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

CASE OF ATHANASSOGLOU AND OTHERS v. SWITZERLAND

(*Application no. 27644/95*)

JUDGMENT

STRASBOURG

6 April 2000

In the case of Athanassoglou and Others v. Switzerland,

The European Court of Human Rights, sitting as a Grand Chamber composed of the following judges:

Mrs E. PALM, *President*,
Mr L. WILDHABER,
Mr A. PASTOR RIDRUEJO,
Mr J. MAKARCZYK,
Mr P. KŪRIS,
Mr R. TÜRMEN,
Mr J.-P. COSTA,
Mrs F. TULKENS,
Mrs V. STRÁŽNICKÁ,
Mr M. FISCHBACH,
Mr V. BUTKEVYCH,
Mr J. CASADEVALL,
Mr B. ZUPANČIČ,
Mrs H.S. GREVE,
Mr A.B. BAKA,
Mr R. MARUSTE,
Mrs S. BOTOUCHAROVA,

and also of Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 17 November 1999 and 8 March 2000,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court in accordance with the provisions applicable prior to the entry into force of Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention")[1] by the European Commission of Human Rights ("the Commission") (Article 5 § 4 of Protocol No. 11 and former Articles 47 and 48 of the Convention).

2. The case originated in an application (no. 27644/95) against the Swiss Confederation lodged with the Commission under former Article 25 of the Convention by twelve Swiss nationals, Mr Andy Athanassoglou, Mrs Ursula Athanassoglou, Mr Martin Schlumpf, Mrs Antoinette Schweickhardt, Mr Claudius Fischer, Mrs Ursula Brunner, Mr Ernst Haeberli, Mrs Helga Haeberli, Mr Pius Bessire, Mrs Katharina Bessire, Mr Hans Vogt-Gloor and Mrs Claudia Rüegsegger ("the applicants"), on 9 June 1995. The applicants complained that they had not had access to a

1. *Note by the Registry*. Protocol No. 11 came into force on 1 November 1998.

"tribunal" within the meaning of Article 6 § 1 of the Convention in respect of the decision of the Federal Council of 12 December 1994 to grant the Beznau II nuclear power plant an extension of its operating licence and that the procedure followed by the Federal Council had not been fair. Invoking Article 13 of the Convention, they also complained that they had no effective remedy enabling them to complain of a violation of their right to life and their right to respect for physical integrity as guaranteed by Articles 2 and 8 of the Convention.

The Commission declared the application admissible on 7 April 1997. In its report of 15 April 1998 (former Article 31 of the Convention), it expressed the opinion that there had been no violation of Article 6 § 1 (fifteen votes to fifteen with the casting vote of the Acting President) and that there had been no violation of Article 13 (sixteen votes to fourteen)[1].

3. Before the Court the applicants were represented by Mr R. Weibel, a lawyer practising in Berne (Switzerland). The Swiss Government ("the Government") were represented by their Agent, Mr P. Boillat, Deputy Director, Head of the International Affairs Division, Federal Office of Justice.

4. On 14 January 1999 a panel of the Grand Chamber determined that the case should be decided by the Grand Chamber (Rule 100 § 1 of the Rules of Court).

5. The applicants and the Government each filed a memorial and replied to the questions of the Court.

6. After consulting the Agent of the Government and the applicants' lawyer, the Grand Chamber decided that it was not necessary to hold a hearing.

7. On 27 August and 10 September 1999 the applicants submitted a request for an interim measure under Rule 39 of the Rules of Court preventing the Beznau II nuclear power plant, which at that time was not functioning because of maintenance and repair works, from resuming its operation until the Court had given its judgment. On 13 October 1999 the Grand Chamber decided (by sixteen votes with one abstention) not to apply Rule 39 in the present case.

8. On 28 February 2000 the applicants submitted unsolicited material relating to the supply of nuclear fuel to the Beznau II nuclear plant from 1996 to 1998 by a British company. The President of the Grand Chamber decided that this material should be included in the case file despite its being submitted after the close of the written procedure (Rule 38 § 1 *in fine*).

