4 As 157/2013 - 33

CZECH REPUBLIC

JUDGEMENT

IN THE NAME OF THE REPUBLIC

The Supreme Administrative Court ruled in a senate composed of the chairwoman JUDr. Dagmar Nygrínová and judges Mgr. Aleš Roztočil and JUDr. Jiří Palla in the plaintiff's legal case:

a) **the municipality of Dobřejovice**, with its registered office at Na Návsi 26, Říčany u Prahy,

b) **the municipality of Herink**, with its registered office Do Višňovky 28, Herink,

c) **the municipality of Modletice**, with its registered office at Modletice 6, Říčany u Prahy,

d) **Association of citizens around SOKP against traffic noise**, with its registered office at Mladýkov 406, Jesenice,

e) **D. Z.**,

all represented by JUDr. Michal Bernard, Ph.D., attorney-at-law, with its registered office in Příběnická 1908, Tábor,

against the defendant:

The City of Prague, with its registered office at Mariánské náměstí 2, Prague 1,

in the proceedings on the cassation complaint of the plaintiffs a) - e) against the decision of the Municipal Court in Prague of 30 September 2013, No. 6 A 162/2013 - 41,

in this way:

the decision of the Municipal Court in Prague of 30 September 2013, No. 6 A 162/2013 - 41, in the part concerning the statements I. and III. **is annuled** and **the case** in this extent **returns** to this court for further proceedings.

Statement of reasoning:

I.

The current course of proceedings

[1] On 27 June 2013, the defendant issued Decision No. MHMP 333704/2013/ODA-01/Za (hereinafter also the "contested decision"), by which he authorized at the request of the Czech Republic – Road and Motorway Directorate of the Czech Republic (hereinafter also “the applicant”) the trial operation of the construction “Road ring around Prague – Southwestern segment, section No. 512 D1 - Jesenice - Vestec”(hereinafter also“ the building in question ”), specified in this Decision and at the same time set out the following conditions for the trial operation: 1) the duration of the trial operation from 1 July 2013 to 31 December 2015, 2) during the trial operation the implementation of anti-noise walls marked as PHS_01 to PHS_05 according to the noise study from 03/2013, No. 3-0512-0008-69, processor PUDIS a. s, will take place. Furthermore, the defendant stated that according to § 124 par. 2 of the Building Act, the only party to the proceedings is the applicant, who is also the builder and the

owner of the building. In the instruction, the defendant stated that a participant could file an appeal against this decision within 15 days from the date of its notification.

[2] The defendants a) to e) challenged this decision of the defendant of 27 June 2013 in an action of August 26, 2013 before the Municipal Court in Prague. The applicants stated that the contested decision infringes on their rights, namely the right to protection of life and health, the right to property, the right to self-government, the right to a favorable environment, as well as the rights deriving from the Convention on Access to Information, public participation in decision-making and access to justice in environmental matters (published under No. 124/2004 Coll., hereinafter also the "Aarhus Convention"). Specifically, they claims the infringement on its rights as follows:

[3] Plaintiff a) is a municipality whose cadastral territory is currently intersected by two significant road communications. The building in question was newly built in the southern and southeastern part of the municipality and has been in operation since September 2010 on the basis of an early use permit for the building, the validity of which ended on 30 June 2013. Road II/0101 also intersects with the building in question on the territory of the municipality. The D1 motorway is adjacent to the municipality. Since the start of operation the load on land a residential zones caused traffic noise has increased significantly and noise is accumulating from all mentioned communications. The citizens of the plaintiff (a) complain that this is an unbearable noise which is continuous and so intense that it is not possible to sleep. Plaintiff (a) participated in the previous stages of discussion of the construction in question and sought to implement measures to minimize noise immissions, specifically the construction of noise walls on the bridge over Sulín, which was rejected with reference to a noise study according to which the load on residential areas should not exceed 47.1 dB, which is less than allowed by relevant standards. However, after the start of operation, on 4 and 5 October 2011 a measurement of the actual noise level, to which the residential houses in Dobřejovice [in particular, the house owned by the applicant (e)] are exposed, took place and it has been established that the actual average value of noise at night was 55 dB, which is a value significantly higher than the value calculated on the basis of the noise study used in previous permitting procedures and at the same time substantially exceeding permitted hygienic limits. These data were also confirmed in further measurements performer from 6 to 9 August 2013. The residents of the plaintiff a) demanded the reduction of noise also through the petition "For the reduction of noise pollution of municipalities in the vicinity of SOKP in part 512", which was signed by 1480 people and was handed over to the Ministry of Health and the Ministry of Transport.

[4] Plaintiff (b) is a municipality through whose territory the building in question also passes. Family houses are located in a distance about 800 m from the building in question and the plaintiff's residents are year-round disturbed by noise from the operation of the construction in question. Noise protection measures (walls, ramparts) on the construction in question in the section adjacent to the built-up area of the plaintiff b) was built in an illogical way on the side facing away from the municipality towards the fields, while on the adjacent side no anti-noise measures were built. The petition " For the reduction of noise pollution of municipalities in the vicinity of SOKP in part 512" was signed by 99 % of the population of the plaintiff b). According to measurements, the night noise load in the built-up area of the municipality exceeded permitted limits by 2.5 dB. The promise of the former minister of transport Dobeš concerning the construction of anti-noise measures was not fulfilled.

