VERDICT

No 15645
Sofia, 26.11.2013

IN THE NAME OF TH PEOPLE

The Supreme Administrative Court of Bulgaria - The five-member panel - II Tribunal, in a sitting on the tenth day of October, year two thousand and thirteen, with members:

CHAIRPERSON:
MILKA PANCHEVA

MEMBERS:
RUMYANA PAPAZOVA
ATANASKA DISHEVA
TODOR TODOROV
NIKOLAY GUNCHEV

with Secretary Grigorinka Lubenova
and with the participation of

the public prosecutor Todor Merdzhanov
heard out the reported

by the judge RUMYANA PAPAZOVA
concerning administrative case No 12075/2013

The legal procedure is under Art. 208 et seq. of the Administrative Procedure Code (APC)
It has been initiated on cassation appeals, filed by the State Enterprise "Radioactive Waste" with headquarters and management address Sofia, and the Minister of Environment and Water, №11040 form 22.07.2013, against the decision, under Adm. case № 14109/2011 of the Supreme Administrative Court, the three-member panel, annulling a decision on the assessment of the environmental impacts No 21-9 / 2011, from October 10, 2011 of the Minister of Environment and Water and the file is sent to the administrative authority for reconsideration.
The stated in the two cassation appeals arguments for depravities in the court decision, give cassation grounds for revocation under Art. 209 pt. 1, 2 and 3 of the APC: nullity and inadmissibility of the judgment, groundlessness, significant breaches of procedural rules of procedural and substantive law and the provisions of the Law on Environmental Protection, the Ordinance on the terms and conditions for environmental impact assessment, the Ordinance on conditions and procedures for assessing the compatibility of plans, programs, projects and investment proposals with the objects and aims of conservation of protected areas, and the Ordinance on ensuring the safety of the management of spent nuclear fuel.
The defendant Petar Penchev Troyanski from Montana is challenging the court appeals in written objections and in written notes.
The representative of the Supreme Administrative Prosecution Office has given a reasoned conclusion on the legality and regularity of the judgment under appeal.

The two cassation appeals are procedurally admissible as submitted by the parties in due term under art. 211, paragraph 1 of the APC.
After having examined them on the merits, the Supreme Administrative Court, the five-member panel, adopted the following:
The point at issue in the legal procedure before the Supreme Administrative Court, the three-member panel, is the decision for environmental impact assessment No 21-9 / 2011, from 10.10.2011 issued by the Minister of Environment and Water, grounded on art. 99, Paragraph 2 of the Environmental Protection Act (EPA), which approved the implementation of the investment proposal for the construction of a National repository for disposal of short-living low and intermediate level radioactive waste (NRDRAW), contracted by the State Enterprise "Radioactive Waste" (SE "RAW") with its headquarters and registered office in the city of Sofia. The Supreme Administrative Court, the three-member panel, came to the correct conclusion, about considerable violations of the administrative and procedural rules in issuing the contested administrative act, which affected its material legality.
The contested judgment was delivered by a legitimate judicial panel, within the confines of the law provided by the judiciary and meeting the formal requirements of Art. 172 a of the APC, in the light of which the arguments in the two cassation appeals of nullity of the judicial act have been judged as ungrounded. The position of both sides pleading cassation for nullity of the judgment because of "absolute incomprehensibility" (arg. from the grounds of Interpretative Decision № 1 from 10.02.2012 of the SCC I. C. № 1/2011, GACCA) is influenced by subjective perceptions that do not correspond to the presented by the court factual and legal grounds. The will of the court is clearly expressed and understandable, and therefore does not need interpretation to derive its meaning. The isolated technical mistakes in the spelling of the name of the applicable Law on Environmental Protection, as well as the occasional reference to the Regulation on ensuring the safety of spent nuclear fuel, affect in no way the validity of the judicial act. In compliance with the procedural rule of Art. 168, paragraph 1 of APC, the court has not confined itself only to a discussion of the reasons mentioned by the appellant, but on the basis of the evidences, examined the legality of the contested administrative act on all grounds under Art. 146.
The presented in the two cassation appeals argument for inadmissibility of the judgment, due to fact that the complaint was submitted by a person without a legal interest in the dispute is groundless. The right of the citizens to a healthy and favorable environment, in accordance with the established standards and norms is guaranteed by Article 55 of the Constitution of the Republic of Bulgaria. The public's right to participate in making administrative decisions with environmental impacts, such as decisions on EIA is legally regulated. According to Art. 3 pt. 11 of the EPA environmental protection is based on the principle of access to justice in matters relating to the environment. With Art. 97 paragraph 2 of the EPA (now paragraph 3) it is provided for the organization and public discussion of the EIA report, as the discussion is open to all interested individuals and legal entities, including public organizations and citizens, whose interests are affected or are likely to be affected by the implementation of the investment project. In that case, the individuals are covered by the term "public" within the meaning of § 1, p. 24 of the AR of the EPA and in order to become accessible to all persons, the EIA decision, pursuant to art. 99, paragraph 4 pt. 2 of the EPA shall be announced by the central mass media, its website and / or other appropriate means. The right of appeal against the decision of the EIA belongs, according to Art. 99, paragraph 6 of the EPA to the interested parties, including individuals whose rights and legitimate interests of maintaining a healthy environment are directly affected or are likely to be affected by the implementation of the investment proposal. In this case the specific investment proposal could have a significant and lasting negative impact on the environment not only on the Kozloduy Municipality, but

