CASE LAW AND ADMINISTRATIVE DECISIONS

CASE LAW

France

Judgement of the Appeal Court of Limoges regarding the dumping of radioactive waste by Cogema (2004)

Since 1949, the mining division of La Crouzille which is attached to the General Company for Nuclear Materials (*Compagnie générale des matières nucléaires* – Cogema) operated uranium mines in Haute-Vienne. Although the mining and processing of uranium came to an end in 2001, there are still residues present in this area. Doubts were raised as to the airtightness or sealed nature of the storage sites by nature protection associations, which demanded expert analysis of the situation. Tests were carried out in particular by the Independent Research and Information Commission (*Commission de recherche et d'information indépendantes* – CRII-RAD) and the Centre for the study of the metrology of nuclear radiation and dosimetry (*Centre d'étude de métrologie des rayonnements nucléaires et de dosimétrie* – CEMRAD). Some of these analyses demonstrated chemical and radioactive contamination of sediment taken from several streams and also the Saint-Pardoux lake.

A claim was lodged with the criminal court on 18 March 1999 by the association *Sources et Rivières du Limousin* (Springs and Rivers of Limousin). The complaint was based on a number of heads of action: the endangering of other peoples' lives (*mise en danger de la vie d'autrui*), the dumping of waste containing radioactive substances, as well as the release into water of pollutants causing damage pursuant to Articles L.432.2 (protection of fish fauna and its habitat) and L.216.6 (criminal sanctions for pollution damage) of the Environmental Code.

In March 2002, the federation entitled *France Nature Environnement* associated itself with this claim as another civil party to the action (*partie civile*).

In an Ordinance of 18 August 2003, the examining judge (*juge d'instruction*) considered that the head of action involving the endangering of other peoples' lives was not applicable. He did nevertheless order that the case be returned to the Magistrates' Court (*tribunal correctionnel*) to be judged in respect of the offences, committed since 1990, concerning the dumping of waste containing radioactive substances as well as water pollution causing damage to fish fauna.

An appeal was lodged by the State Prosecutor against this ordinance, in that it ordered that the Cogema case be returned to the Magistrates' Court. The judgment delivered on 25 March 2004 by the instructing chamber of the Court of Appeal of Limoges confirmed the litigious ordinance in all respects.

In relation to the offence of dumping of waste, the Court proceeded to examine the various requirements which Cogema is obliged to implement under the legislative and regulatory framework. It pointed to the absence of a clear definition of the notion of "nuclear waste". The 1977 Decree establishing the list of waste whose abandonment or disposal are punishable under Article L.541-46 of the Environmental Code by two years' imprisonment and a EUR 75 000 fine, does mention radioactive waste but does not provide a definition. The Court therefore took the approach taken by the International Atomic Energy Agency as a starting point, i.e. shall be considered as radioactive waste "material that contains or is contaminated with radionuclides at concentrations or radioactivity levels greater than clearance levels established by the appropriate authority and for which no use is foreseen".* The judgement proceeds to mention several national texts which define concentration levels for radionuclides or limits for exposure to radiation. It refers in particular to the 1966 Decree on general principles of protection against ionising radiation and Council Directive 96/29/Euratom of 13 May 1996 laying down basic safety standards for the protection of the health of workers and the general public against the dangers arising from ionising radiation (see *Nuclear Law Bulletin* Nos. 52 and 58).

The Court, without ruling on an explicit definition of radioactive waste, carried out a comparison of these standards and examined the results of the tests in the file concluding that the radioactivity of the waste in question exceeded acceptable limits. The Court considered that the statement made by the state prosecutor, according to which Cogema had respected the various requirements to which it is subject, as the controlling authority, the Regional Directorate for Industry, Research and the Environment (*Direction régionale de l'industrie, de la recherche et de l'environnement* – DRIRE) had never issued statements of offences (*procès-verbal d'infraction)* to Cogema, was manifestly contradicted by several elements in the file. Several reports and analyses of springs and rivers close to the Cogema installations demonstrate the presence of radioisotopes whose concentration exceeds the limits established by radiation protection standards.