[5] Plaintiff (c) is a municipality in whose territory both the D1 motorway and now the building in question are located; the noise load increased after the commissioning of the building in question, so that the noise is now continuous and unbearable. Measurements have shown that noise studies used in permitting procedures that stated that the noise limits would not be exceeded, were incorrect and in fact the noise limit set for night hours is exceeded. Noise immissions are also affecting real estate

owned by the plaintiff c) (land with sports fields, playground, fire station armory). Citizens of plaintiff b) are also signatories to the above-mentioned petition.

[6] Plaintiffs (a) to (c) agree that the contested decision infringes on their right for self-government guaranteed by Article 8 and Articles 100 to 104 of the Constitution of the Czech Republic, the content of which is in accordance with § 2 para. 2 and § 35 para. 1 and 2 of Act No. 128/2000 Coll., on Municipalities (Municipal Establishment), the care for the all-round development of their territory and the needs of their citizens and the creation of conditions to meet the needs, protect the health of their citizens, develop culture and protect the public all right. From § 10 letter c) of the Act on Municipalities, the plaintiffs conclude that municipalities are also obliged to care for the protection of the environment in its territory. Permitting the trial operation of the construction in question was a serious threat to the abovementioned values, especially the well-being of living, life and health of citizens and led to the deterioration of the environment in the municipalities in question.

[7] Plaintiff (d) is a civic association according to § 70 of Act No. 114/1992 Coll., On the protection of nature and landscape. The subject of its activity is the protection of public health against traffic noise, especially in the area around the ring road around Prague, protection of nature and landscape from negative effects of traffic. These objectives are pursued by the plaintiff d) by participating in administrative proceedings, communication with authorities and public campaigns. The applicant (d) claims that the contested decision infringed in particular on its right to a fair trial and the right to a favorable environment.

[8] Plaintiff (e) is a co-owner and resident of house D. No. X on plot no. 475 in the municipality and cadastral territory D. The plaintiff e) stated that the corridor of the construction in question leads approximately 415 m away from its owned property. Objectively, there is a year-round and all-day load from operation the buildings in question, in particular noise and air pollution. Noise measurement performed on real estate the applicant e) from 4 to 5 October 2011 demonstrated a significant exceedance of noise limits. The contested decision therefore infringes on the rights of plaintiff (e) to the protection of its property and the right to health protection.

[9] Plaintiffs (a) to (e) agree that the contested decision is a decision of an administrative authority in the sense of § 65 par. 1 of Act No. 150/2002 Coll., the Code of Administrative Justice (hereinafter also "c. a. j."), which requires them to withstand an above-limit noise load for a set period of time (and possibly longer). The applicants further also derive their standing from Article 11 of Directive 2011/92/EU and Article 9 (3) of the Aarhus Convention. In support of their view that they are entitled to seek judicial review of the contested decision, they cited the judgment of the Court of Justice of the EU in Case C-240/09.

[10] The plaintiffs further alleged a number of illegalities in the contested decision, which they considered to be a reason for its annulment [conflict with regulations for the protection of public health, violation of § 11 of Act No. 17/1992 Coll., on environmental protection, violation of § 119 para. 2 and 3 and § 124 para. 1 of Act No. 183/2006 Coll., on Spatial Planning and Building Regulations (Building Act), non-compliance with conditions 34, 53 and 54 set out in the EIA statement, non-compliance with the conditions set out in in the valid building permit]. Among other things, the defendant erred when on the basis of extraordinary institutes (early use, trial operation) allowed for a long-term use of the building in question, thereby circumventing the need for approval required by the Building Act. Neither the condition required by the Building Act for the imposition of a trial operation was fulfilled, i.e. the need for the verification of functionality and execution of the construction, the properties of the construction in question have been verified for three years now by the unrestricted operation without making any changes or modifications to these that would change

or limit the (harmful) properties of the building in any way. The contested decision is also devoid of sufficient justification and was therefore issued in violation of Sections 2, 3 and 68 (3) of Act No. 500/2004 Sb., Administrative Procedure Code.

[11] Possibly, in case the administrative courts conclude that the contested decision is not a decision within the meaning of Section 65 para. 1 of c. a. j., the plaintiffs have proposed that the contested decision is to be considered as an unlawful interference and for the court to declare that it is an unlawful interference and to prohibit the defendant from continuing in this intervention.

[12] At the same time, the plaintiffs suggested that the Municipal Court should issue an interim measure prohibiting the trial operation of the construction in question or, alternatively, to order the Ministry of Transport to provide for a traffic adjustment for a transitional period consisting of a restriction on the construction in question of driving speed of not more than 100 km/h for cars and not more than 60 km/h for lorries.

[13] The Municipal Court in Prague by order of 30 September 2013, No. 6 A 162/2013 - 41, rejected the action (statement I.), rejected the application for interim measures (statement II.), further ruled that none of the participants is entitled to reimbursement of costs (statement III.) and that the court fee in the amount of CZK 11,000 paid by the plaintiffs is reimbursed (statement IV.). The Municipal Court stated in the reasoning that the contested decision is a decision of an administrative body in the sense of § 67 of c. a. j. and § 65 para. 1 of c. a. j. Pursuant to Section 5 of c. a. j., protection of rights may be sought in administrative judiciary proceedings only after exhaustion remedies permitted by a special law. According to § 68 letter a) of c. a. j. an action is inadmissible if the plaintiff has not exhausted the proper remedies in the proceedings before the administrative authority. An appeal is admissible against the contested decision of the administrative body and it even includes appropriate instructions on the possibility of lodging an appeal. The Municipal Court concluded that the plaintiffs a) to d) had not used the right to appeal against the contested decision, therefore their action is inadmissible and must be rejected according to § 46 par. 1 let. d) of c. a. j. Regarding the eventual proposal to assess the contested decision as an unlawful interference of the defendant the Municipal Court stated that if a certain act of the administrative body may be reviewed in proceedings on an action against a decision of an administrative authority, its review cannot be sought by an action for the protection against an unlawful interference under § 82 of c. a. j.

