CZECH REPUBLIC

JUDGMENT
IN THE NAME OF THE REPUBLIC

The Supreme Administrative Court ruled in a senate composed of Chairperson JUDr. Eliška Cihlářová and Justices JUDr. Jaroslav Hubáček and JUDr. Karel Šimka in the case of the plaintiff: The "**V havarijní zóně jaderné elektrárny Temelín, občanské sdružení**" civic association, registered office Neznašov 122, Všemyslice, represented by Mgr. Martin Šíp, lawyer with registered office Převrátilská 330, Tábor, against the defendant: The State Office for Nuclear Safety, registered office Senovážné náměstí 1585/9, Prague 1, in proceedings on the plaintiff's cassation complaint against the judgment of the Municipal Court in Prague of 25/ 11/ 2010, ref. 9 Ca 182/2008 - 96,

as follows:

I. The cassation complaint is **rejected**.

II. **None** of the parties is entitled to reimbursement of the costs of the proceedings.

By judgment of the Municipal Court in Prague of 25/ 11/ 2010, ref. 9 Ca 182/2008 - 96, the petition filed by the plaintiff (hereinafter the "complainant") against the decision of the chairperson of the State Office for Nuclear Safety of 5/ 3/ 2008, ref. SÚJB/PrO/5156/2008, rejecting its remonstrance and confirming the resolution of the State Office for Nuclear Safety (hereinafter the "Office") of 6/ 12/ 2007, ref. 32699/2007, by which it was decided that the complainant is not a party to the administrative proceedings concerning a permit to operate Block 3 of the Dukovany Nuclear Power Plant (hereinafter "Dukovany NPP"), was rejected. In the grounds of the judgment, the Municipal Court stated that it considered the complainant to be a person with a procedural right to a fair hearing in the case of the review of the contested administrative decision, as this decision decided its participation in the administrative proceedings. Another issue is the legality of the reviewed decision and the complainant's position in the administrative proceedings themselves. Here, the Municipal Court did not infer the complainant's right as the public concerned within the meaning of the Aarhus Convention (hence a specific participant under the rules of national law). The complainant, as the public concerned, does not derive its right from any fundamental tangible

rights and obligations in relation to the subject matter of the proceedings, as the subject matter of the proceedings was not any of its constitutional rights or the impact of the structure (its operation) on the environment. The subject of the proceedings was only the time extension of a permit for a part of a nuclear facility under conditions that clearly and substantively relate to the obligations of the applicant and nuclear power plant operator as regards record-keeping, and the management and securing of documentation on the state of safety and emergency preparedness.

The complainant filed a cassation complaint against this judgment within the statutory time limit for the reasons stated in Section 103(1)(a) and (d) of the Code of Administrative Justice. In its cassation complaint, it argued that where a decision is made to extend the operation of a nuclear facility, and this decision has serious consequences for the life and health of citizens and also for the environment, it is essential to take into account all the circumstances of the specific case and to decide on the indicated plan in particular with regard to the safety of operation of the nuclear facility. The complainant registered in the proceedings precisely so that it could make comments and objections concerning the safety of operation of the nuclear facility whose operation was to be extended. However, the complainant was not allowed to do so, as it was not treated as a party to the administrative proceedings. Given that these proceedings under Act No 18/1997, as amended (hereinafter the "Atomic Act") are the only proceedings in the case in question for a permit to operate a nuclear facility, the complainant's participation should have been inferred and its objections and comments regarding the safety of operation should have been addressed on their merits. The complainant also emphasized during the proceedings for the extension of operation of Block 3 of the Dukovany NPP that the operation of the Dukovany NPP was never assessed in terms of its environmental impacts, nor was the procedure under Act No 100/2001, as amended, i.e. an EIA, performed. In view of this fact, the complainant is of the opinion that it is necessary to infer the direct applicability of the Aarhus Convention in the present proceedings, as this is the same situation which the Supreme Administrative Court has already discussed and where it inferred the direct applicability of the Aarhus Convention in cases where proceedings under the Atomic Act are the only proceedings necessary for the commissioning of a nuclear power plant (see judgment of the Supreme Administrative Court of 9/ 10/ 2007, ref. 2 As 13/2006 - 110). The Office should therefore have reviewed the objections of the complainant as a full party to the administrative proceedings concerning the safety of operation of the nuclear facility. The above conclusion of the complainant is also supported by the nature of the permit to operate a nuclear facility. This is because the validity of the permit is limited in time and it is necessary to reapply for a new permit (to extend the permit). It may be inferred from this that the legislator intended that the continued operation of the nuclear facility be reassessed after a certain period of time. It cannot therefore be inferred that a permit for the operation of a nuclear facility is a final permit with no time limit. In accordance with the above-mentioned decision of the Supreme Administrative Court, the complainant's legitimacy in proceedings under the Atomic Act is derived through an interpretation of national law, specifically Section 70 of Act No 114/1992, as amended (hereinafter the "Act on Nature and Landscape Protection") so as to ensure compliance of national law with the international obligations of the Czech Republic. The Aarhus Convention, respectively Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment (hereinafter the "EIA Directive"), requires that the authorization of nuclear facilities be subject to an environmental assessment under the conditions set out therein (Annex I to the Aarhus Convention and the EIA Directive). Both the Aarhus Convention and the EIA Directive define a special body ("the public" or "the public concerned") to which they grant the rights mentioned therein in relation to the environmental assessment of projects. It is clear from the definition in Article 2(5) of the Aarhus Convention and Article 1 (2) of the EIA Directive that civic associations are included in "the public concerned". The complainant is a civic association under Act No 83/1990, as amended, i.e. it is "the public concerned" within the meaning of the Aarhus Convention and the EIA Directive, and should therefore enjoy the rights arising from the Aarhus

