EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

DECISION

Application no. 28711/10
Walter TRAUBE
against Germany

The European Court of Human Rights (Fifth Section), sitting on 9 September 2014 as a Committee composed of:

Boštjan M. Zupančič, *President,*
Helena Jäderblom,
Aleš Pejchal, *judges,*
and Stephen Phillips, *Deputy Section Registrar,*

Having regard to the above application lodged on 25 May 2010,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr W. Traube, is a German national who was born in 1963 and lives in Salzgitter-Bleckenstedt. He lodged his complaint also on behalf of his five children, born in 1995, 1996, 2006 and 2008 respectively. The applicant was represented before the Court by Mrs W. Rülle-Hengesbach, a lawyer practising in Dortmund.

A. The circumstances of the case

2. The facts of the case, as submitted by the applicant, may be summarised as follows.

1. Background to the case

3. The applicant is the owner of farm premises located in the proximity of the former "Schacht Konrad" iron ore mine at Salzgitter, Lower Saxony. He operates the farm and also lives on the land with his wife and five children. In 1991, a plan-approval procedure was opened for the transformation of the mine into a nuclear waste repository for the final

disposal of low-level and intermediate-level radioactive waste. The plans were made available to the public in the period from 16 May to 15 July 1991.

4. Around 290,000 objections were filed against the plan by individuals, including the applicant, as well as representatives of the local municipalities concerned and a number of non-governmental organisations. The objections had been the subject of discussion on the occasion of public hearings which were held in 1992 and 1993 over a total of 75 days. In the planning decision the objections were regrouped and dealt with by subject matter and with respect to each category the licensing authority provided reasons for its finding that the objections were ill-founded.

5. By a planning decision of 22 May 2002 the Lower Saxony Ministry for the Environment granted a licence for the transformation of the mine into a nuclear waste repository for the final disposal of low-level and intermediate-level radioactive waste.

6. According to the planning decision only solid or solidified radioactive waste with "negligible heat generation" may be stored in the repository. This type of radioactive waste originated from the operation and dismantling of nuclear power plants or was generated in the research, industry and medical fields. It comprised, for instance, contaminated protective clothing as well as tools or components from nuclear power plants. It did not include highly radioactive waste such as irradiated fuel elements from nuclear power plants.

7. It is stated on the Konrad repository's official website that the conversion of the mine into a repository is still under way and, according to cautious estimates, might become operational in 2019. It is planned to operate the site for a period of around 80 years following which the repository is to be sealed and the land to be recultivated.

2. The proceedings at issue

8. By written submissions dated 17 June 2002 the applicant challenged the licence before the Lower Saxony Administrative Court of Appeal. He argued that the provisions of the Nuclear Power Act did not enable the authorities to decide on the construction of a final and irreversible storage of nuclear waste and that such a measure required authorisation by Act of Parliament. In his opinion there was no need and thus no justification for the construction of the repository since there already existed sufficient intermediate storage facilities for nuclear waste in Germany.

9. He also alleged that the project was premature, since the authorities had not developed independent criteria for the suitability of a potential site as repository and had consequently not considered alternative locations for its construction. The applicant further alleged that the approval procedure had not complied with the statutorily prescribed formal requirements and, in

particular, that the public had not been sufficiently involved in the proceedings.

10. Even though further research regarding the project had been undertaken and changes had been made to the planning decision following the public's involvement in 1992/93, the amended plan had not been made available for renewed public discussion. Moreover, some of the experts involved in the assessment of possible hazards resulting from the repository's operation had not been independent since they had been mandated by the Federal Office for Radiation Protection which had applied for the licence as well as by the Lower Saxony Ministry for the Environment which was the authority competent for the granting of the licence.

11. The applicant also complained that once the repository was operational, radioactive substances would be discharged into the environment and on his farm premises through waste water and upcast air. It could not be excluded that the radiation exposure would exceed the thresholds defined in the Radiation Protection Act. In this context he argued that the planning decision had not sufficiently taken into account the particular risks resulting from the meteorological conditions at the site and the specific exposure to radiation in the case of outside farm work. The same applied to risks resulting from possible transport accidents, plane crashes etc. He finally claimed that the authorities' assessment of the repository's long-term safety was not in line with the current state of science and technology.

12. On the occasion of the hearing on 1 March 2006, the expert who had rendered the opinion on the potential radioactive exposure resulting from the repository's operation provided additional explanations. He explained that the exposure to radiation via inhalation could be considered insignificant.

13. On 8 March 2006 the Lower Saxony Court of Appeal held that the applicant's children could not be considered as plaintiffs in the proceedings since they had not been jointly represented by both parents as required by domestic law. It further dismissed the applicant's complaints as ill-founded.

14. It held that there was nothing to establish that the planning decision violated the applicant's rights. The provisions of the Nuclear Power Act constituted a sufficient basis for a decision by the executive on the construction of a repository for final and irreversible storage of nuclear waste and the Lower Saxony Ministry for the Environment had demonstrated in its decision why the mine was a suitable site for the planned repository.