[14] Plaintiffs (a) to (e) [hereinafter also referred to as "complainants (a) to (e)] filed a cassation complaint against the decision of the Municipal Court of 30 September 2013, No. 6 A 162/2013 – 41 and only to the extent of statements I. and III. According to the complainants, the Municipal Court dismissed their action illegally, as it was not true that they had not exhausted remedies in proceedings before administrative authorities which would be permitted by law to file. Pursuant to Section 81 (1) of the Administrative Procedure Code, only a party to the proceedings may appeal. The party to the proceedings on the authorization of a trial operation is according to § 124 para. 2 of the Administrative Procedure Code only the owner of the construction and the builder (in this case only the applicant). Complainants a) to e) were not participants in the administrative proceedings and therefore could not lodge an appeal against the contested decision, since a special law (the Administrative Procedure Code and the Building Act) did not grant them such a right. The applicants further referred to the judgment of the Supreme Administrative Court of 12 May 2005, No. 2 Afs 98/2004 - 65, which stated that the condition of exhaustion of the remedies in the proceedings before the administrative authority applies only to the party to the proceedings. According to the complainants, the general regulation of participation in the proceedings cannot be applied in the given case, as it is excluded by a special law, in particular the provision of § 124 para. 2 of the Building Act. The Municipal Court did not even address the question of the complainants on what should be their right to appeal against the contested

decision based, and the contested ruling is therefore also unreviewable for lack of reasoning. Regarding the standing of the applicants a) to c), they further referred to the decision of the Supreme Court of August 25, 1999, p. No. 2 Cdon 330/97, which states that the municipality is entitled to demand a court protection of its inhabitants against air pollution. The complainants also referred to the case law of the Constitutional Court (III. ÚS 542/09 and III. ÚS 224/98), according to which courts are obliged to provide effective protection rights of participants. If due to procedural formalism the decision in the case shifts to a time when there is no longer anything to decide, the complainants' right to effective and timely judicial protection would be violated. In view of this, the complainants proposed the annulment of the contested ruling and referral back to the Municipal Court for further proceedings.

[15] The defendant stated in its response to the cassation complaint of 27 December 2013 that the concerned state administration authority in the field of public health protection, i.e. the Regional Hygienic Station of the Central Bohemia region has issued a favorable opinion on the trial operation, provided that in the course of test operation noise walls PHS_01 to PHS_05 would be realized according to noise study from 03/12, prepared by PUDIS a.s., including evaluation of their effect. These noise barriers are to be built by spring 2015. The applicant will further perform noise measurements to demonstrate that the implemented anti-noise measures are sufficient and that the hygienic noise limits are not exceeded. The defendant further stated that the applicants could have lodged an appeal against the contested decision, although they were not parties to the proceedings. In such a case, the appellate body would then proceed in accordance with § 92 para. 1 of the Administrative Procedure Code and at the same time assess whether the preconditions for a review procedure or reopening of the procedure are met. The defendant thus agreed with the conclusion of the Municipal Court that the applicants had not exhausted the remedies in the administrative proceedings and that their action had thus been inadmissible.

[16] In their reply of 3 February 2014, the complainants stated that the applicant had three years for the implementation of anti-noise measures and the verification of their effect as the construction in question has been in operation since September 2010. The complainants further stated that not any mean can be considered as a proper appeal admissible under a special law in the sense of § 68 letter a) of c. a. j., i.e. not an inadmissible appeal, not an incentive to initiate review proceedings, not a general complaint or a criminal complaint. The complainants stated that they were also seeking redress for the unlawful legal situation also by non-legal means, including petitions, a complaint to the Ombudsman, complaints addressed to different authorities. They consider the action to be the last step would have taken only after even after three years the situation has not been remedied by other means.

II.

The assessment of the cassation complaint

[17] The Supreme Administrative Court first assessed the legal elements of the cassation complaint and stated that the appeal in cassation was lodged in proper time, by the persons entitled, against a decision against which the cassation complaint is admissible within the meaning of § 102 of c. a. j., and the complainants are in accordance with § 105 para. 2 of c. a. j. represented by an attorney-at-law. The Supreme Administrative Court then reviewed the merits of the cassation complaint in accordance with the provisions of § 109 paras 3 and 4 of c.a.j., within the limits of its scope and the reasons given. At the same time it did not find any defects pursuant to § 109 para. 4 of the c. a. j. ex officio.

[18] The complainants lodged an appeal in cassation expressly for the reasons set out in the provisions of § 103 para. 1 (a) a), b), d) and e) of c. a. j.

[19] However, for the reasons described in the appeal, it follows that only a reason according to § 103 para. 1 let. e) c. a. j. can be given. This reason is a special reason in relation to the reasons according to letter a) to d) of the same provision. The Supreme Administrative Court in the judgment of 21 April 2005, No. 3 Azs 33/2004 - 98, already stated that if the cassation complaint is filed against a court ruling that dismissed the action, the only possible ground of of the complaint is the reason according to § 103 para. 1 let. e) of c. a. j., consisting of the alleged illegality of the ruling to dismiss the action.

