

Round seal reading:

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1 (6)

Translator's note: rectangular seal, reading:

KHO

24.04.2019

HFD

DECISION OF THE HÖGSTA FÖRVALTNINGSDOMSTOLEN
(The Supreme Administrative Court)

Case No. 4840-18

issues in Stockholm on 21 December 2018

APPLICANT

ClientEarth Prawnicy dla Ziemi Foundation

Legal representative: David Loveday, Attorney

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129 04 Hägersten

DECISION APPEALED AGAINST

Decision of the Government (Näringsdepartementet [the Ministry of Economy]) of 7 June 2018 No. N2016/05812/FÖF) concerning the application for a permission under 15 a § lagen (1966:314) om kontinentalsockeln (the Law (1966:314) on continental shelf) to install two natural gas transportation pipelines on the continental shelf located within the Swedish economic zone on the Baltic Sea.

SUBJECT OF THE CASE

Court review procedure

RULING OF THE HÖGSTA FÖRVALTNINGSDOMSTOLEN

(The Supreme Administrative Court)

The Högsta Förvaltningsdomstolen (the Supreme Administrative Court) rejected to request a preliminary ruling from the European Court of Justice.

The Högsta Förvaltningsdomstolen (the Supreme Administrative Court) rejected the request to carry out a court review.

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Case No. 4840-18

DECISION

SITUATIONAL BACKGROUND

Both natural persons and legal persons have the right to apply for a court review of a governmental decision concerning their civil rights and obligations in the meaning of Article 6 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the ECPHR). Furthermore, an organisation whose activities include protection of the natural environment has the right to apply for a court review of a decision concerning granting a permission. In such a situation, such an organisation should consist of at least 100 members or enjoy a different form of public opinion support.

The Applicant, ClientEarth Prawniczy dla Ziemi Foundation (hereinafter referred to as ClientEarth), is a Polish organisation, seated in Warsaw, whose activities include protection of the natural environment. ClientEarth has applied for a court review of the governmental decision granting Nordstream 2 AG a permission to install two natural gas transportation pipelines on the continental shelf located within the Swedish economic zone on the Baltic Sea.

CONTENT OF THE APPLICATION

ClientEarth requests that the said governmental decision is annulled. ClientEarth also asks the Högsta Förvaltningsdomstolen (the Supreme Administrative Court) to request a preliminary ruling from the European Court of Justice with regard to the case in question and with regard to the right to apply for a court review.

ClientEarth puts forth the below-mentioned arguments to support its claim that it has the right to apply for a court review of the said governmental decision.

In accordance with Article 6 of the ECPHR, the said governmental decision concerns the civil rights of the Foundation and, therefore, the Foundation has, in the first place, the right to lodge a complaint under 1 § lagen (2006:304) om rättsprövning av vissa regeringsbeslut (the Law on court reviews of some governmental decisions). Secondly, the Foundation has the right to lodge a complaint under 2 § of the same Law as the Foundation is an organisation whose activities concern the natural environment in the meaning of Chapter 16, 13 § miljöbalken (the Code of Environmental Protection). Finally, the Foundation has the right to lodge a complaint under the European Union *acquis communautaire* and the Convention of 25 June 1998 on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention).

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GROUNDINGS AND REASONS FOR THE RULING

Legal regulations

In accordance with 1 § Rättsprövningslagen (the Law on court reviews), a natural person may apply for a court review of a governmental decision which concerns the person's civil rights or obligations in the meaning of Article 6.1 of the ECPHR.

Article 9.2 of the Aarhus Convention stipulates that the public concerned with sufficient interest or maintaining impairment of a right, where the administrative procedural law requires this as a precondition, should have access to a review procedure before a court of law to challenge the substantive and procedural legality of certain decisions concerning environmental issues. Article 2.5 of the Convention stipulates that the term "the public concerned" includes organizations promoting environmental protection.

2 § Rättsprövningslagen (the Law on court reviews) stipulates that an organisation promoting environmental protection – in the meaning of Chapter 16, 13 § miljöbalken (the Code of Environmental Protection) – has the right to apply for a court review of governmental decisions concerning granting permissions falling within the scope of Article 9.2 of the Aarhus Convention.

Organisations referred to in Chapter 16, 13 § miljöbalken (the Code of Environmental Protection) include non-profit organisations and other legal persons whose main objective is the protection of environmental interests (1), which are non-profit oriented, (2) which have carried out their activities in Sweden for at least three years (3), and which have at least 100 members or receive a different form of public opinion support (4).

The provisions of Chapter 16, 13 § miljöbalken (the Code of Environmental Protection) have been developed taking into account the fact that both Sweden and the European Union are parties to the Aarhus Convention. The Convention's provisions on the right to consider environmental issues have been implemented into the EU regulations by, among others, amending the Directive on the assessment of the effects of certain public and private projects on the environment (initially Directive No. 85/337/EEC, amended, among others, by Directive No. 2003/35/EC and codified by Directive No. 2011/92/EU, i.e. the environmental impact assessment Directive).

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The European Court of Justice stated that national regulations implementing the environmental impact assessment Directive should guarantee that organisations promoting environmental protection have the right to access a court review procedure and, furthermore, that the provisions of the Directive should be effective (*Djurgården-Lilla Värtans Miljöskyddsförening* (Environmental Protection Association - *Djurgården-Lilla Värtan*), C-263/08, EU:C2009:631, Clause 45).

Assessment of the *Högsta Förvaltningsdomstolen* (the Supreme Administrative Court)

The *Högsta Förvaltningsdomstolen* (the Supreme Administrative Court) first of all noted that a party that claims to have a right to lodge a complaint should demonstrate that conditions to use that right had been fulfilled.

