

2. Administrative Law

Fukui District Court, March 22, 2000

Isobe v. Prime Minister (*Monju* Case)

1727 HANREI JIHŌ 33, 1043 HANREI TAIMUZU 122

Reference:

The court confirmed the invalidity of the disposal to permit the establishment at a nuclear reactor.

Background:

“*Monju*” is a prototype fast breeder reactor which was developed and built in Japan. The Proper Noun “*Monju*” means *Manjusri*, the bodhisattva of wisdom. The name implies that nuclear power will be controlled by wisdom.

A breeder reactor is a reactor which produces more nuclear fuel than it consumes by changing the uranium 238 which occupies 99% and more of the natural uranium and which doesn’t burn to the plutonium. In the fast breeder reactor, in which a fast neutron is used, uranium resources are made effectively available by about 100 times in theory, in comparison with the light water reactors which are usually used in atomic power plants. But it has the drawbacks that it was strongly toxic plutonium in large quantities and the still difficult to handle sodium as the cooling material.

Atomic Energy Fundamental Law, which is fundamental law for the development of atomic energy in Japan, was enacted in 1955. This law has the purpose of trying to secure future energy resources by promoting the research, development and use of atomic energy on the basis of three principles for the peaceful use of atomic energy: democracy, autonomy and publicity. As for the development of a fast breeder reactor, since 1964, when the Power Reactor Development Meeting was established by the Atomic Energy Commission, this has become active. In 1967, the Power Reactor and Nuclear Fuel Development Corporation was established. In 1968, “the basic policy concerning the

power reactor development business of the Power Reactor and Nuclear Fuel Development Corporation” was decided, and it was decided to develop an experimental reactor and a prototype reactor as fast breeder reactors of the sodium cooling type. In 1970, the experimental reactor “*Joh-yoh*”, which was the first step in the development of a fast breeder reactor, was started, and, in 1977, it reached the critical phase. The prototype reactor “*Monju*” involved in this case, was the next stage in the development of a fast breeder reactor. In 1983, “*Monju*” received the Prime Minister’s permission to go ahead and, in 1991 its assembly was completed, and in 1994 reached the critical phase.

However, the development of a fast breeder reactor has developed a bad reputation. In 1995, while a performance examination was being operated, “*Monju*” caused a fire accident due to a sodium leak, and operation was suspended. In 1997, an actual proof reactor — the next stage in the development of a fast breeder reactor — in France, which was the leader in the development a fast breeder reactor, was abandoned for reasons of risk and the cost of its development and construction. At present, only Russia, China, Japan appear to be enthusiastic about fast breeder reactors. In 1999, the Tokai-mura critical accident happened. In this accident, the uranium solution reached the critical phase in the process of making fuel for “*Joh-yoh*”, and large quantities of radiation were detected, and many people were exposed and two workers died. Moreover, a serious blow was given to crops in the surrounding that circumference area including the damage in the reputation at the crops.

Facts:

In 1985, the prototype fast breeder “*Monju*”, which was under construction by the Power Reactor and Nuclear Fuel Development Corporation (which has been reorganized and renamed the “Japan Nuclear Cycle Development Institute” since 1998), was the subject of a suit brought by inhabitants living around it to the Fukui District Court, in search of the invalidity confirmation to have the permission for the establishment of the reactor, made by the defendant, the Prime Minister, on the basis of “the Act about the Regulation of Nuclear Raw Material, Nuclear Fuel Material and Nuclear Reactor” (administrative litigation).

tion), declared invalid and the construction and operation of the reactor by the Power Reactor and Nuclear Fuel Development Corporation suspended on the grounds of the right to personality and the right to environment (civil litigation).

Halfway, through the proceedings, the court separated the administrative litigation case and the civil litigation case, and proceeded with the trial. In 1987, with regard to the former case, the court denied the plaintiffs' standings and dismissed the suit (Fukui District Court, December 25, 1987, 38 GYŌSAISHŪ 1829). In 1989, however, the Nagoya High Court, Kanazawa branch, recognized the plaintiffs' standings for the persons who lived within the range of a radius of 20 km from the reactor (Nagoya High Court, Kanazawa branch, July 19, 1989, 40 GYŌSAISHŪ 938). Furthermore, in 1992, the Supreme Court recognized the plaintiffs' standings for all of the plaintiffs (Supreme Court, September 22, 1992, 46 MINSHŪ 571; 46 MINSHŪ 1090). As a result, it was decided to send the administrative litigation case back to the Fukui District Court for all of the plaintiffs. This note treats the first judgment vote of that remanded case. As for the above-mentioned civil action case, the first judgment vote was at length made on the same day, in the 15th year after the appeal. (Fukui District Court, March 22, 2000, 1727 HANREI JIHŌ 33; 1043 HANREI TAIMUZU 259). Both decisions were the first judgments on the merits in the "*Monju*" cases, but in both decisions the plaintiffs' requests were dismissed. The plaintiffs are now appealing to a higher court.