[20] The cassation complaint is well founded.

[21] According to § 5 of c. a. j., unless this or a special law provides otherwise, it is possible to claim in the administrative judiciary proceedings the protection of rights only upon proposal and after exhaustion of proper remedies, if permitted by a special law. The provision of § 68 letter a) of c. a. j. states that the action is inadmissible if the plaintiff has not exhausted proper remedies in proceedings before an administrative body, if permitted by a special law, unless a decision of the administrative authority has been altered to the detriment of its rights on the grounds of an appeal of another person.

[22] Pursuant to § 81 para. 1 of the Administrative Procedure Code, a participant may appeal against the decision if the law does not provide otherwise. The Building Act stipulates in § 124 para. 1 that the functionality and properties of the completed construction according to the documentation or project documentation is verified by a trial operation of the construction. The trial operation shall be permitted by a building authority at the reasoned request of the builder or ordered at the request of a concerned authority or in cases otherwise justified. The decision shall specify in particular the duration of the trial operation of the construction and, if necessary, sets out the conditions for it, or the conditions for the smooth transition of the test operation to the use of the building. The builder shall attach the evaluation of the results of the trial operation to the application for the issue of a building permit. Test operation may be permitted only on the basis of a favorable opinion or decision of a concerned authority. The building authority may also, if necessary, set further conditions by a new decision for a trial operation imposed in accordance with § 115 para. 2 of the building act. For the duration of the trial operation it is possible to issue a new decision to extend the duration of the trial operation without further proceedings. Para. 2 adds that the party to the proceedings pursuant to para. 1 is the builder and the owner of the construction.

[23] The Supreme Administrative Court first considered the appeal in cassation the question whether the complainants were parties to the administrative proceedings in which the contested decision was issued and whether they therefore had the right to appeal against the contested decision in the sense of § 81 para. 1 of the Administrative Procedure Code. The Supreme Administrative Court states that for the assessment of this it is irrelevant that the defendant did not actually deal with the complainants as parties to the proceedings, since participation in proceedings cannot be based on the fact that an administrative authority has not treated a particular person as a participant, nor can a person to whom the participation belongs by law lose the status of a participant through the fact that it was in fact not treated as a participant (cf. the judgment of 7 December 2005, No. 3 As 8/2005 - 118, No. 825/2006 Coll. NSS, or the judgment of 16 December 2010, No. 1 As 61/2010 - 98, point 13, all decisions of the Supreme Administrative Court cited here are available at www.nssoud.cz).

[24] It is therefore necessary to assess whether the legislation on participation in the procedure on trial operation contained in § 124 para. 2 of the Building Act excludes the general legal regulation of participation in administrative proceedings contained in § 27 para. 1 and 2 of the Administrative Procedure Code. The Supreme Administrative Court considers the enumeration of participants in the proceedings in § 124 paragraph 2 of the Building Act is an exhaustive list, which excludes the general legal regulation of participation in the Administrative Procedure Code. This conclusion is indicated by

both the literal interpretation the provisions of § 124 para. 2 of the Building Act (there is no indication that this would be the case of a demonstrative list, e.g. using the terms "also", "above all", "always", etc.). A different interpretation would lead to the redundancy of this provision, as even in the case of the application of § 27 itself of the Administrative Procedure Code, the builder and the owner of the building (usually in one person) would always be parties to the proceedings (even according to § 27 par. 1 of the Administrative Procedure Code). It can also be argued that a similar conclusion was also reached by the case law in relation to the analogous provision of § 109 of the Building Act, which regulates participation in construction proceedings. Here, too, it was judged that the list of participants in construction proceedings in § 109 of the Building Act is a closed list, which excludes the application of § 27 of the Administrative Procedure Code (cf. Judgment of the Supreme Administrative Court of 1 June 2011, No. 1 As 6/2011 - 347, No. 2368/2011 Coll. NSS). It is also possible to argue with (already historical) case law on participation in proceedings relating to the use of buildings, but relating to the Building Act from 1976. The enumeration of participants in these proceedings was always considered closed (cf., for example, the judgment of the Supreme Court) of the Administrative Court of 9 December 2004, No. 7 As 29/2003 - 78, No. 943/2006 Coll. NSS, judgment Of the Supreme Administrative Court of 13 May 2009, No. 6 As 49/2008 - 96, Judgment of the Constitutional Court of 22 March 2000, file no. stamp Pl. ÚS 2/99). This interpretation is also consistent with the purpose of the legal regulation, which is a quick and effective decision-making on trial operation, and elimination of possible procedural obstructions by third parties, which generally had sufficient opportunity to comment on the project itself already in the previous stages of its authorization and in the process of spatial planning. The legislator also proceeded from the correct assumption that the situation, in which a trial operation permit could affect the rights of third parties, would occur rather exceptionally. It is possible therefore to conclude in the interim that the complainants were not parties to the administrative authorization procedure trial operation, as they were neither the builders nor the owners of the construction in question.