Convention and the EIA Directive. The public concerned must be given a timely and effective opportunity to participate in decision-making procedures when assessing whether to authorize projects listed in Annex I (including nuclear facilities) and, to that end, must have a procedural right to express their comments and views to the competent authority or authorities at a time when all options are still open, i.e. before a decision is taken on the application for a permit (Article 6(4) of the Aarhus Convention and Article 6 of the EIA Directive). In the given case it is not possible to refer to the decision of the Constitutional Court ref. IV. ÚS 1791/07, since in the said proceedings the Constitutional Court addressed the issue of a civic association's access to judicial protection, i.e. a question different from the relevant proceedings, when the Municipal Court concluded the complainant's legitimacy to review the legality of the contested decision. The contested decision violated the procedural and substantive rights of the complainant as a party to the proceedings defending the interests of nature and the environment. In the administrative proceedings in question, it was decided to extend the operation of the nuclear facility, which is a source of ionizing radiation with all its existing risks. The Supreme Administrative Court should therefore, in accordance with its case law, have examined the merits of the complainant's objections to ensure effective and efficient judicial protection. The complainant further addressed the residual life of the components of the permitted nuclear power plant, in particular the radiation embrittlement of phosphorus in the pressure vessel welding of Soviet construction, other safety deficiencies such as tritium water contamination around the plant, failure to assess the impacts of a possible serious accident at the nuclear facility, for example the threat of a plane crashing into the reactor hall and an increase in the incidence of tumours in the area around the nuclear power plant. For the above reasons, the complainant proposes that the Supreme Administrative Court annul the resolution of the Municipal Court and return the case to it for further proceedings.

In its statement on the cassation complaint, the Office disputed the direct applicability of the Aarhus Convention within the meaning of Article 10 of the Constitution. It referred to resolution of the Constitutional Court ref. IV ÚS 1791/07, which confirms the opinion that the Aarhus Convention is not directly applicable. It also referred to the extensive case law of the Supreme Administrative Court, confirming that in proceedings under Section 14(1) of the Atomic Act, the only party to the proceedings is the applicant for a permit, and other case law confirming that the Code of Administrative Justice limits legitimacy to make petitions only to those who are parties to the administrative proceedings. Regarding the complainant's participation pursuant to Section 70 of the Act on Nature and Landscape Protection, it stated that the permit to extend the operation of Block 3 of the Dukovany NPP is not the first permit for operation, but only an extension of an issued operation permit, as they are always issued only for limited time. Given that in the case of proceedings for the extension of operation there is no intended or planned intervention as regards nature and landscape, they are also not administrative proceedings in which the interests of nature and landscape protection could be affected. In addition, in these proceedings the Office qualitatively addresses other issues, in particular compliance with technical conditions it imposed on the operator itself. The Office also objected to the complainant's factual objections regarding the suitability of the annealing of the pressure vessels, regarding the possibility of emergency and control rods falling into the reactor core, and regarding the monitoring the occurrence of tritium. For the reasons set out above, it sought that the cassation complaint be rejected as unfounded.

On the basis of the filed cassation complaint, the Supreme Administrative Court reviewed the challenged judgment in accordance with Section 109(2) and (3) of the Code of Administrative Justice, bound by the scope and reasons in the cassation complaint of the complainant, and did not find the defects referred to in paragraph 3 which it would have to take into account ex officio.

In several of its decisions, the Supreme Administrative Court has already addressed the question of whether, in proceedings pursuant to Section 9 of the Atomic Act, the sole party is the

applicant for a permit, as follows from Section 14(1) sentence two of this Act, or whether, on the contrary, other provisions of this Act, Article 35 of the Charter of Fundamental Rights and Freedoms, the Aarhus Convention, or European Union law also imply the right of civic associations addressing nature and landscape protection to be parties to such proceedings.

In the present case, the applicant referred to the judgment of the Supreme Administrative Court of 9/ 10/ 2007, ref. 2 As 13/2006 - 110, concerning the operating permit for Block 2 of the Temelín Nuclear Power Plant and in which the issue of the relationship between Section 14(1), second sentence, of the Atomic Act and Section 70 of the Act on Nature and Landscape Protection in connection with the Aarhus Convention was reviewed. In this judgment, the Supreme Administrative Court concluded that Section 14(1), second sentence, of the Atomic Act, which stipulates that the applicant is the only party to the proceedings for a permit to operate pursuant to Section 9, does not violate either Section 70 of the Act on Nature and Landscape Protection or Article 6 of the Aarhus Convention, which is not directly enforceable, so cannot be granted direct and preferential applicability within the meaning of Article 10 of the Constitution. This legal opinion was, in relation to the similar judgment of the Supreme Administrative Court of 29/ 3/ 2007, ref. 2 As 12/2006, accepted by the Constitutional Court in its resolution of 21/ 11/ 2007, ref. IV. ÚS 1791/07.