15. Furthermore, the plan-approval procedure had been conducted in accordance with the statutory procedural requirements. When examining whether the requirements for the construction and operation of a repository at the site were met and when addressing the objections lodged in the course

of the approval procedure, the licencing authority had had recourse to expert opinions on aspects such as the adequacy of the site's geological situation, the evaluation of possible security risks as well as the long-term safety of the repository and possible impacts on the environment. There was no indication that the experts had been biased. Contrary to the applicant's submission a renewed involvement of the public had not been necessary since any amendments to the plan following the public hearings in 1992/1993 had related to planning details that had no substantial impact on the interests of third parties.

16. The Court of Appeal further recalled that domestic law only allowed the granting of a licence for a repository for the storage of nuclear waste if according to the state of science and technology it was excluded in practice that its operation presented a risk for the life, health or material assets of third parties. It held that the licencing authority had considered all relevant elements in its assessment of the risks involved in the operation of the repository. In particular it had demonstrated that a potential radiation exposure for an individual in the applicant's situation would, under any circumstances, and even based on a worst case scenario, stay well below the threshold allowed by the Radiation Protection Act.

17. Furthermore, the authorities had taken into account and arranged for sufficient precautions against possible accidents, hazardous incidents and disruptive acts by third parties. As regarded the applicant's complaint that the security of the repository could not be ensured in the long term and might entail risks for future generations, the Court of Appeal held that such complaints referred to scenarios in the distant future that did not directly concern the applicant in his own constitutionally guaranteed rights. In any event, the authorities had demonstrated that within the next 10,000 years no geological changes having an impact on the site's security were to be expected.

18. On 26 March 2007 the Federal Administrative Court rejected the applicant's request to be granted leave to appeal. The Federal Administrative Court held in particular that the applicant's right to be heard had not been infringed by the Court of Appeal. In his motions for the taking of further evidence submitted in the course of the hearing the applicant had failed to substantiate in which way the further evidence requested by him could contribute to the assessment of the case and the Court of Appeal's decision to dismiss the applicant's related request had thus been justified. The Federal Administrative Court concluded that the Court of Appeal had complied with its procedural obligation to fully clarify the circumstances of the case.

19. By a decision of 10 November 2009 (no. 1 BvR 1178/07) running to some 22 pages, the Federal Constitutional Court declined to consider the applicant's constitutional complaint lodged against the aforementioned

decisions of the domestic courts as well as the provisions of the German Nuclear Power Act on which the planning decision had been based.

20. The Constitutional Court held that the complaint lacked any prospect of success. The relevant provisions of the Nuclear Power Act provided for a sufficient protection of the applicant's fundamental rights. The Court underlined that only lightly contaminated material such as protective clothing and equipment was to be stored in Schacht Konrad but no highly radioactive spent nuclear fuel (*abgebranntes Brennelement*).

21. The Court of Appeal, in line with the established case law of the Federal Administrative Court, had interpreted these provisions as allowing for a licence for a repository to be granted only if according to the current state of science possible risks resulting from its operation were "practically excluded" and in its related assessment had referred to the thresholds for nuclear exposition as set out in the Radiation Protection Act. The fact that a residual future risk could not be entirely ruled out did not infringe the State's duty to protect the fundamental rights of its citizens. The legislator could not be expected to exclude with absolute certainty any risks of a possible violation of fundamental rights resulting from the authorisation and operation of technical installations.

22. The Federal Constitutional Court further endorsed the Court of Appeal's finding that to the extent the applicant put into question the long-term security of the repository and invoked risks its operation might entail for future generations, he referred to scenarios in the distant future that did not directly concern his own constitutionally guaranteed rights.

B. Relevant domestic law

23. Pursuant to the relevant provisions of the Nuclear Power Act (*Atomgesetz*) it is the Federal State's responsibility to establish facilities for the disposal of radioactive waste, a task that falls within the competence of the Federal Office for Radiation Protection. Section 7 § 2 of the law provides that a licence for a repository for the final disposal of nuclear waste may only be granted if it is ensured that, *inter alia*, the necessary precautions against hazards arising from the construction and operation of the repository are taken in accordance with the state of science and technology and if the necessary protection of the site against hazardous incidents, accidents or disruptive acts by third parties is guaranteed. According to Section 9 c § 4 of the Act the licence has to be refused in the event it is to be expected that the operation of the facilities would impair the well-being of the public or infringe provisions of public law, in particular environmental law.

COMPLAINTS

24. Acting also on behalf of his five children, the applicant complained under Articles 2 and 8 of the Convention about the granting of the construction and operation permit.

In addition, the applicant alleged a violation of his right to a fair trial under Article 6 and of his right to an effective domestic remedy under Article 13 of the Convention.