[25] The Supreme Administrative Court adds that it did not address the issue of the possible participation of the complainant d) in administrative proceedings pursuant to § 70 of the Nature and Landscape Protection Act. This is because that the complainant d) did not allege any facts to necessarily consider his possible participation in the administrative proceeding. In particular, the complainant d) did not claim or prove that in accordance with § 70 para. 3 of the Nature and Landscape Protection Act he notified the defendant in writing within 8 days from the notification of the commencement of the proceeding that he intends to participate in the administrative proceeding. Under these circumstances the considerations of the hypothetical participation of the complainant d) in the trial operation procedure, including an assessment of whether such participation in proceedings under § 124 of the Building Act is at all possible, would be mere theorizing without affecting the solution of the matter in question.

[26] Furthermore it had to be considered whether the proper remedy, allowed by a special law, which the plaintiff is obliged to exhaust before filing an action, is an appeal in the case of plaintiff who was not a party to the proceeding. This question must also be answered in the negative. The Supreme Administrative Court considers the principle of subsidiarity of judicial review expressed in § 5 and § 68 letter a) of c. a. j. as one of the basic principles of administrative justice. In its judgement of 16 November 2004, No. 1 As 28/2004 - 106, No. 454/2005 Coll. the Supreme Administrative Court stated the following: "*Above all, the protection of rights before the administrative court is the original protection in matters where subjective rights and obligations of a public law nature were violated or endangered; its aim is to determine whether the activities of public administration were unlawful or not. This approach is logically reflected in the proceedings against the decision of an administrative authority; the general standing thus gives a right of claim to anyone who claims to have had his rights*

infringed on by a decision of the administrative authority. Allegation that the administrative decision incorrectly affected the legal sphere the applicant includes the presumption that such a decision is final, either after all the proper remedies have been exhausted, or without using them, if the law does not allow them. In addition, in accordance with the principle "Vigilantibus iura scripta sunt", everyone should actively and consistently exercise their rights already before the administrative authority and only after his efforts have been in vain should he go to court. The emphasis is on the one hand to respect the requirement of procedural economics, because if there is a legal possibility of redressing the illegality by a higher administrative instance, there is no factual or legal reason to bring a case before a court, on the other hand the need for action is emphasized among subjects of public relations in the protection of their subjective rights. The proper remedies are institutes of procedural law which, if duly and timely filed, give the parties to the proceedings a procedural possibility the power ("right") to initiate a review of an administrative decision issued before it becomes final. Proper, i.e. an admissible and timely appeal to the competent administrative body therefore regularly brings with it a suspensive effect. The effects of legal force and thus also enforceability are postponed until the remedy is settled (here: appeal). "(Highlighted by the Fourth Chamber.)

[27] However, the principle of subsidiarity of judicial review cannot go so far as the judicial protection in proceedings on an action against a decision of an administrative body would be conditioned by the filing of a an extraordinary, inadmissible or non-claimable remedy. If the law stipulates a condition of exhaustion of a proper remedy admissible under a special regulation (here Administrative Procedure Code), then in administrative proceedings it means an appeal in cases where the law allows for it, and only in relation to entities that are permitted by law to lodge an appeal, i.e. to the participants in the administrative proceedings. From the fact that the Administrative Procedure Code regulates the procedure of the appellate body in the case of filing an inadmissible appeal (§ 92 of the Administrative Procedure Code) it cannot be concluded that such an access to court should be conditioned by an inadmissible appeal (or a decision on it). If the law does not provide for such a permissible proper remedy, it is necessary to admit an action directly against a first-degree decision of an administrative body (cf. the judgment of the Supreme Administrative Court of 17 April 2013, No. 6 Ans 16/2012 - 62, No. 2959/2014 Coll. NSS). After all, an action against a decision on an inadmissible appeal pursuant to § 92 of the Administrative Procedure Code can be discussed, but the administrative courts only examine whether the defendant's (i. e. the administrative authority‘s) conclusion on the inadmissibility or delay of the appeal lodged is valid. This way the complainants could not have obtained a substantive judicial review of the contested decision.

[28] It must also be borne in mind that the rules governing the admissibility of actions are the implementation of the constitutional right to a fair trial and to judicial review of public administration decisions under article 36 para. 2 of the Charter of Fundamental Rights and Freedoms, which includes the right of access to court. Legal restrictions of this right of access to court, including restrictions arising from § 5 and § 68 letter a) of c. a. j., must be interpreted and applied restrictively, as follows from the extensive case law of the Constitutional Court. Regarding this principle it can be briefly referred to, for example, the Constitutional Court's judgement of 16 March 2006, file no. stamp IV. ÚS 49/2004, judgment of the enlarged Senate of the Supreme Administrative Court of 26 October 2005, No. 1 Afs 86/2004 - 54, No. 792/2006 Coll. NSS, judgment Of the Supreme Administrative Court of 29 March 2006, No. 2 Afs 183/2005 - 64, 886/2006 Coll. NSS or most recently the judgement of the enlarged senate of the Supreme Administrative Court of 11 June 2013, No. 3 Ao 9/2011 - 219, No. 2887/2013 Coll. NSS. In no case can the provisions of the Charter of Fundamental Rights and Freedoms and the legal provisions implementing them can be interpreted in a way which would mean a de facto denial of the essence and meaning of fundamental rights (cf. article 4 para. 4 of the Charter of Fundamental Rights and Freedoms). Such a factual denial of the meaning and purpose of the right of

access to court would result in the acceptance of the opinion of the Municipal Court that the condition for filing an action against a decision of an administrative authority is the filing of an appeal even if there is no such appeal permissible.