A fundamental difference between the case under ref. 2 As 13/2006 (as well as the case under ref. 2 As 12/2006, concerning the permit for the operation of Block 1 of the Temelín Nuclear Power Plant) and the present case is that the first two cases concerned the commissioning of new blocks of the Temelín Nuclear Power Plant, i.e. a new nuclear facility, while in this case it is an extension of the operation of the Dukovany Nuclear Power Plant, originally permitted 25 years ago. It is precisely newly commissioned nuclear facilities that pose a potential threat to the environment, i.e. the interests legitimately protected by environmental civic associations, which include the complainant, and hence such civic associations should therefore have the right, according to the cited judgments, to participate in at least one administrative procedure necessary to put such new nuclear facilities into operation. If such single procedure was, in the case of the putting into operation of a new nuclear facility presenting a potential threat to the environment, a procedure under the Atomic Act, civic associations should have the right to participate in it, as stated in the judgments cited. However, the present case differs from them in that it concerns proceedings concerning a facility already in operation. It is therefore not a new facility that could potentially worsen the state of the environment compared to the current situation. It is not clear how a procedure for the extension of an existing situation may constitute an intervention or be an administrative procedure which "could involve nature and landscape protection interests" within the meaning of Section 70 of the Act on Nature and Landscape Protection. In this respect, the Supreme Administrative Court agrees with the Office that the nature and landscape protection interests can really be involved only in the case of a newly commissioned nuclear facility, or a qualitative change in the sense of e.g. Section 4(1) of Act No 100/2001, as amended. In the given case, such a change would be, for example, an extension or increase in the capacity of a nuclear facility In general, however, nature and landscape protection interests cannot be involved by the continuation of the status quo

However, this certainly does not mean that the procedure for granting an extension of operation is not important, and that it does not involve the interests of the public. The purpose of this procedure is basically a new comprehensive assessment of the safety of the operated facility. This is certainly an issue that is also important from the point of view of the public. Especially in the case of such an important nuclear facility as a block of a nuclear power plant. However, the public interest in these proceedings lies only in verifying whether the nuclear facility under consideration remains safe, not whether its continued existence will affect the environment. The environment may have been affected by the construction or extension of this nuclear facility or another major change,

not by the continuation of its operation. The assessment of the safety of its operation is then a purely technical issue and has the character of an inspection after a certain period of operation. At the same time, only the Office is competent to perform such an assessment as, according to Section 3(1) of the Atomic Act, it exercises state administration and supervision in the use of nuclear energy and ionizing radiation and in protection from radiation.

The interconnectedness of proceedings concerning the commissioning and maintenance of nuclear facilities is set rationally and in accordance with both Article 35 of the Charter of Fundamental Rights and Freedoms and the obligations of the Czech Republic contained in the Aarhus Convention. If a new nuclear facility is put into operation, which may involve an impact on the environment, the public concerned may comment in the proceedings in which this issue may be addressed, in particular in the EIA process or in the building permit proceedings. In addition, there are also proceedings pursuant to the Atomic Act, in which the interests of the environment are not separately involved. Therefore, it is in accordance with national and international law that the only party to them is the applicant for a permit, as expressly provided for in Section 14(1), second sentence, of the Atomic Act. If, on the other hand, the facility is already in operation, then it is necessary to check whether it is still safe after a specified time. However, the mere continuation of its existence does not affect the protection of nature and landscape in a way that would justify the need for the public to have the right to participate directly in this technical procedure in the manner provided for in Section 70 of the Act on Nature and Landscape Protection. It is therefore not necessary, in either of these cases, for the unambiguous text of Section 14(1), second sentence, of the Atomic Act to be violated and for representatives of the public to be granted the right to participate.

For all the above reasons, the Supreme Administrative Court did not find the cassation complaint justified, and therefore, pursuant to Section 110(1) of the Code of Administrative Justice, it rejected it without a hearing in accordance with the procedure pursuant to Section 109(1) of the Code of Administrative Justice, according to which it usually decides on cassation complaints without a hearing.

The statement on the reimbursement of costs of proceedings rests on Section 60(1), first sentence, in conjunction with Section 120 of the Code of Administrative Justice, according to which, unless otherwise provided by this Act, a participant who has been fully successful in a case is entitled to reimbursement of the costs of the proceedings before a court it reasonably incurred against the party who was unsuccessful in the case. The Supreme Administrative Court did not award any costs to any of the parties, as the complainant was unsuccessful in the proceedings and the Office did not incur any costs in these proceedings.

Note: Appeals against this judgment **are not** admissible.

In Brno, 27 October 2011

JUDr. Eliška Cihlářová
chairperson of the senate