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1. *Note by the Registry*. The full text of the Commission's opinion and of the separate opinion contained in the report will be reproduced as an annex to the final printed version of the judgment (in the official reports of selected judgments and decisions of the Court), but in the meantime a copy of the Commission's report is obtainable from the Registry.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicants live in the villages of Villigen, Würenlingen, Böttstein and Kleindöttingen, situated in zone 1 in the vicinity of unit II of a nuclear power plant in Beznau (Canton of Aargau). They either own or rent property. The Beznau II nuclear power plant consists of a dual-loop pressurised water reactor. The site is situated five kilometres from the German border.

A. The application for an operating licence

10. On 18 December 1991, the Nordostschweizerische Kraftwerke AG ("NOK"), a private company which had operated the nuclear power plant since 1971, applied to the Swiss Federal Council (the government) for an extension of its operating licence for an indefinite period. The application was supported by a technical report and a safety analysis report established by NOK. The application and these reports were published in the Official Journal (*Amtsblatt*) of the Canton of Aargau of 27 January 1992 and in the Official Gazette of 28 January 1992 together with a notice inviting persons satisfying the requirements laid down by sections 6 and 48 of the Federal Administrative Proceedings Act (see paragraph 28 below) to file an objection.

11. By 28 April 1992 more than 18,400 objections were lodged by virtue of these provisions with the Federal Energy Office, a large part of which came from Germany and Austria. More than 99% of the objections were photocopies.

12. In their objections the complainants requested the Federal Council to refuse an extension of the operating licence and to order the immediate and permanent closure of the nuclear power plant. They attached an expert opinion of the Institute for Applied Ecology (*Öko-Institut – Institut für angewandte Ökologie e. V.*) in Darmstadt, Germany, to their objections, namely a report of April 1992 on selected aspects of the safety analysis report produced by NOK in December 1991. Relying in particular on section 5(1) of the Nuclear Energy Act (see paragraph 22 below), they opposed the application for an extension of the operating licence because of the risks which they maintained such an extension entailed for their rights to life, to physical integrity and of property. According to them, the nuclear power plant did not meet current safety standards on account of serious and irremediable construction defects and, owing to its condition, the risk of an accident occurring was greater than usual. They also requested that in the meantime certain provisional measures be taken. The complainants also

disputed the impartiality of the administrative bodies involved in the proceedings. With regard to the fact that under the applicable law the Federal Council would consider the application for an operating licence as an authority of both first and last instance, they invoked their right of access to a court, as guaranteed by Article 6 § 1 of the Convention.

13. On 5 February 1993 the Federal Department of Transport, Communications and Energy, as the competent body deciding prior to the decision of the Federal Council, rejected the requests for provisional measures.

B. The Federal Council's decision

14. On 12 December 1994 the Federal Council dismissed all the objections as being unfounded and granted NOK a limited operating licence expiring on 31 December 2004. The licence was subject to compliance with various specific conditions concerning, for instance, threshold levels for radioactive substances, tests of the safeguard system, improvements of the feedwater system, a systematic programme, specific to the Beznau II nuclear power plant, for ageing surveillance and various other continuous technical improvements of the plant. NOK was also requested to submit periodically updated safety reports.

15. In its decision the Federal Council relied on a safety evaluation report established by the Swiss Nuclear Safety Inspectorate (*Hauptabteilung für die Sicherheit der Kernanlagen* – "*HSK*"). The report gave the results from the point of view of nuclear safety and radiation protection, including conclusions and proposals for licence conditions to be formulated in the licensing decision. The Federal Council further relied on an opinion of the Nuclear Technology and Safety Section of the Federal Energy Office, a statement of the Swiss Federal Nuclear Safety Commission (*Eidgenössische Kommission für die Sicherheit von Kernanlagen* – "*KSA*") on basic aspects of the application and on the safety evaluation report of the *HSK* and the view expressed by the cantonal authorities.

With regard to the complainants living in Austria, the Federal Council considered that these persons had no *locus standi* on the ground that they were not exposed to a significantly higher risk than that existing for the population in general, in view of the distance between the nuclear power plant and the Swiss-Austrian border. As to the remaining complainants, the Federal Council was satisfied that certain complainants lived in zone 1 around the nuclear power plant and were therefore entitled to take part in the proceedings.