[29] Related to this question is whether there can be any cases in which there would be a decision of an administrative authority that would infringe on the rights of someone who is not a party to the administrative proceeding. The Supreme Administrative Court states that, although such a situation is extremely undesirable, it cannot be ruled out a priori that it may exceptionally occur. It is conceivable especially in cases where participation in proceedings before the administrative authority is not regulated by § 27 para. 1 and 2 of the Administrative Procedure Code, which associates the right to participate with a potential prejudice to rights (cf. the judgment of the Supreme Administrative Court of 17 December 2008, No. 1 As 80/2008 - 68, No. 1787/2009 Coll. NSS), but the participants in the proceedings are exhaustively enumerated by the provisions of a law special to the Administrative Procedure Code, as is currently in the case in question. In contrast to the regulation of administrative justice contained in Part Five of the Code of Civil Procedure, as in force until the end of 2002, the c. a. j. no longer connects standing to bring an action against a decision of an administrative authority with participation in administrative proceedings (cf. § 250 para. 2 of the Civil Code, as amended until 31 December 2002, or § 65 paragraph 1, p.). In the judgment of 6 February 2014, No. 4 Ads 107/2013 - 29, the Supreme Administrative Court noted that "*and this conclusion* [i.e. that the complainant was entitled to bring an action] *can not be altered by the fact that the complainant was not a party to the proceedings in which her son's amount of care allowance had been reduced. The framework of § 65 para. 1 of c. a. j. does not necessarily require prior participation of the plaintiff in administrative proceedings as far as standing to bring an action is concerned, it is therefore not decisive whether the entity concerned was treated as a party to the administrative proceedings or not, but whether the decision issued affected his legal sphere in the sense described above. This conclusion was reached by the Supreme Administrative Court in its judgment of 22 February 2011, No. 2 Afs 4/2011 - 64, which was based on the ruling of the Enlarged Senate of 23 March 2005, No. 6 A 25/2002 - 42. This new case law then overcame the opposite conclusion reached in the ruling of the Supreme of the Administrative Court of 15 September 2004, File No. 5 A 45/2001 - 65, to which the Regional Court reffered to in its ruling.*"

[30] The Supreme Administrative Court therefore concludes that (in general) it is conceivable that the contested decision encroaches on the complainants' legal sphere (or some of them), although they were not parties to the proceedings before the administrative authority. In such situations, their standing to file an action can not be made conditional by the lodging of an appeal against the contested decision of the defendant, which would be manifestly unjustified and which would have to be rejected as inadmissible. In that case, on the other hand, an action against a final decision of the first instance administrative authority may be exceptionally admissible. Similarly, for example, an action filed by the Attorney General or the Ombudsman would be admissible, even against a final decision of the first instance authority under the conditions specified in § 66 para. 2 and 3 of c. a. j.

[31] Should the defendant's decision indeed actually infringe on complainants' rights, the application of the legal opinion expressed in the annuled judgement of the Municipal Court could result a denial of justice, in particular in a situation where, as a result of the judgment of the Constitutional Court of 11 January 2012, file no. stamp I.ÚS 451/11, the possibility for complainants to seek redress for the alleged defective situation in proceedings before civil courts was substantially limited, if not excluded.

[32] The Supreme Administrative Court also considered whether the provisions of 124 para. 2 of the Building Act, which practically excludes persons from participating in the trial operation permit procedure other than the owner of the building and the builder, is not in conflict with the constitutional

order of the Czech Republic and whether therefore there is or is not a reason for the procedure under article 95 para. 2 of the Constitution of the Czech Republic, i.e. the submission of the case to the Constitutional Court together with a proposal to repeal this provision of the Act. For a similar reason in fact, in the past, the Constitutional Court annulled § 78 para. 1 of the Building Act of 1976 by a judgment of March 22, 2000, file no. stamp Pl. ÚS 2/99 [cf. also the finding from the same day in the case of file no. stamp Pl. ÚS 19/99, repealing the provisions of § 139 letter c) of the Building Act 1976]. However, the Supreme Administrative Court concluded that the reason for the annuling judgment of the Constitutional Court in the cited cases was the then applicable procedural regulation of the right to bring an action against an administrative authority decision which linked that authorization with participation in the administrative procedure. Exclusion of persons whose rights the decision of the administrative body could infringe on from proceedings before the administrative body therefore also resulted in the denial of judicial protection for the persons concerned. However the currently valid regulation of standing to bring an action is different and does not directly link the right of access to a court and participation in administrative proceedings. Therefore, the Supreme Administrative Court did not find in the present case inconsistency of the legal regulation contained in § 124 para. 2 of the Building Act with the constitutional order.

[33] In view of the abovementioned, the Supreme Administrative Court finds that the legal opinion expressed by the Municipal Court according to which the action brought by the applicant must be dismissed on the ground that non-exhaustion of remedies is unlawful and the contested ruling must therefore be annulled and the case returned to the Municipal Court for further proceedings.