THE LAW

A. Alleged violation of Article 8 of the Convention

25. Acting also on behalf of his five minor children, the applicant complained that the granting of the construction and operation permit for a nuclear waste repository in the vicinity of his premises violated their rights under Articles 8 and 2 of the Convention. The Court, being master of the characterization to be given in law to the facts of the case, considers that this complaint is most appropriately examined from the standpoint of Article 8 alone (see *Hardy and Maile v. the United Kingdom*, no. 31965/07, § 184, 14 February 2012), which provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

26. The Court observes, at the outset, that the applicant lodged the complaint on his own behalf as well as on behalf of his five minor children. The Lower Saxony Court of Appeal held in its judgment of 8 March 2006 that the applicant's children could not be considered as plaintiffs in the proceedings since they had not been jointly represented by both parents as required by domestic law. Furthermore, the applicant did not lodge a complaint on behalf of his children before the Federal Constitutional Court.

27. That being said, the Court does not find it necessary to determine whether the applicant had legal standing to represent his children before the Court as, in any event, the complaint lodged on the applicant's own behalf and on behalf of his children is inadmissible on the grounds set out below.

28. The Court reiterates that in a case such as the present one, which involves government decisions affecting environmental issues, there are two aspects to the examination which it may carry out. Firstly, it may assess the

substantive merits of the Government's decision, to ensure that it is compatible with Article 8. Secondly, it may scrutinize the decision-making process to ensure that due weight has been accorded to the interests of the individual (see *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 99, ECHR 2003-VIII, and *Giacomelli v. Italy*, no. 59909/00, § 79, ECHR 2006-XII).

29. In relation to the substantive aspect, the Court has held on a number of occasions that in cases involving environmental issues the State must be allowed a wide margin of appreciation (see *Hatton and Others*, cited above, § 100; *Buckley v. the United Kingdom*, no. 20348/92, 25 September 1996, Reports 1996-IV, pp. 1291-93, §§ 74-77; *Taşkın and Others v. Turkey*, no. 46117/99, 10 November 2004, § 116; *Luginbühl v. Switzerland* (dec.), no. 42756/02, 17 January 2006; and *Giacomelli*, cited above, § 80).

30. Turning to the circumstances of the instant case, the Court notes that the impugned licence was granted in accordance with the relevant legal provisions and pursued a legitimate aim, namely the interest of the general public in the final disposal of nuclear waste in line with scientific and technical safety standards. Furthermore, it is apparent from the information submitted that the domestic authorities and courts, having thoroughly examined the case relying on pertinent expert opinions and referring to the statutorily fixed thresholds for non-hazardous radiation exposure, reached the conclusion that possible risks for the public in connection with the operation of the repository were excluded in practice and that, consequently, the requirements for its licencing pursuant to the provisions of the Nuclear Power Act were met.

31. The Court notes that the applicant does not suggest that the said thresholds fail to provide sufficient protection from harmful radiation. Having regard to the wide margin of appreciation States enjoy in cases involving environmental issues, the Court finds that the domestic authorities in the instant case have struck a fair balance between the public interest to have a safe nuclear waste repository for the final disposal of low-level and intermediate-level radioactive waste and the applicant's interest to be protected from potentially harmful radiation.

32. As regards the compliance of the domestic decision-making process with the procedural aspect of Article 8, the Court recalls the necessity of transparency and the possibility to participate in the decision-making process as well as the right to seek judicial review (see *Hardy and Maile*, cited above, § 230). The Court notes that the public was involved in the plan-approval procedure at an early stage of the decision-making process. The planning permission was publicised and the objections had been the subject of discussion on the occasion of public hearings which were held in 1992 and 1993 over a total of 75 days. In the planning decision the objections were regrouped and dealt with by subject matter and with respect

to each category the licencing authority provided reasons for its finding that the objections were ill-founded.

33. It follows from the information submitted that the public was involved in the plan-approval procedure and that the applicant had the benefit of adversarial proceedings before administrative bodies and the domestic courts in three instances which took into consideration his submissions. At the various stages of those proceedings he was able to submit the arguments which he considered relevant to his case. The factual and legal reasons for the decisions dismissing his action were set out at length by three court instances, including the Federal Constitutional Court. The domestic courts examined the applicant's offers of proof and gave reasons why they decided not to take the requested evidence. There is, accordingly, no appearance of a violation of the procedural aspect of Article 8 of the Convention.

34. It follows that the complaints under Article 8 are manifestly ill-founded within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention

B. The remainder of the applicant's complaints

35. The applicant further complained about a violation of his right to a fair trial of his right to be heard under Article 6 of the Convention. He finally invokes a violation of his right to an effective domestic remedy under Article 13 of the Convention.

36. Having regard to its findings under the procedural aspect of Article 8 (see paragraphs 32-33, above), the Court considers that there is no appearance of a violation of Articles 6 § 1 and 13 of the Convention.

37. It follows that also these complaints are manifestly ill-founded within the meaning of Article 35 § 3 and must be rejected be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Stephen Phillips
Deputy Registrar

Boštjan M. Zupančič
President