The Federal Council observed that although power stations built twenty years earlier certainly no longer met current technical standards, they could nonetheless be maintained and modernised so that they could continue to

operate quite safely. In order to satisfy itself that this was so in the case under review, the Federal Council considered each of the objections in turn.

It examined in particular the complainants' objections relating to the emergency cooling system and the residual heat removal, the emergency feed system, the reactor containment and pressure-limiting system, the fire-protection, the emergency power supply, the emergency boronising system, the control circuits and outside influences, such as plane crashes and actions by third parties. The Federal Council observed that since the Beznau II nuclear power plant had come into operation various backfittings to improve the safety of the power plant had been carried out. It referred to the emergency standby system and improved power supply system (NANO), put into operation in 1992, and the filtered containment venting system. Furthermore the results of the probabilistic safety analysis carried out at the Beznau II nuclear power plant showed that a nuclear accident was unlikely. The Federal Council gave detailed reasons why it found the objections to be unfounded and concluded that on the basis of the evidence submitted no relevant deficiencies could be established. The Federal Council further pointed out that an assessment of the organisation, management and staff situation at the Beznau II nuclear power plant presented a positive overall picture.

The Federal Council further observed that by voting against the popular initiative of 23 September 1990 (see paragraphs 20-21 below) “For the Progressive Abandonment of Nuclear Energy” the Swiss people and the majority of the cantons had expressed the wish to continue using nuclear energy.

With regard to the complaint based on the right to life, the Federal Council pointed out that this right was protected by the Constitution and drew attention to the position under the Federal Court's case-law, whereby only deliberate infringements could constitute a breach of that right. That did not apply to the operation of a nuclear power plant, at least so long as appropriate technical and operating procedures were adopted to prevent such an infringement and so long as these could reasonably be considered to provide a level of protection comparable to that existing in other generally accepted technical installations.

With regard to the reactor accident at Chernobyl, the Federal Council stated that the reactor of the Chernobyl nuclear power plant was technically not comparable to a light-water reactor like that of the Beznau II power plant. Furthermore the Chernobyl reactor had never undergone a safety review process as normally carried out in western countries. The Chernobyl power plant was therefore not relevant in the context of the assessment of the risks of western nuclear power plants.

The Federal Council also pointed out that, in accordance with the Agreement of 10 August 1982 between the government of the Swiss Confederation and the government of the Federal Republic of Germany on

mutual information on the construction and operation of nuclear installations in the vicinity of the border, the German authorities had been provided with the relevant documents relating to the requested operating licence for the Beznau II power plant. From the beginning, this subject had been discussed during the sessions of the German-Swiss Commission on the Safety of Nuclear Installations (*Deutsch-Schweizerische Kommission für die Sicherheit kerntechnischer Einrichtungen* – "*DSK*"). In its report adopted at its session held from 5 to 7 October 1994 this commission had expressed the view that, if the terms of the licence were observed, the Beznau II nuclear power plant would operate safely. There would be no risk for the population of the Federal Republic of Germany.

C. Further developments

16. Following the decision of the Federal Council, the Beznau II nuclear power plant, like all the Swiss nuclear installations, was subject to official surveillance by the *HSK* in all matters regarding nuclear safety and radiation protection. The *HSK* presented annual reports giving a concise evaluation of the conditions and standards of operation of the Beznau II power plant. It followed from these reports that the condition of the power plant with regard to nuclear safety and radiation protection and also to its operation had been rated as good. It followed in particular from the annual report of 1997 that the notifiable incidents which had occurred were of minor relevance to nuclear safety. Appropriate improvements had been carried out. However, further efforts were needed in order to recognise problems in the area of human behaviour and organisational management. Since 1996, the Beznau II power plant had followed an ageing surveillance programme as a permanent task for its safety-relevant plant components. The relevant documentation examined by the *HSK* had not revealed any safety-relevant gaps in the maintenance programmes. Furthermore, these results indicated that no unacceptable reduction in safety-related properties was to be expected in the near future. As to the requirements in connection with the operating licence of 12 December 1994 the *HSK* stated that all conditions which were associated with deadlines had been complied with and some conditions had in part to be updated periodically with respect to plant documentation and analyses.