[34] In the following proceeding it will be up to the Municipal Court to carefully evaluate the action in terms of whether the complainants (or some of them) are not manifestly ineligible to bring an action in the sense of § 46 para. 1 let. c) of c. a. j. The Municipal Court will base this evaluation on the case law of the Supreme Administrative Court, according to which there is a "presumption of review" and an action can be dismissed only if that judicial review, or active legitimacy, is undoubtedly excluded by law (cf. judgment of the Supreme Administrative Court of 22 February 2011, No. 2 Afs 4/2011 - 64, No. 2260/2011 Coll. NSS). As also indicated above, it is necessary in these considerations to take account of the fact that the case-law on standing to file an action has evolved over time and it is necessary to proceed from the legal opinion of the enlarged senate on the interpretation of § 65 par. 1 of c. a. j., expressed inter alia in the ruling of the Enlarged Senate of the Supreme Administrative Court of 23 March 2005, No. 6 A 25/2002 - 42, No. 906/2006 Coll. NSS: "*Standing to bring an action under this provision must be given for all cases where the legal sphere of the plaintiff is affected, i.e. where a unilateral act of the administrative authority concerning a specific matter and specific addressees, bindingly and authoritatively affects their legal sphere. It doesn't matter whether the act of the administrative authority established, amended, annulled or bindingly determined the rights and obligations of the plaintiff, but whether, according to the plaintiff in the action, it had a negative effect on his legal sphere.*"

[35] In this context, the Supreme Administrative Court further states, without prejudging the assessment of the question of standing of the complainants to file an action by the Municipal Court, that the conclusions expressed in the judgment of the Supreme Administrative Court of 31 August 2008, No. 8 As 8/2008 – 33, in which the Supreme Administrative Court did not find the plaintiff's (the owner of a neighboring property) standing to file an action against a building permit issued pursuant to § 81 and 82 of the Building Act of 1976, are not applicable to this case without further ado. The Supreme Administrative Court finds, contrary to the cited judgment, in the present case essential differences, i.e. that is concerned with the permit for trial operation, not on the approval, further in that it is a procedure according to different act (currently valid building law vs. building law from 1976)

and especially in nature and the extent of the project in question (here a high - traffic motorway, there a transfer station pipeline).

[36] When considering the claim of the complainants a) to c), the Municipal Court will also take into account the resolution of the Enlarged Senate of the Supreme Administrative Court of 11 June 2013, File No. 3 Ao 9/2011 - 219, No. 2887/2013, in which the enlarged senate assessed the standing of the city district of Prague. It concerned an interpretation of § 101a of c. a. j. that defines standing to file a proposal to repeal a measure of general nature, but in both cases the standing is based on an allegation of infringement of rights by the contested act of the administrative authority (the Enlarged Senate did not state that in the case of the standing it deduced, it would be an authorization pursuant to § 101a para. 2 of c. a. j., on the other hand it inferred the right to bring an action by alleging that the petitioner was shortened in its right of self-government). The Municipal Court will also take into account the case law of the Supreme Court granting a municipality the right to file a negative action pursuant to § 127 of the Civil Code of 1964 to protect its inhabitants and their property against imissions. The Supreme Court in the judgment of 25 August 1999, file no. 2 Cdon 330/97, stated that: "*[from] the above provisions it follows that a municipality is a public corporation, the factual basis of which is its citizens (the personal substrate of this legal entity in the sense of § 18 par. 2 let. c / of the Civil Code). Citizens have the ability to perceive these immissions and if they are disturbed by them during legitimate use of real estate owned by the municipality, the municipality is disturbed by them during the exercise of its property rights as well. Therefore the municipality, if fulfilling the preconditions stated in § 127 para. 1 of the Civil Code, may exercise against the owner of the thing that creates noise or vibrations the right to demand that these immissions are stopped. In the present case the plaintiff is a municipality whose citizens are disturbed in the use of its buildings and land by at least airborne noise operation of the defendant. Therefore, the plaintiff is entitled to invoke in court the right to protection against noise nuisance (possibly also vibrations) in the sense of the provisions of § 127 para. 1 of the Civil Code.*"

[37] Last but not least, the Municipal Court must in assessing the applicants' standing to bring an action take into account that the project is subject to an environmental impact assessment (EIA) and, consequently, the interpretation of procedural rules concerning the admissibility of an action must also be based on the Aarhus Convention and Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the impacts of certain public and private projects on the environment. According to recital 21 of the preamble to that directive, the aim of the directive is, inter alia, implementation the provisions of the Aarhus Convention which provide for access to judicial or other proceedings for the purpose of challenge the substantive or procedural legality of decisions, acts or omissions subject to public participation provisions in Article 6 of that Convention. The Court of Justice of the EU further ruled in its judgment of 8 March 2011, in Case C-240/09, *Lesoochranárske zoskupenie VLK*, paragraph 45 et seq.: „*Article 9 para. 3 of the Aarhus Convention does not contain any clear and precise obligation which could directly regulate the legal situation of individuals. Given that only "members of the public who meet the criteria, if any are provided for in national law", have the rights mentioned in article 9 para. 3, the implementation and effects of that provision depend on the adoption of a later act. However, it should be noted that the aim of these provisions, even if they are formulated in general, is to ensure effective protection of the environment. In the absence of Union legislation in this area, it is for the national law of each Member State to regulate the procedural conditions for actions designed to ensure the protection of the rights of individuals which are derived from European Union law, in the present case from the Habitats Directive, the Member States are in any case responsible for ensuring effective protection these rights (see, in particular, Case C-268/06, Impact ECR I-2483, para. 44 and 45). (…) It is therefore for the referring court to interpret the procedural law governing the conditions to be met for the purpose of*