Concerning the allegations in relation to pollution of fish fauna and the fish habitat pursuant to the Environmental Code, the Court relied on previous case-law to demonstrate that the substances released, contrary to the mineral in its raw-material form, contained unstable and soluble radio-elements and that damage to stream beds causing (a) reductions in fish food and (b) radioactive contamination of fish flesh affecting its value as a comestible product. The Court rejected the argument made by the state prosecutor according to which these radioelements are naturally present in the water, and considered that the evidence of damage under Article L.432-2 of the Environmental Code linked to the release of radioelements was sufficiently established.

Concerning the moral element of the charge, the Court based itself on the culpable negligence of Cogema which, in view of its world-wide reputation based on its legal and technical expertise, and its efforts to protect the environment, could not have been unaware of the contamination of nearby streams and should have remedied this problem, even in the absence of intervention by the DRIRE.

The Court further noted that these offences allowed Cogema to lower operating costs, and therefore the environmental costs of these activities would be borne by the inhabitants of the Limousin area. In light of the substantial profits made by Cogema in the field of uranium mining, the Court judged that the polluter pays principle must be applied here.

The appeal lodged by Cogema against this decision was rejected by the French Supreme Court (*Cour de cassation*) on 3 November 2004. Therefore, the case will be returned to the Magistrates'

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* *Principles of Radioactive Waste Management*, Safety Series No. 111-F, IAEA, Vienna (1995).

Court (*tribunal correctionnel*) to be judged in respect of these offences concerning the dumping of waste containing radioactive substances.

Slovak Republic

Judgement of the Slovak Constitutional Court on Greenpeace claim (2004)

On 24 June 2004, the Constitutional Court of the Slovak Republic delivered its judgement in respect of the claim entered by Greenpeace Slovakia objecting to the breach of their basic constitutional rights by the ruling of the Supreme Court of 23 October 2003 (see *Nuclear Law Bulletin* No. 72).

Based on Act 211/2000 Coll. on Free Access to Information, Greenpeace had requested, in June 2002, that the Slovak Nuclear Regulatory Authority (NRA) provide certain information on thermal and hydraulic analysis in the safety reports concerning the reconstruction of the V-1 Bohunice NPP.

The NRA withheld the requested information on the basis of Article 10 of the Act on Free Access to Information, which provides that information which is classified a**s** commercial secret shall not be made available to the public. Following a complaint issued by Greenpeace, the Head of the NRA conducted a second proceeding which confirmed the first decision.

Proceedings for judicial review were filed with the Supreme Court in October 2002. Greenpeace claimed that the NRA had failed to examine all objective and subjective criteria of commercial secrets as required by the Commercial Code and that the information concerned could not, in any event, be considered to be a commercial secret. The NRA responded that information classified as a commercial secret should not be made available, and further it was not within the competence of the NRA to determine whether all conditions required by civil and commercial law regarding commercial secrets had been complied with in its determination that the requested information was in fact a commercial secret. These proceedings resulted in a ruling on 25 March 2003 in favour of the NRA, upholding its decision not to provide Greenpeace with the requested information. This ruling was confirmed by the Supreme Court upon appeal on 23 October 2003.

Greenpeace filed a complaint with the Constitutional Court of the Slovak Republic on the grounds that their basic rights under Article 26, Section 2 (right to information) and Article 46, Sections 1 and 2 (right to a fair trial) of the Constitution had been breached. Greenpeace requested that the previous ruling of the Supreme Court be overturned, the matter be reconsidered by the Supreme Court and that compensation of 50 000 Slovak crowns (approximately 1 250 EUR) plus costs be awarded.