also on the rest of the country, incl. Montana, where lives the individual - complainant Petar Penchev Troyanski. As a representative of "the public concerned" within the meaning of § 1, p. 25 of the AR of the EPA, Petar Penchev Troyanski is a due side with legally protected interest to challenge the decision under Art. 99, paragraph 2 of the EPA, without the need to present evidence of his subjective rights and interests related to the investment proposal for the construction of a national repository for the disposal of short-living low and intermediate level radioactive waste.

The advocated by both sides pleading cassation opinion, that the provisions of the Convention on access to information, public participation in the process of decision-making, and Access to Justice in Environmental Matters (the so called Aarhus Convention) "have no direct effect on our country" is wrong. Pursuant to Art. 5 paragraph 4 of the Constitution of the Republic of Bulgaria, international treaties ratified by the constitutionally established procedure, promulgated and effective for Republic of Bulgaria, are part of domestic law. They take precedence over domestic legislation which contradicts them. The Aarhus Convention was ratified by a law passed by the 39th NA on 02.10.2003, and published in SG. 91 of 14.10.2003 and is effective for the Republic of Bulgaria since 16.03.2004 The purpose of Article 9, paragraph 3 of the Aarhus Convention is to provide members of the public, who meet the criteria, if any, laid down in the national law (in this case capable individual), access to administrative or judicial procedures, to challenge actions or omissions by private persons and public authorities which, contravene provisions of national legislation in the field of environment. The sides pleading cassation also incorrectly relied on the judgment of the European Court of Justice of 11.03.2011 in Case C-240/09, according to which Article 9, paragraph 3 of the Aarhus Convention has not direct (natural) action in legislation of the European Union. It is an obligation of the inquiring (national) court to interpret to the greatest possible extent the relevant procedural rules, in order to bring the administrative or judicial proceedings in accordance with the objective of Article 9, paragraph 3 of the Convention and the objective of the effective judicial protection of the rights created by the EU legislation, aiming to secure the environmental organization with the opportunity to challenge in court the administrative decision, which may contradict to the EU law in the field of environment.

Unfounded are the complaints of considerable violations of the court rules in the constitution of the parties and collection of evidence. Pursuant to Art. 7, paragraph 1 of the Civil Code and in conjunction with Art. 144 of the APC, the court officially performs the necessary proceedings for the progress and conclusion of the case, and monitors the eligibility and the proper execution of the procedural actions by the parties. It assists the parties to clarify the case from factual and legal point of view. With the provisions of Art. 9 paragraph 3 and Art. 171, paragraph 3 of the APC the Administrative court is obliged to instruct the parties that certain circumstances relevant to the case is not evidence. In compliance with the rules of law, the court has taken procedural steps for the proper constitution of the parties and for completion of the case with evidence. By order of the closed meeting of 04.06.2012, the court has decided on the objections of the Minister of Environment and Water and of the SE "Radioactive waste" against the validity of the complaint and the active material and legal legitimacy of the applicant. It has exhibited its reasons, which held that the appeal of Peter Penchev Troyanski, as a citizen of the Republic of Bulgaria, against the EIA procedure is permissible, but left it without consequences, with the indication for payment of stamp duty at the rate of 10 BGN. The irregularity of the complaint has been removed in time, with the presentation of a document, filed on 15.06.2012, that the state fee has been paid. By order of the closed session of 26.03.2012, the court has instructed the Minister of Environment and Water, until 30.04.2012 to prepare a complete and accurate list of the documents contained in the administrative file, and to submit the decision on Art. 93 of the EPA, which apraises the