bringing an administrative remedy or an action in a manner which as far as possible takes into account the objectives of article 9 para. 3 of the Aarhus Convention as well as the objective of effective judicial protection of the rights conferred by Union law (…)" These interpretative guidelines will also have to be respected when interpreting § 65 para. 1 and § 46 para. 1 letter c) of c. a. j. in the present case. This is also because the complainants in the filed action have expressly claimed their rights under Directive 2011/92/EU and the Aarhus Convention. The obligation to interpret the regulations of Czech law so that their application does not conflict with the law EU, the Supreme Administrative Court repeatedly recalls in its case law. Here it is possible, for example, in brief refer to the judgment of the Supreme Administrative Court of 16 November 2010, No. 5 As 69/2009 - 86, No. 2245/2011 Coll. NSS, which states: "*It should be recalled that all authorities of a Member State, including courts, according to the settled case-law of the Court of Justice, are required in the application of national law to interpret this law in the light of the wording and purpose of a directive or other Union legislation, which it implementats, as far as possible (see, for example, the judgments of the Court of Justice of 10 April 1984, von Colson and Kamann, Case 14/83 [1990] ECR 1891, paragraph 26; and Case C-106/89 Marleasing [1990] ECR I-4135, paragraph 26. 8, cf. see also, for example, the judgment of the Supreme Administrative Court of 29 August 2007, No. 1 As 3/2007 - 83, published under No. 1401/2007 Coll. NSS).*"

[38] If it is not possible to interpret § 65 para. 1 of c. a. j. in such a way that the complainants do have the standing, it will be necessary to further examine whether the complainants (or at least some of them) do not have the right to file an action against the contested decision pursuant to § 23 para. 10 of Act no. 100/2001 Coll., on environmental impact assessment and on the amendment of some related acts (Act on Environmental Impact Assessment), in conjunction with § 66 para. 4 of c. a. j. According to this provisions of the Act on Environmental Impact Assessment *civic association or generally beneficial companies whose object of activity is the protection of the environment, public health or cultural monuments, or the municipality affected by the project, if they have submitted a written statement to the documentation or the expert report, may by an action due to a violation of this Act demand the annulment of a subsequent decision issued in proceedings pursuant to special legal regulations, in accordance with the Code of Administrative Justice*.

[39] In relation to the specific issue of an action brought by a non-party to the proceedings before an administrative body, the Supreme Administrative Court further points out that it is also necessary to evaluate the timeliness of the action. Unless the complainants were made aware of the contested decision in a standard way, the opinion expressed by the Supreme Administrative Court will have to be applied e.g. in the judgment of 6 September 2011, No. 9 As 92/2011 - 186: "*in assessing the timeliness of the action account must be adequately taken of the legal opinion contained in the judgment of the Enlarged Senate of the Supreme Administrative Court of 17 February 2009, No. 2 As 25/2007 - 118 (No. 1838/2009 Coll. NSS), according to which* ,a decision of an administrative authority which has not been formally duly served on the party to the proceedings may acquire legal force (§ 52 para. 1 of the Administrative Procedure Code of 1967, § 73 para. 1 of the Administrative Procedure Code of 2004), when the fiction of the announcement of the decision occurs. ... If the party to the proceedings whose rights, right the protected interests or obligations were affected by the decision, omitted when the decision was notified, the fiction of announcing the decision occurs at a time when it is safe and without reasonable doubt found that the omitted participant was aware of the full content of the decision in terms of its identifying features and substantive content, in principle equivalent to that of a proper decision notified."

[40] In conclusion, the Supreme Administrative Court adds that in the case of a trial operation permit it is clearly not one of the approvals granted by the building authority outside of the administrative

proceedings, in relation to which the Enlarged Senate of the Supreme Administrative Court has concluded that these are acts pursuant to Part Four of the Administrative Procedure Code, against which protection can be sought by means of an action against the illegal intervention in the sense of § 82 et seq. of c. a. j. (cf. ruling of the Enlarged Senate of the Supreme Administrative Court of 18 September 2012, No. 2 As 86/2010 - 76, No. 2725/2013 Coll. NSS). This is because that the Building Act in § 124 explicitly (cf. the terms “permit”, “order”, “decision”, “participants to the proceedings ”etc.) foresees that the trial operation permit is issued in an administrative proceeding by a decision in which it is possible to determine, among other things, the conditions of the test operation. Therefore it is a decision in the sense of § 67 of the Administrative Procedure Code, respectively § 65 of c. a. j. The complainants therefore chose the correct procedural scheme when they have brought an action against the decision of the administrative authority against the contested decision. On the other hand, an action for protection against unlawful interference, instruction or coercion of an administrative authority would be inadmissible according to § 85 of c. a. j.

III.

Conclusion

[41] Given that the Supreme Administrative Court has found the opinion of the Municipal Court, on which it based its decision to dismiss the complainants' action, unlawful, he had no choice but to proceeded to annul the contested resolution and returned the case to the Municipal Court for further proceedings (§ 110 para. 1 of c. a. j.).

[42] When the Supreme Administrative Court annuls a decision of a regional court and returns the case to it for further consideration proceedings, it is bound by the legal opinion expressed by the Supreme Administrative Court in the annulment decision (§ 110 para. 4 of c. a. j.).

[43] The costs of the cassation appeal proceedings will be decided by the Municipal Court in a new decision in the matter (§ 110 para. 3 of c. a. j.)

Instruction:

Appeals against this judgment are inadmissible.

Brno, 18 April 2014

JUDr. Dagmar Nygrínová

President of the Senate