which basis, [the Council of State decides]:

First: on the two briefs presented by the State on 5/8/2008 and 12/11/2008

The State presented two briefs on the rapporteur and government delegate's reports beyond the time prescribed by the statute of limitations.

These briefs are joined to the file in the cause of justice.

Second: In the request for third party intervention on 18/9/2008:

Mr. Fadi Nasif Daww and his colleagues presented a request for intervention as winners in the contest which is the subject of the petition.

The case seeks to examine the legality of the contest on the basis of objective conditions not linked to the personal situation in the participants.

The case in its current state is ripe for decision, and there are sufficient elements in the file for this Council to make its decision on the issue raised.

In any case, the request for third-party intervention before this Council must be limited to supporting one of the two parties under Article 83 of the Council's rules.

Therefore, in the light of the above, the request for third party intervention is denied.

Third: In the request to cancel the freeze order

Since the case is ready for a decision, the request for a freeze order [a freeze order is a temporary measure that the court may decide] is joined to the case. Both will be decided together.

Fourth: Standing

The defendant requests the dismissal of the case for lack of standing of the plaintiffs.

It argues that a number of plaintiffs have failed under the basic rules of the contest, and the cancellation will result in the dismissal of the contest results, but will not lead to a direct and personal advantage to them.

The file shows that the plaintiffs have participated in the contest held for their promotion to the rank of lieutenant, and that they reject the Employment Memo which included the results of the contest.

Precedents agree on the acceptance of the request of the contest participants, who are the persons who have participated in a particular exam, when the rules for the preparation of the contest, for its carrying out, and for the appointments are being challenged.

A. Plantey. La fonction publique , 1991, p.448.

1083 : La juridiction a largement admis la recevabilité des pourvois qu'ils soient dirigés contre les décisions préparatoires au concours ..., ou contre les opérations du concours, de la part des candidats qui se sont présentés (cf ...), ou enfin contre les nominations qui suivent le concours.

Sont recevables les requêtes présentées par les candidats, c'est-à-dire par toute personne qui s'est présentée (cf ...), a participé à toutes les épreuves (cf ...), ou même seulement à la première (cf ...) ... En revanche, ne sont pas recevables les requêtes des personnes qui n'ont pas été (cf ...) ou ne pouvaient être candidates au concours (cf ...) ...

Auby et Drago, Traité des recours en matière administrative, 1990, p.244.

9°... Dans le cas du recrutement après concours, les actes concernant l'organisation du concours et pris avant l'ouverture de celui-ci peuvent faire l'objet d'un recours de la part de toutes les personnes susceptibles de prendre part au concours. Après l'ouverture, la recevabilité est plus restreinte ... Les décisions du jury concernant l'organisation des épreuves ne peuvent donner lieu à un recours que de la part des candidats admis à concourir et ayant pris part aux épreuves(cf ...). En ce qui concerne enfin le classement des candidats par le jury ou les nominations intervenues, seuls les candidats ayant pris part au concours, y compris ceux qui ont été reçus ou nommés (cf ...) ont intérêt (cf ...).

On that basis, Memo 11 which includes the results of the contest for promotion from principal inspector and above to lieutenant, can be challenged by any candidate for promotion whose candidacy has been accepted and who has participated in the contest, whether he succeeded or failed.

The defendant's argument is therefore rejected, and all the plaintiffs considered to have standing in the case.

Five : on deadlines

The defendant requests the rejection of the case for being outside the statute of limitations, because the order challenged in circular 511/as/ dated 4/12/2006, according to which the modifications of the contest rules were decided, and argues that it is not possible to divide the results of the contest or distinguish it from the circular.

It is agreed, in legal writings and in case-law, that a contest is a complex operation, and that a challenge can be brought against any of the adverse measures or orders carried out under its provisions, within two months of the date of notification of such measures, the legality of which it is possible to challenge even after the deadline, so long as the challenge is made of the latest related measure, which is here the announcement of the contest results.

R. Odent, Contentieux Administratif, 1970-1971, Fasc. III, p. 863 :

Opérations Complexes:

... Les intéressés peuvent attaquer chacune des décisions préliminaires dans le délai du recours ouvert contre ladite décision. Mais ils peuvent aussi attendre l'intervention de la décision finale contre laquelle ils sont recevables à invoquer l'illégalité de l'une quelconque des décisions qui y ont concouru, même si le délai pour attaquer directement ces décisions arguées d'illégalité, est expiré. L'exemple classique d'opération complexe est celui des examens et concours.

The announcement of the results of the contest was made by Employment Memo 11 dated 24/2/2007.

The plaintiff presented its case challenging the Memo on 23/4/2007, within the two months statute of limitation. It falls therefore within the legal time and fulfils all of its formal conditions.

Sixth: On substance

The plaintiffs request the cancellation of the contest the results of which were announced in Memo 11 dated 24/2/2007, arguing that the defendant had changed the rules of the contest after it was started, and that it is illegal to alter the rules of any contest after the closing of the candidacy or after it started, in conformity with the principle of equality between the candidates.

The defendant argues that the principle of no change to the rules of the contest is relative, that it is possible not to follow it, and that the principle allows exceptions when so needed by the contest.

The issue raised before this Council regards the competence of the relevant authority in designating the rules and conditions of the contest, and the introduction of any modification to them after the start of the contest proceedings.