need for environmental impact assessment, the additional specification, the scope and content of the assessment referred to in letter №26-00-1223 / 18.09.2009, the Government's strategy for radioactive waste, a 2007 report to assess the environmental impact of the investment proposal, report entitled "Development of a preliminary project for a national repository for low and intermediate level short-living radioactive waste" of July 2008, prepared by "Parsons" and "Risk Engineering". By order dated 20.02.2013, the court again indicated the administrative authority to submit the list of the documents in the file, as distributed in folders and evidences, to inform the Republic of Romania for the contested decision. By orders dating 03.01.2013 and 25.03.2013, the court requested submission of documents from third parties, not involved in the case - the Ministry of Economy, Energy and Tourism and the Geological Institute of the Bulgarian Academy of Sciences. In view of the above procedural steps the complaints of the sides pleading cassation for "unilaterally manifested activity in connection with all requests of the complainant" are considered unfounded. By these orders, the court has been giving instructions to the administrative authority and the state enterprise, for which the administrative act is favorable, for the presentation of evidence to establish the factual grounds for the issuance of the Act, in the procedural rule for the allocation of the burden of proof, under Art. 170, paragraph 1 of the APC. In addition, by its order dating 01.12.2011 the court rejects the complaint with request to stop the allowed by the administrative authority implementation in advance of the contested act.

The cassation arguments for misapplication of Art. 14, paragraph 3 pt. 2 of the Ordinance on the conditions and procedures for environmental impact assessment (OCPEIA) in justifying the conclusion that the competent authority has not carried out a thorough and reasoned ruling on the completeness and reliability of the included in the EIA report information as well as in the objectivity of its findings to meet the regulatory criteria, are unfounded. By letter № EIA-2454 / 21.12.2010, signed by the Deputy Minister of Environment and Water, after the expiration of the instructional period of 30 days, the State Enterprise "Radioactive Waste" was informed that pursuant to Art. 14, paragraph 3 pt. 2 of the OCPEIA, the assessment of the quality of the EIA report of investment proposal for building a national repository for the disposal of short-lived low and intermediate level radioactive waste, is positive. The assessment of the quality of the EIA report is carried out by the competent authority following the mandatory criteria listed in Art. 14, paragraph 1, p. 1-7 and paragraph 2 of the OCPEIA. In this case there are no data for the completion of such an assessment for the quality, in order to be concluded the the criteria for a positive assessment have been met, according to Art. 14, paragraph 3 pt. 2 of the OCPEIA with omissions that are not essential in making the decision. Pursuant to Art. 15, paragraph 1 of the OCPEIA, notification letter is sent to the contracting authority, after a positive assessment in agreement with Art. 14, paragraph 3, in conjunction with paragraphs 1 and 2. The Court cannot substitute the competent authority in its administrative functions and instead of the authority to perform the due quality assessment of the report, through the legal proceedings. During the review of the submitted for the case report on Environmental Impact Assessment from January 2011, with the annotation “last version / with letter EIA-2454/21.02.2011”, the Court found out that certain additions and corrections of shortcomings have been made, which means that the report has been revised / supplemented after the stage of assessing it. The remake of the report after a positive assessment is permissible under Art. 17 paragraph 6-8 of the OCPEIA after a public discussion, but in this case this procedure was not used. In connection with the mentioned above, it should be added that according to Art. 14, paragraph 2 „б” of the OCPEIA (SG. 80 of 2009, effective as of 14.04.2010) to evaluate the significance of the positive and negative impacts on men from the construction and the operation of the investment proposal, the competent authority is obliged to request a preliminary opinion on