Opinion:

1. Issues

The issues in this case may be summarized as follows:

"The issues of this case are whether there is an important and clear illegality which constitutes a reason for the permission to be considered invalid in this case. These issues can be broadly divided into the following: (1) procedural legality; (2) requirement fitness of Article 24, paragraph 1, no. 3 of this regulation (limited to the part of technical ability); (3) requirement fitness of clause 4 of the same."

2. **Standing**

First, this court mentions the plaintiffs' standings and states that the "plaintiffs can be said to have standings for this suit, so this suit is lawful."

"[Each clause of the regulations for nuclear reactors article 24 section 1] contain not only the point that they protect the lives of the public, the safety of persons and environmental interests as general public goods. They also should be interpreted to contain the point that they protect as the particular interests at individuals, the safety of the lives and persons of such a range of inhabitants, who live around the reactor facilities, to whom disasters caused by the above-mentioned accidents may be supposed to give immediate and important damage Whether the areas in which the inhabitants live are areas which can be supposed to be given immediate and important damage by disasters caused by the above-mentioned reactor accidents should be reasonably judged in the light of generally accepted social ideas, taking into account the kinds, structures and dimensions of the reactor facilities in question In this suit in search of a confirmation of the invalidity of the permission, the plaintiffs ... are recognized as constituting "persons having legal interests" as provided by the Administrative Litigation Act article 36."

3. **The Judgment Framework**

Next, the court offers the following judgment framework in this case.

(1) **The Objects of Examination and Judgment**

First, the court states that this case, which is a suit for invalidity confirmation, like a suit for cancellation should have the Administrative Litigation Act Article 10, paragraph 1 analogically applied to it.

"... Because [a suit for a confirmation of invalidity] ..., like a suit for cancellation, is interpreted to be a subjective litigation whose purpose is the remedy of a violation of rights and interests by the disposal of an administrative agency, there is no reason for recognizing the claim of the illegality of things without regard to one's own legal interests. So [the Administrative Litigation Act]

article 10 section 1 is analogically applied to a suit for a confirmation of invalidity A suit for a confirmation of invalidity can be said to be a supplementary way to remedy the lack of litigation forms when the period of appeal has passed. So if this section cannot be interpreted as applying correspondingly to such a suit, whether the period of appeal has passed or not leads to a difference in treatment and an unjust conclusion Therefore, because Administrative Litigation Act Article 10, paragraph 1 is analogically applied to a suit for the confirmation of invalidity, plaintiffs in this case cannot claim the illegality of things not related in their own interests.

Next, the court limits the illegality of things which plaintiffs can claim to the following: (1) "procedural defects of the safety hearing in this case concerning fundamental designs or the fundamental policies of designs"; (2) the fitness requirements concerning technical ability for permission provided by Article 24, paragraph 1 no. 3 of this regulation; (3) important and clear defects in the hearings and judgments concerning the requirements concerning fitness. As a result, the following illegal things claimed by the plaintiffs are not able to be objects of hearings or judgment in this case: things not related to the plaintiffs' own legal interests (e.g. claims about the basis of the accounting); things not subjected to safety hearings (e.g. claims about the public benefit of fast breeder reactors)."

(2) The Method of Arriving at a Judgment

The court offers the following method of arriving at a judgment in light of the nature of the granting of the permission and safety hearings.

"Hearings about the safety of reactor facilities ... require a total judgment on the basis of a high degree of the newest scientific and technical knowledge The procedures for granting permission for the establishment of such a reactor are interpreted as having the point that judgments about the fitness of the standards provided by each clause are left to the Prime Minister, the defendant, who should regard ... the Safety Council's ... opinions, some of which are given by people of experience or academic standing from various areas of specialization. (See the Supreme Court's de-

cision in the Ikata Case).

In the light of the above-mentioned structures of safety hearings and granting of permission, hearings and judgments in a suit for the invalidity confirmation of the invalidity of the permission given for the establishment of a reactor should be made in the light of whether the administrative agency's judgment, which is based on technical inquiries, hearings and judgments in the Safety Council, has such an unreasonable element that this element can be said to have an important and clear defect."