Precedents concur on the following:

The principle of no change to the conditions of participation in the contest, “les conditions d'accès au concours,” is an absolute principle which brooks no exception. The principle finds its rationale in the nature of these conditions, following which those who may participate in the contest are designated, for it is on this basis that the request for the candidacy, its acceptance or rejection gets decided.

CE, 29 octobre 1948, Bousquiet- Lerbet, p. 399.

La date de clôture des inscriptions est particulièrement importante. On doit estimer que, après cette date, la réglementation du concours ne doit plus pouvoir être modifiée. Cette réglementation est, en effet, de nature à inciter certains à se porter candidats, comme à détourner d'autres de faire acte de candidature.

René Chapus, Droit Administratif Général, Tome 2, 12<sup>e</sup> édition , p. 164.

It is always possible to alter the system of the competition (the number of exams, the date they take place, the subject-matter ...) at any time, and the measures taken in this regard can be applied immediately. It is necessary in this case for the contest or the exam not to have started.

Juris Classeur administratif, Fasc. 181, 88.

Un arrêt rappelle incidemment que la réglementation d'un concours peut être modifiée à tout moment par des dispositions d'effet immédiat (CE, 30 Juin 1978, Association nationale des assistantes de sc. éco. jur.et pol. : Dr. Adm. 1978, comm. 271 ...)

Mais elle ne peut être modifiée une fois commencées les épreuves.

CE, 27 juin 1962, Rec. 1962, p.991 : “Modification au règlement du concours : Inapplicables au concours dont les épreuves ont commencé avant la publication.”

CE, 5 juillet 1974, Sieur Mascaro, Rec. 1974, p. 403-404.

“Considérant que si l’arrêté d’ouverture d’un concours doit prévoir le nombre des postes à pourvoir, ce nombre peut être légalement modifié tant que les épreuves n’ont pas commencé.”

CE, 25 mars 1987, Mme Ell. Rec. 1987, p. 105.

“Considérant... il appartenait à l’autorité compétente tant que les épreuves du concours n’avaient pas commencé, d’apprécier s’il y avait lieu de réviser la liste des postes mis au concours pour faire droit à une demande de réintégration d’un praticien dont la disponibilité s’achevait ...”

Established precedents add another condition to the changes in the contest rules, namely that all the candidates without exception get notified of the modification at the same time and under the same conditions, otherwise the contest maybe annulled. Scholars explain this additional condition by the need to secure propriety in the appointment and to protect the principle of equality between the participants.

CE, 13 juillet 1961, Rec. 1961, p. 517, Sieur Cazes.

“... Qu’ainsi, dans les circonstances de l’affaire, et faute par l’administration d’avoir porté à la connaissance de tous les candidats au même moment et dans les mêmes conditions la suppression de l’épreuve de l’anatomie, le principe de l’égalité entre les candidats à un même concours n’a pas été respecté ; que dès lors le Sieur Cazes est fondé à demander l’annulation du jugement ... qui a refusé d’annuler les opérations dudit concours.”

The modification in the contest rules carried out by the administration took place after the beginning of exams, in particular the math exam, whilst taking note of the potential of each candidate and the establishment by the math exam committee of its assessment, according to the administrative file which the government presented in its brief dated 25/6/2007. The math disqualifying grade was cancelled by circular 511 dated 4/12/2006, and the other subject matters were modified by the Memo as follows:

The modifications explained above are contrary to legal principles established by precedent, undermine the validity of the contest, and call for its cancellation.

The defendant argues that the plaintiff, by raising the difference in the grades tables between the math committee and the final committee, intervenes in the discretionary power of the administration. This is not legally correct, because the administration’s power of appreciation in exam matters, even if discretionary, cannot constitute an abuse of power or a violation of the principle of equality.

“L’appréciation à laquelle il est procédé est discrétionnaire ... sauf détournement de pouvoir ... manquement au règlement du concours ou altération d’une épreuve ... violation de l’égalité des candidats ...”

(A. Plantey, La fonction publique, 2ème édition , p. 516).

It appears from the file that the grades of the final committee in the table appended under 2/exam committee in date of 21/2/2007, are different from the grades that appear in the math exam committee number 10127 in date of 27/11/2006.

The final committee may not reconsider the conclusions of the exam committee or change the grades which it receives from it.

The grade modification does not come within the discretionary power of the administration, and constitutes therefore an abuse of power which undermines the validity of the contest.

“Constituent des irrégularités graves le fait de soumettre certaines des épreuves du concours à d’autres personnes que les membres du jury (cf ...) comme celui de faire réviser les opérations du jury ou modifier ses propositions par un autre organisme (cf ...) ou de remettre même indirectement en cause une appréciation du jury.”

(A. Plantey, op. cit. p. 517).

Therefore, it is necessary to void the Memo under review and the contest on which it is based.

There is no need to look in the rest of the issues, which are moot.

Therefore,

The Council decides unanimously:

1. To add the government briefs in date of 5/8/2008 and 12/11/2008 to the file.
2. To reject the request for third party intervention.
3. To add the request for the freeze order to the main file.
4. To reject the defense’s argument of lack of standing of the petitioner.
5. To formally accept the petition.
6. To accept the petition in substance and to annul the Employment Memo and the contest results based on it.
7. To order defendant to pay all costs and fees, and to reject all other additional or contrary requests.

A decision made public on 22 January 2009.

President Chucri Sader; Chamber president Albert Serhan; Chamber president André Sader; Member Fatima al-Sayegh Uwaidat; Member Yusif Nasr; registrar Jeanne D’Arc Hajj.