the EIA report by the Ministry of Health. The Court at the first instance has found that the Ministry of Health has expressed negative opinion with letter No РД-04-09-340/24.01.2011, with remarks about the completeness of the content of the report, concerning the scope and the evaluation of the health and hygienic aspects of the environment, and the risk for the human health from point of view of the radiation impact of a repository for radioactive waste and the risk for human health, a remark has been made that the chosen model for evaluation of the irradiation of the population has not been described and its parameters have not been validated. And at a later time it was not received a positively reasoned opinion of the Ministry of Health that it is not expected a significant negative impact on the health of the population by the construction and operation of the repository. The Court at the first instance explained in details the reasons for which it is accepted that the difficulties which the report's authors have encountered in gathering information, have affected its quality. Negative opinion has been expressed in a letter № 5005 / 29.11.2010 of the Basin Directorate for Water Management - Danube region with center Pleven, which prior to the issuance of the notification letter of 21.12.2010 indicated incompleteness of information on water resources, and recommended completion of the plan of measures for reducing, limiting or eliminating adverse effects on the environment. With letter №04-00-6552 / 24.11.2010, the Executive Environmental Agency has given recommendations on measures for removal and mitigation of the adverse consequences during the operation of the facility, since in assessing the radiological state of the environment only data from the radiological monitoring made by the NPP "Kozloduy" have been used. The statement that the potential radiological impact is localized within the repository site and beyond it is negligible is without proof. The opinions and recommendations have not been analyzed in assessing the quality of the EIA report under Art. 14 of the OCPEIA. The alleged irregularities in the application of Art. 31 of the Biological Diversity Act (BDA) and regulations for its implementation have not been found. According to Art. 31 paragraph 4 of the BDA (SG. 88 of 2005, effective from 01.01.2007) plans, programs and investment proposals under paragraph 1, for which the competent authority under paragraph 6 considers that it is likely to have a significant negative impact on the protected area shall be subject to evaluation covering the degree of impact of the plan, program or investment proposal on natural habitats and habitats of species subject to conservation in the protected zone. The Court of First Instance has applied the provisions of art. 34 of the Ordinance on the terms and conditions for assessing the compatibility of plans, programs, projects and investment proposals with the object and purpose of conservation of protected areas, according to which the evaluation of art. 21 is carried out by experts in art. 9 based on the criteria of art. 22 and is presented as an annex to the report on SEA / EIA and an integral part of it. It was found out lack of application of legally provided content as well as that the information in Part III of the report refers to the protected area "Zlatiata" without data on other protected areas in the two-kilometer strip along the Danube ("Islands Kozloduy", "River Ogosta" "Kozloduy", "Tsibar"). In the last act there is not a statement of reasons on which it is inferred that there is no chance that the construction of a national repository for radioactive waste will have a significant negative impact on natural habitats and habitats of species in protected areas. In view of the procedural obligation under Art. 168, paragraph 1 of the APC, the cassation complaints alleging that, in assessing the legality of the contested administrative decision on all grounds under Art. 146 the Court has gone "beyond its powers" are unfounded. The provisions of Art. 2, paragraph 1 of the OCPEIA require that the actions for assessing the impact on the environment to be carried out in a regulatory sequence. After evaluating the quality of the EIA report a public discussion under Chapter V of the Ordinance has to be organized. Given the specifics of the project - multi barrier near-surface disposal facility of low and intermediate level radioactive waste - and the high risk to people’s health,