Moreover, as for the base period for a judgment of illegality, the court states that a suit for the confirmation of invalidity, like a suit for cancellation, is a complaint litigation which presupposes that there is an administrative agency's primary judgment and which examines whether this judgment is appropriate or not; that so, in principle, the base period is that of when the decision about permission was made. The court, however, adds the following as a proviso:

"However,...in judging matters of scientific technology, courts should use scientific knowledge, not of the scientific standards current when this decision was made, but rather of scientific standards at present, because such knowledge amounts to no more than a scientific rule of thumb, a natural law, or a law of logic.

...However, when new knowledge after a decision renders the old knowledge at the time of the decision invalid, if, even on the premise of the new knowledge, the safety of the reactor in this case were to be recognized as secured,...then, of course, the proposal to give permission in this case would be legal."

(3) Burdens of Claim and Proof

While stating that the plaintiffs should claim and prove on the basis of concrete facts that the administrative agency's decision has any important and clear defects, the court virtually shifts burdens of claim and proof to the administrative agency because the arguments of the Supreme Court's decision in the Ikata Nuclear Plant case (46 (7) MINSHŪ 1174 (1992)), which was a suit for cancellation, applied also to this case.

"...In this suit for confirmation of the invalidity, like a suit for cancellation, if it is considered that the defendant has all the

materials about the safety of this institution, the following interpretation is reasonable: first, the defendant has to claim and prove on the basis of appropriate grounds and materials that the defendant's judgment involved no mistakes or deficiencies serious enough to constitute important and clear defects; if the defendant does not adequately claim and prove this, there is a virtual presumption that the defendant's judgment involved unreasonable elements. So, in a suit for confirmation of invalidity, it is sufficient for courts to consider whether the defendant's decision meets the requirements of importance and clearance to the degree required of the defendant."

4. The Procedural Legality of the granting of Permission in this Case (the first issue)

The court decided that "the procedure for granting permission in this case was appropriate for the procedure for the application for permission for the establishment of this reactor at the stage of study and development to the final granting of permission and was therefore legal." As for plaintiffs' claim that, because it is unjust that the objects of a safety hearing are limited to basic designs and basic lines of design, the decision to grant permission in this case was some important and clear defects, one of the plaintiffs' many claims that was rejected as a consequence of the judgment, the court argues as follows:

"The fitness with regard to the standards provided by Article 24, paragraph 1 of the regulation is left to the reasonable judgment of the Prime Minister, the defendant, regarding the opinions of the Safety Council based on scientific and technical knowledge. So what designs should be the objects of safety hearings, as constituting of basic designs and basic policies of designs is, because this is a part of the above-mentioned discretionary judgments, are interpreted as being left to the reasonable judgment of the defendant. It is sufficient for this court to judge whether the fact that the council did not treat a particular matter as a basic design or a basic policy of design and therefore an object of the safety hearings involved mistakes and deficiencies sufficient for it to be said that the process of examination, council, and judgment had important and clear deficiencies, and whether the defen-

dant's judgment on the basis of this hearing involved any important and clear deficiencies."

5. Fitness of the Decision to Grant Permission with regard to Article 24 Section 1 Clause 3 of the Regulations (the Second Issue)

"It cannot be said that the policies regarding the safety hearings or the matters considered in the hearings in this case involved any unreasonable elements. And, in the light of these policies and matters, the applicant deployed sufficient staff to establish and operate this reactor, and prepared sufficient personnel and organizational systems to perform the tasks appropriately. So this process of examination, council and judgment, which has been judged to have met the requirements concerning such technical facilities, is not acknowledged to have involved mistakes or insufficiencies such that they could be said to constitute important and clear defects."

6. Fitness of the Decision to Grant Permission with regard to Article 24 Section 1 Clause 4 of the Regulations (the Third Issue)

"...The securing of the safety of reactor facilities provided for by article 24 section 1 clause 4 of the regulations does not mean that there is absolutely no danger or damage to the lives and persons of people, but means considering the degree of this danger and the benefits gained from using scientific technology, and then reducing the release to the environment of radioactive substances as much as possible, keeping it less than the level where there is a danger of the occurrence of a disaster by this can be accepted in society common idea. Therefore,...the measure of benefits gained from using this reactor (hereinafter the "beneficiality") is one element in the judgment of safety

Of course, danger or damage from a release to the environment of radiation accompanying operation of the reactor facilities violates serious legal interests concerning the maximum respect to be paid to the safety of a person's life or body. Therefore, that danger cannot simply be balanced with the monetary profit which can be earned by the operation of the reactor facilities; it is re-

quired naturally that danger to a person's life or body be so low that that influence can be ignored socially, as less than the level which can be accepted according to the prevailing social consensus; it is not possible to justify a danger which exceeds this just because of the beneficiality of the reactor facilities. So as long as the activities leading to this danger require a beneficiality which exceeds this danger, "beneficiality" ... is interpreted to be a part of any judgment of safety.