On 24 June 2004, the Constitutional Court of the Slovak Republic ruled* that:

- the Supreme Court breached the right of Greenpeace Slovakia to information under Article 26, Section 2 of the Slovak Constitution, together with the right to have the lawfulness of a decision taken by a public administration body examined by a court. According to the Constitutional Court, the Supreme Court could not conclude that the NRA had the right to refuse to divulge the information requested without having

* An unofficial English translation of this ruling, kindly provided by the Slovak authorities, is available from the NEA upon request.

demonstrated that the public electricity company Slovak Electric could not be considered as a person required to diffuse the information requested;

- the ruling of 23 October 2003 of the Supreme Court is annulled and this matter shall return to that Court to be re-examined;
- the remaining part of the complaint filed by Greenpeace Slovakia is rejected;
- Greenpeace is entitled to reimbursement of legal fees by the Supreme Court.

This claim will therefore return to the Supreme Court for further proceedings. That Court will be bound by the findings and opinion of the Constitutional Court which are not subject to appeal.

ADMINISTRATIVE DECISIONS

Sweden

Decision of the Environmental Court on permits for Studsvik Nuclear AB and Svafo AB (2004)

Under Swedish legislation, operators of nuclear installations are required to obtain permits pursuant to both the 1984 Act on Nuclear Activities [Section 3] (the text of this act is reproduced in the Supplement to NLB No. 63) and the 1998 Environmental Code [Article 808] (see *Nuclear Law Bulletin* No. 63). Since the entry into force of the Environmental Code in January 1999, it is thus no longer sufficient to obtain a permit under the nuclear legislation alone. The transitional provisions of the Environmental Code provide that an operator which was already operating an installation when the new rules entered into force has until December 2005 to submit its application for a permit to the Environmental Court.

In assessing an application, the Court shall examine a broad range of questions. Along with the safety requirements laid down in the Nuclear Activities Act, the applicant shall also show that the installation it operates complies with the common rules of consideration laid down in Chapter 2 of the code.

According to these general rules, preventive measures shall be taken when any damage, or risk thereof, to human health or the environment can be foreseen. In practice, this requires that any person operating a nuclear facility shall have the necessary knowledge and take the appropriate protective measures. Consequently, this person shall select a suitable site for the activity, use the best possible techniques, envisage the possibility of re-use and recycling, and avoid using chemical products or bio-technical organisms that may involve risks and that can be replaced with similar less dangerous products or organisms.

Furthermore, the Environmental Code provides additional requirements to be complied with by the operator of a nuclear installation, such as maximum levels for noise, vibration, light and radiation, and sustainable management of resources. An application shall also contain an Environmental Impact Assessment (EIA) which must be approved by the Court in order to obtain a permit.

Studsvik Nuclear AB, a company that *inter alia* operates research reactors outside Nyköping, has held a permit for nuclear activities under the nuclear legislation since 1959. Pursuant to the provisions of Chapter 9 of the Environmental Code, in 2003 the company submitted an application for a permit under the Environmental Code to the Environmental Court of Stockholm.

Svafo AB, another company undertaking nuclear activities, primarily in the field of nuclear waste management, and also located in Studsvik, submitted a similar application for a permit under Chapter 9 of the Environmental Code. Since these two companies belong to the same group, and the application consisted of the same elements, the cases were handled jointly both by the applicants and by the Environment Court.

After written and oral proceedings, the Environmental Court of Stockholm made public its decision on 19 May 2004. It approved both applications, deciding that *Studsvik Nuclear AB* and *Svafo AB* are permitted to operate according to the Environmental Code. The *Studsvik* permit was made subject to a number of conditions concerning *inter alia* noise levels. *Studsvik Nuclear AB* was also obliged to establish financial security in the form of a bank guarantee designed to cover measures relating to shutdown and other decommissioning measures. The *Svafo AB* permit was also made subject to a certain number of conditions.

This is the first case where an Environmental Court in Sweden assessed and approved an application to carry out nuclear activities under the Environmental Code. In the near future, similar proceedings will take place, as other operators of nuclear power plants are also in the process of applying for permits under the Environmental Code.