the Court reasonably accepted that a limited and incomplete public discussion was carried out only in Kozloduy municipality and in the village Harlets on which territory is the construction site under the name "Radiana". The expected environmental impact from the operation of surface depository with buried short living low and intermediate radioactive waste in no way can be limited to the territory of a single municipality. On the public discussion of the EIAR in March 2011 (letter of the contracting authority ref. № 04-11-299 / 04.04.2011) the competent authority was required, pursuant to Art. 99, paragraph 2 of the EPA to decide on the EIA within 45 days, but the instructional time has been missed with more than four months. Pursuant to Art. 21 paragraph 1 of the Regulation on the Safety of Radioactive Waste Management (RSRAWM – revoked - SG. 76 of 30.08.2013) the disposal of radioactive waste must ensure the protection of the health of the workers and the public and the environment during the operation of the disposal facility and after its closure, preventing the uncontrolled spread of radioactive material and ensuring its isolation from the biosphere. The Regulation specifies the requirements, standards and safety regulations on siting, design and construction of facilities for radioactive waste management (Article 1, paragraph 2). The site selection of the facilities for the disposal of radioactive waste is carried out under Art. 54 RSRAWM (revoked), based on a comparative analysis of not less than three alternative sites, taking into account the possible impact of the facility on the population and the environment provided in four phases, one of which expressly refers to the collection of data and analyzing areas. On the grounds of Article 58 during site selection the safety of the facility is assessed, aiming to demonstrate the ability of the site, in combination with the chosen concept for disposal, to protect the population subject to the criteria of Art. 9, p. 3. In assessing the quality of the EIA report the contracting authority pursuant to Art. 96 paragraph 1 pt. 2 of the EPA, presents to the competent authorities examined alternatives for location (with layouts and coordinates of typical points in the established coordinate system for the country) and / or technology alternatives and the reasons for the choice of the study, given the impact on the environment including "zero" alternative. In the contested judgment it was found that the EIA report is not an in-depth comparative analysis of the location and site characteristics and they are not appreciated. It is not proven that the selected site "Radiana", which is located within the secured area of the NPP "Kozloduy", is the most complete answer to the requirements of Art. 55 of the RSRAWM (revoked). The report also lacks complete and thorough assessment of the safety of the facility concerning radioactive waste management in accordance with Art. 77 of the RSRAWM (revoked), which requires an analysis of the ability of the facility to fulfill its safety functions not only during normal operation but also in the event of any conditions and expected events, incl. in cases of emergency and low probability events, and for a facility for the disposal of radioactive waste - violation of protective barriers due to human activity after closure. The unfounded conclusion was made that it is not expected cumulative radiation impact on the environment during operation of the designed facility for the disposal of radioactive waste that is located a few kilometers away from the nuclear power plant "Kozloduy". The Court found out that in the non-technical summary there is no analysis of the statistics for Kozloduy Municipality for 2008, which shows a significantly higher growth rate of mortality of people in the municipality due to diseases of the circulatory and respiratory system in comparison with the national average. The large volume of stored waste, which enhances the radiological impact, was not reported. The misapplication of Art. 25 pt. 4 of the OCPEIA has not been found out, in view of the cross-border context of the procedure, which should be consistent with the Convention for the Evaluation of Environmental Impact in a Transboundary Context (SG 86 of 01.10.1999, active from 10.09.1997). Reasonably the Court accepted that in the EIAR lacks a detailed analysis of the Radiological impact on the territory of the Republic of

Romania in order to be assumed that as a result of the operation of the repository there are no expected transboundary impacts. It was not reported that the Danube passes through other territories for discussion of the radioactive pollution of the environment of other European states. In the motives of the contested judgment there are clearly expressed in details the circumstances under which the court judgment was concluded for inappropriate justification of the selected type of storage - trench. Properly applied are the provisions of Art. 22 of the Regulation on the safe management of radioactive waste (revoked.), which requires the manner of disposal of radioactive waste to be determined according to the type, category, activity and radionuclide composition of the radioactive waste (solid radioactive waste category 2a are buried on the surface or geological, and RAW category 2b and 3 - only in geological disposal facilities). Referred to the strategy for the management of spent nuclear fuel and radioactive waste up to 2030, adopted by the Decision of the CM on the meeting of 05.01.2011, Application № 6, according to which the disposal of waste in a facility of intermediate depth and in geological repository is the preferred solution. For selection of the type of the repository for low and intermediate level radioactive waste, the SE "RAW" commissioned preliminary studies to "WorleyParsons / Risk Engineering" - for trench type repository and to"Minproject" AD - for tunnel repository. Despite the opinion of the Technical Board of the SE "RAW", based on the results of "Risk Engineering" AD expertise that the best option for building a repository is the tunnel type, the Expert Technical Board at the Minister of Economy, Energy and Tourism has adopted a decision with which has determined the choice of the appropriate design type of repository - multi barrier engineering facility - surface trench type. The above considerations lead to the conclusion that the contested administrative decision is not sufficiently reasoned, according to the requirements of Art. 18 and Art. 19 of the OCPEIA in conjunction with Art. 99, paragraph 3 of the EPA. Numerous questions have not been clarified and discussed in their entirety, that are of significance for the protection of the environment for the present and future generations and for the protection of human health, preventing and reducing pollution, conserving biodiversity, transboundary effects, etc. By finding that the act is issued under considerable violations of administrative procedural rules, which requires its cancellation and return of the administrative file for reconsideration, the Supreme Administrative Court, the three member panel ruled the right decision. Referred to in court appeals grounds for revocation are not available, therefore the judgment under appeal should be upheld. The defendant in cassation has not presented evidence of expenses incurred for handling the case in this instance and thus the claim for the award of costs should not be upheld. Led by the above considerations and pursuant to Art. 221, paragraphs 1 and 2 of the APC, the Supreme Administrative Court, the five-member panel,

RULES:

The verdict No 11040 of 22.07.2013, enacted by adm. case No 14109 / 2011 of the Supreme Administrative Court, the three-member panel REMAINS VALID.

THE DECISION is not subject to appeal.