Limits to judicial review in environmental law

Federal Constitutional Court of Germany, Order of the First Senate of 23 October 2018 - 1 BvR 2523/13, 1 BvR 595/14 -

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I. The Case

- classic conflict: infrastructure vs. species protection
- red kite endangered by wind energy plants
  - no avoidance behavior
  - search of prey
  - use of thermic currents
    - turbine blades move with up to 300 km/h
- complainants sought permits for wind energy plants nearby nesting areas of red kites

II. The Statutory Law

§ 44 BNatSchG

(1) Es ist verboten, **wild lebenden Tieren der besonders geschützten Arten** nachzustellen, sie zu fangen, **zu verletzen** oder **zu töten** oder ihre Entwicklungsformen aus der Natur zu entnehmen, zu beschädigen oder zu zerstören,

[…]

(5) […] ein Verstoß gegen […] das Tötungs- und Verletzungsverbot nach Absatz 1 Nummer 1 [liegt] nicht vor, wenn die Beeinträchtigung durch den Eingriff oder das Vorhaben das Tötungs- und Verletzungsrisiko für Exemplare der betroffenen Arten **nicht signifikant erhöht** und diese Beeinträchtigung bei Anwendung der gebotenen, fachlich anerkannten Schutzmaßnahmen nicht vermieden werden kann,

- prohibition to kill protected species takes effect if a project significantly increases the protected animals' risk of being harmed
- „significant"? ➔ in any case: higher level than general risk to the life

III. The Issue

- How to determine the risk?
  - factual circumstances unclear: number of nests/eyries; flight and hunting behaviour
  - standards and methods for survey?
  - standards and methods for risk assessment?

➔ Administrative Courts:

"lack of recognised scientific standards and standardised survey methods for assessing the risks"

IV. The Challenged Decisions

1. Federal Administrative Court
   - competent authority has a “prerogative of assessment in nature conservation issues”
   - tenable: significant increase if distance to a nest < 1000 m
   - limited judicial review
     - correct fact finding
     - proper assessment possible?
     - tenable assessment
2. Alternatives?

V. The Constitutional Complaint

Art. 19 (4) Grundgesetz (Basic Law)

- right to effective legal protection
- obligation of the courts to fully review the challenged administrative acts in legal and factual terms
- exception: discretion (“Ermessen” and “Beurteilungsspielraum”)
- express statutory authorisation and sufficiently weighty factual grounds are needed to grant administrative authorities the right to make final decisions specifying legal concepts that are not precisely defined in statutory law (cf. on this BVerfGE 129, 1 <21 et seq.>)

VI. The Ruling

Headnotes

1. Where judicial review reaches the limits set by the current state of knowledge in ecological science and practice and the courts have examined the matter as extensively as possible, Art. 19(4) first sentence of the Basic Law does not require the courts to investigate further. Rather, the courts may then base their decision on the authority's plausible assessment of the specialist question at issue. In such instances, the limitation of judicial review does not result from a prerogative of assessment granted to administrative authorities and does not require express statutory authorisation.
2. In case of a "vacuum of scientific knowledge" in areas that also have a bearing on fundamental rights protection, the legislature must not permanently assign decision-making to administrative authorities or courts without determining further requirements; at least in the longer term, it must ensure that standards are established at any rate in delegated legislation.

1. Specialist Knowledge

- "Courts are not in a position to close gaps in specialist knowledge themselves, and they are also not obliged to commission research that goes beyond investigations regarding the current state of scientific knowledge."

- but: obligation to examine the matter as extensively as possible
  ➔ expert opinions regarding the current state of scientific knowledge

2. Tenable Assessment

If judicial review reaches the limits set by the current state of knowledge in ecological science and practice:

- regarding non-legal factual questions, it cannot be presumed that the courts have more expertise than the administrative authorities do;
- it's objectively impossible for administrative courts to reach a final conclusion as to whether the outcome of the authority's decision was correct;
- courts may then base their decision on the authority's assessment of the specialist question if the courts consider this assessment plausible.

3. Prerequisites

- non-legal factual question – lack of knowledge
  "no generally recognised standards and methods for a specialist assessment of the matter"
- tenable specialist standards and methods used by the authority
- plausible assessment of the specialist constituent elements of the relevant provision

▪ no express statutory authorisation required

≠ "significant" increase *(undefined legal criterion)*

4. General Limits

General legal principles require a judicial review whether (cf. on this BVerfGE 84, 34 <53 and 54>):

- procedural errors occurred when determining and applying the specialist method the authority chose from the range of tenable options,
- the authority failed to apply relevant law,
- based its decisions on facts that were incorrect or insufficiently investigated in other respects,
- violated universally valid assessment criteria or
- was guided by irrelevant considerations.

5. Further Restrictions

- essential matters doctrine ("Wesentlichkeitsgrundsatz"*)*

  "[…] legislature must ensure that standards are established at least at the level of delegated legislation, for example by setting up expert bodies to determine uniform standards and methods or at least to define more precise rules for authorities' decisions among several tenable opinions."

- "generally recognised" standards?

VII. Conclusion

Opening Pandora‘s box?

➔ <u>still closed</u>

- dynamic knowledge development
- effective limits
- separation of powers – purpose of judicial review