As regards ClientEarth's right to request a court review of the governmental decision in question, the *Högsta Förvaltningsdomstolen* (the Supreme Administrative Court) found what follows:

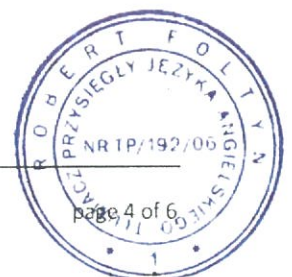
The decision complained against may be regarded as a governmental decision regarding granting a permission referred to in Article 9.2 of the Aarhus Convention. However, the said decision does not in any way concern ClientEarth's civil rights or obligations in the meaning of Article 6.1 of the ECPHR. Therefore ClientEarth cannot have the right to lodge a complaint under 1 § *Rättsprövningslagen* (the Law on court reviews).

An organisation promoting environmental protection which meets the criteria referred to in Chapter 16, 13 § *miljöbalken* (the Code of Environmental Protection) has the right to lodge a complaint under 2 § *Rättsprövningslagen* (the Law on court reviews). As indicated in ClientEarth's statute, the main goal of the Foundation is to protect environmental protection interests and the Foundation is not profit-oriented. This means that the Foundation meets the first two criteria specified in the *miljöbalken* (the Code of Environmental Protection).

Furthermore, eligible organisations should have at least 100 members or have a different form of public opinion support. ClientEarth did not declare to have any members, which means that it should have otherwise demonstrated its public opinion support.

In the case of organisations with less than 100 members, the purpose of court reviews is to enable smaller, local associations to complain against environmental decisions (Draft Law: 2009/10:184, page 64).

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During preparatory works it was highlighted that organisations whose membership functions in a different way than it does in non-profit associations should have a clear and stable connection with public interest. As an example, the law makers suggested a requirement that the organisation should demonstrate its connection with local society that is affected by the organisation's activities or measures, or it should demonstrate that it actively participates in a given process, e.g. in a consultation procedure, representing society in many different ways. Having a large number of donors or people supporting its activities will also be perceived in favour of that organisation (a. prop. page 65 f.).

ClientEarth made a reference to two documents to demonstrate its public opinion support. The first document is the Polish call entitled "Stoppa gesledningen Nord Stream 2" (Stop the construction of Nord Stream 2 pipeline" which was signed by some 2 500 people. The other document is a letter from Greenpeace Nordic.

The call – which clearly aims at the annulment of the permission for the construction of the Swedish part of Nord Stream 2 pipeline – was directed to the Högsta Förvaltningsdomstolen (the Supreme Administrative Court) in Sweden. It refers to some construction issues connected with the pipeline in view of safety policies and the project's impact on the environment. The call, however, does not refer to ClientEarth's activities, apart from mentioning that the Foundation appealed against the permission for the pipeline in Finland.

To carry out a court review of the decision in question, however, it would be necessary to demonstrate that the organisation enjoys public support with regard to the whole of the organisation's business and activities, rather than with regard to a singular issue, as is the case with the above-mentioned call (see: NJA¹ 2012, page 921, Clause 18). ClientEarth's call fails to demonstrate that the Foundation enjoys a general support of its activities.

In its letter, Greenpeace Nordic expressed its support for the request to carry out a court review of the decision in question. In the opinion of ClientEarth, the fact that Greenpeace is an organisation promoting environmental protection in the meaning of Chapter 16, 13 § miljöbalken (the Code of Environmental Protection) and enjoys the support of over 160 thousand people, implies that ClientEarth also enjoys public opinion support.

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¹ Nytt juridiskt arkiv = New archives of legal documents – translator's note



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The Högsta Förvaltningsdomstolen (the Supreme Administrative Court) found that ClientEarth should have demonstrated that the Foundation's activities had a direct support. The letter from Greenpeace is not sufficient evidence in this case.

Therefore it should be concluded that ClientEarth failed to demonstrate that it had a clear and stable connection with public support, which is necessary to prove the fact of having public opinion support in the meaning of Chapter 16, 13 § miljöbalken (the Code of Environmental Protection). Consequently, ClientEarth does not have the right to request a court review under 2 § Rättsprövningslagen (the Law on court reviews). Furthermore, ClientEarth may not claim to have the right to request a court review resulting directly from the European Union *acquis communautaire* or the Aarhus Convention (see: Djurgården-Lilla Värtans Miljöskyddsförening (Environmental Protection Association - Djurgården-Lilla Värtan), Clause 43 – 45 and Den slovakiska brungjörnen, C-240/09, EU:C:2011:125, Clause 44 and 45).

This means that ClientEarth's request for a court review should be rejected.

In view of the above, there are no issues connected with interpretation which would require a preliminary ruling from the European Court of Justice. Therefore, the request for a preliminary ruling should also be rejected.

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The ruling is given by the following Judges of the Supreme Administrative Court: Henrik Jermsten, Per Classon, Mari Andersson, Kristina Svahn Starrsjö and Ulrik von Essen.

The role of the Judge-rapporteur was performed by Daniel Wållander.

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I hereby certify that the above translation is consistent with the original Swedish document.

Jacek Warga, Sworn Translator in Swedish, registered in the Register of Sworn Translators kept by the Minister of Justice under No. TP/91/17, Translation Registry No. 335/2019, Mosty, 21 May 2019

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Registry Entry No: 311/2019, Date: 27 May 2019

I hereby certify the above to be
a true translation from Polish

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