Case Law

European Union

Judgement of the European Court of Justice on failure of a Member State to fulfil obligations under Directive 96/29/Euratom (2007)

On 18 July 2007, the European Court of Justice (ECJ) handed down its ruling in the case *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*[1] in which the Court declares that the United Kingdom failed to fulfil its obligations under Article 53 of 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[2] (see *Nuclear Law Bulletin* Nos. 58 and 61).

The ruling originates in the European Commission's commencement of the procedure for failure to fulfil obligations under Article 141 of the Euratom Treaty in 2002 and the Commission's request to declare that the United Kingdom failed to adopt the necessary measures to fulfil its obligations in 2006.

Article 53 of the Directive, entitled "Intervention in cases of lasting exposure", obliges Member States to bring into force laws, regulations and administrative decisions to ensure that "where Member States have identified a situation leading to lasting exposure resulting from the after-effects of a radiological emergency or a post practice" specific measures are to be taken. The United Kingdom however, imposed an obligation to intervene only if a situation of radioactive contamination results from a present or past activity for the exercise of which a licence was granted. The national legislation does not oblige the authorities to take measures referred to in Article 53 of the Directive in circumstances in which radioactive contamination results from a past practice which was not the subject of such a licence. The United Kingdom Government admitted the validity of the Commission's claims adding that further legislation to transpose that article into national laws is in the process of being drawn up.

Germany

Judgement of the Federal Administration Court on the standing of third parties regarding attacks at interim storage facilities (2008)

In its judgment handed down on 10 April 2008, the German Federal Administrative Court overrules a decision of a Higher Regional Administrative Court and declares that residents in the vicinity of an interim storage facility may challenge the licence for that facility on the grounds that the necessary protection has not been provided against disruptive action or other interference by third parties.[3] The licensing authority has discretion to determine if and to what extent such protection is necessary. The decision of the

1. The text of the ruling is available at www.curia.europa.eu/.

2. *Official Journal of the European Union* 1996 L 159, p. 1.

3. BVerwG 7 C 39.07; information taken from BVerwG Press Release No. 23/2008.

authority can be scrutinised by courts as to whether or not the administrative risk analysis and risk assessment is based on sufficient data and is in accordance with state of the art in science and technology.

The Higher Regional Administrative Court had denied the possibility of an infringement of the plaintiff's individual rights ("standing"), ruling that the provision on the protection against disruptive action or other interference by third parties [Article 7 paragraph (2) No. 5 of the German Atomic Energy Act] serves the general public, not individuals.

By contrast, the Federal Administrative Court states that the protection against acts of terrorism at an interim storage facility is covered by the Atomic Energy Act (reproduced in Supplement to *Nuclear Law Bulletin* No. 70) and that the protection against such risks serves the individual rights of those who live in the vicinity of the facility. The fight against terrorism by the state does not release the operator from its duty to take measures to protect the facility and its operation for which it is responsible. However, such protection of third parties does not apply to areas which the licensing authority has classified as residual risk (*Restrisiko*). The ruling of the Higher Regional Administrative Court does not include any such finding which is why the Federal Administrative Court has remanded the case.

United States

Judgement of the US Court of Appeals on licensing of the LES Uranium Enrichment Facility (2007)

On appeal to the Federal Court of Appeals for the District of Columbia, the joint petitioners objected to the Nuclear Regulatory Commission (NRC) issuing a license to the Louisiana Energy Services, L.P. (LES) Uranium Enrichment Facility in New Mexico on several grounds:

(1) the NRC violated the Atomic Energy Act (AEA) by "supplementing" the environmental impact statement (EIS) after the hearing closed;
(2) the NRC violated the National Environmental Policy Act (NEPA) by insufficiently analysing the environmental impacts of depleted uranium waste from the LES facility;
(3) the NRC violated the Atomic Energy Act by determining that LES had presented a reasonable cost estimate for disposal of depleted uranium waste from the LES facility;
(4) based on remarks made regarding one of the petitioner's expert witness, NRC Commissioner McGaffigan should have disqualified himself from the licensing proceeding.[4]

As to the first objection, Section 193 of the AEA provides that an EIS shall be prepared before the hearing on the issuance of a licence for the construction and operation of a uranium enrichment facility is completed.[5] Petitioners claimed that the EIS was not "prepared" before the hearing was completed because the written opinions of the Licensing Board and the Commission "supplemented" the EIS. Because the NRC prepared a draft EIS and issued a final EIS after incorporating public comments, the Court of Appeals found that the petitioners' claims were irrelevant because the agency "prepared" an EIS before the hearing was completed, which is all that the AEA requires.

4. *Nuclear Information & Resource Service v NRC*, 509 F.3d. 562 (D.C. Cir. 2007).

5. 42 U.S.C. 2243(a)(2) (2008).

As to the second objection, the court found the petitioners' claim that the NRC had failed to sufficiently analyse the impacts of depleted uranium waste disposal to be unpersuasive. Both the EIS and the extensive administrative record demonstrated that the agency met the requisite NEPA "hard look" standard for assessing environmental impacts of waste disposal. As to the third objection, the court endorsed the following standard:

> "A license applicant need not present a 'concrete plan' to dispose of waste generated by a proposed uranium enrichment facility. Rather, an applicant must present 'a plausible strategy for the disposition of depleted uranium' waste. An applicant also must present a reasonable estimate of the costs of disposal and give adequate assurance that it can pay those costs."[6]

The petitioners contended that the cost estimate was unreasonable because it used too low a contingency factor for unseen costs related to the Department of Energy's waste disposal activities, in light of the Department's "alleged history of underestimating costs on other projects". The NRC dismissed petitioners' claims because there was no direct connection between the Department's prior cost overruns and the licensing action in dispute. The Court of Appeals found that the petitioners had not presented any viable basis to upset NRC's reasoning and conclusion that the contingency factor used in the cost estimate was reasonable.

Finally, as to the fourth objection, petitioners claimed that Commissioner McGaffigan should have disqualified himself from the NRC's decision based on comments he made in an unrelated proceeding regarding one of the petitioner's expert witness. The court stated that it is presumed that administrative officers are objective and capable of judging a particular controversy fairly. Absent circumstances where a disinterested observer could conclude that an official has judged the facts as well as the law of a case in advance of hearing it, the agency official should not be disqualified. The court found that, since the Commissioner's remarks were made in the course of a separate matter, there was no evidence to support the claim that he had prejudged the issues in this particular proceeding.

6. 509 F.3d at 569.