... It is clear that reactor facilities in this case have the beneficiality of the development of a source of the electric power. This degree of beneficiality would be enough to justify a danger at a level at which its influence can be ignored socially. It is not necessary to consider whether the cost of the electricity of a reactor or a fast breeder reactor in this case is economically appropriate, or whether there are other rational methods of creating an energy supply any further."

Finally, it is stated that the process of the examination, discussion and judgment of safety in the hearing in this case is not acknowledged to have had mistakes and deficiencies which cannot be overlooked and thus can be said to constitute important and clear defects.

7. Conclusion

The conclusion of this lengthy opinion is as follows:

"As the above, the decision to grant permission in this case is not recognized as illegal because it is recognized to have been made according to the procedure of the law Permission in this case is substantively legal,... because no unreasonable point determining the conclusion of the safety hearing has been recognized in the policy of the hearing or the standard of the hearing used for the examination and discussion of the safety in this case, and because no mistakes or deficiencies lacks which cannot be overlooked or can be said to be important and clear defects in the process of examination, discussion and judgment in the safety hearing were recognized and that the reactor facilities in this case met with the standard for the examination."

Editorial Note:**1. The Position of this Decision**

Regarding suits for the cancellation of decisions to grant permission for nuclear reactors, some decisions were reached in cases in Ikata, Fukushima, Tokai, Kashiwazaki, and Karihane. In each case, however, the plaintiffs' claims have been rejected. This Fukui District Court decision belongs to this group, despite the difference that it was a suit for confirmation of invalidity.

2. Disregard of Distinctions in this Case

There are some distinctions in this case: (1) this case is, unlike the previous suits for cancellation, a suit for the confirmation of invalidity; (2) the reactor in this case is not a light-water reactor as previously, but a fast breeder reactor and a prototype reactor which has not reached the stage of practical use; (3) "*Monju*" actually caused a sodium leakage accident in 1995, and the safety of *Monju* and defects in the safety control and correspondence of the Japan Nuclear Cycle Institute, which was the applicant for permission, have been pointed out. Particularly, the second and third factors may be in favor of the plaintiffs, but, in the event, these factors were virtually disregarded in this case.

3. Influences of Being an Administrative Litigation

This decision, fundamentally, depends on the judgment framework of the Supreme Court decision in the Ikata case. In this decision, reflecting the fact that this case was not a civil litigation for suspension, but an administrative litigation for the confirmation of invalidity, there was the following statement: the base period for a judgment of illegality was when the decision was made; as a requirement of a judgment of illegality, the presence of an "important and clear defect" is necessary; the objects of the administrative agency's hearing are only basic designs or basic policies of designs and do not extend to detailed designs. I think these factors work against the plaintiffs. The civil action judgment was given on the same day. The plaintiff's request was dismissed even there. But, if both decisions are compared, big suggestion

will be able to get it.

4. Problems of this Decision in the Light of the Seriousness of the Question of Nuclear Power Generation

In Japan, though the problem of the supply of electric power is a vital issue, the problem of nuclear power plant accidents is also literally a matter of life and death for not only the inhabitants in the neighborhood of a plant but also people over a large area. Undoubtedly, the greatest priority should be given to safety over the promotion and development of nuclear power generation, and the relief and comprehension of not only the inhabitants close by but also of people over a wide range should be taken seriously. At present, when not much time has passed since the Tokai-mura criticality accident happened, trust in the safety of atomic power generation is not high. Even if there are unavoidable considerations to be taken into account, it cannot be said that there is no problem for the judiciary to make judgments leading to prevent an administrative agency's safety hearing from being elaborated: for example, the court states that a safety hearing about the decision to grant permission does not require the examination of details, and that, even if there were problems in the standard of the safety hearing at the time of decision, if in effect safety is recognized according to the appropriate standard at present then that decision is valid. At the time when the movement to reopen operations at "*Monju*" have become active, despite many objections, this decision may have a social impact which cannot be ignored.

From the viewpoint that the safety of inhabitants is prior to the development and promotion of nuclear power generation, a decision such as the one in this case, where, while closely examining the safety of inhabitants in the neighborhood, benefits from promotion and development are disregarded, is seemingly sound. But, ironically, negative counter interests, such as the needs of fast breeder reactors and reactors in this case being prototypes are not considered, so the court adopts a judgment framework which work against the plaintiffs.

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