17. From 13 November to 1 December 1995 a mission of the Operational Safety Assessment Review Team (OSART) from the International Atomic Energy Agency (IAEA) was conducted at the Beznau II power plant. The experts noted especially "the stringent requirements with regard to quality and safety, the professional qualities of the staff at all levels as well as the very satisfactory condition of the Beznau II nuclear power plant", but recommended additional safety improvements.

18. On 15 December 1997 the applicants submitted an expert report of 26 November 1997 drawn up by the Institute for Applied Ecology in Darmstadt. According to that report, the licence at issue continued to tolerate the serious safety deficiencies which had already been mentioned in the institute's previous expert reports of 1992 and 1994.

It was stated that the modernisation which was both technically possible and had been required in the case of pressurised water reactors of the same generation had not been carried out. All the safety systems installed at the Beznau II nuclear power plant for the purpose of preventing nuclear accidents were very seriously flawed compared with more modern pressurised water reactors in central Europe.

The report criticised, for example, the safety systems for their failure to ensure that the back-up components were physically separate and protected from fire; the standard of the emergency cooling system and residual heat removal compared to modern light water pressure reactors in central Europe; the unsatisfactory emergency power supply concerning certain components that were important for the safety of the plant; the design of the emergency power supply itself with regard to back-up and separation from the main system; the emergency feed system not satisfying the standards applying to modern pressurised water reactors; the deficiency of the emergency boronated water system, the purpose of which was to ensure that the pressurised water reactor was switched off until it was cold; the reactor containment in case the active pressure-limiting process could not be carried out successfully; the design of the pressure-limiting systems themselves and the deficiency of the control circuits with regard to the back-up system, physical separation, the main and emergency power supply, the fail-safe mechanism and the production of readings. Moreover, the lack of protection against outside influences rendered the plant much more vulnerable to a plane crash or to action by third parties.

In spite of the fact that it was a condition for the granting of the licence that parts of the plant be modernised, no demand had been made for an actual emergency system, such as was required for the more recent western European pressurised water reactors. The report compared the attitude adopted in the last few years to older, Westinghouse-type, first-generation pressurised water reactors by the supervisory authorities in various countries of Europe, the USA and Japan and reached the conclusion that the standards applied in the licensing procedure at issue were far below those applying in other central European countries – i.e. risks were accepted that would no longer be tolerated in other countries.

The report further referred to the OSART mission which was conducted in 1995 and the criticism expressed by the experts with regard to the organisational structures and management at the Beznau II power plant. According to the report, such deficiencies not only created an increased risk of accident but gave rise to concern with regard to the effectiveness of

damage limitation and emergency protection in the event of serious malfunctions at the power station.

19. From 30 November to 11 December 1998 a team of eleven experts of the International Regulatory Review Team (IRRT) reviewed the working methods of the *HSK*. During the mission six members of the team also visited the Beznau II nuclear power plant. In their report of January 1999 the reviewers identified "a number of good practices which had been recorded for the benefit of other nuclear regulatory bodies". They also made recommendations and suggestions which indicated where improvements were necessary or desirable to further strengthen the regulatory body in Switzerland.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Popular initiatives

20. Article 139 of the Federal Constitution of 18 April 1999 (formerly Articles 118, 121 to 123 of the Federal Constitution of 29 May 1874) provides that 100,000 citizens may seek, by way of a constitutional or popular initiative, an amendment to the Constitution on any topic. Popular initiatives do not originate from Parliament or the government, but from the citizens themselves.

21. On 18 February 1979 the popular initiative on the "Safeguard of the People's Rights and the Safety of the Construction and Operation of Nuclear Installations" was rejected by a majority of the people and the cantons. In 1981 the popular initiative "For the Interruption of the Nuclear Power Programme" failed, because the necessary 100,000 signatures could not be collected within eighteen months. On 23 September 1984 the people and the cantons rejected the initiative "For a Future without Further Nuclear Power Plants". On 23 September 1990 the popular initiative "Stop the Construction of Nuclear Power Plants (Moratorium)" was adopted, while on the same date the initiative "For the Progressive Abandonment of Nuclear Energy" was rejected. Two further popular initiatives "Moratorium-Plus – for the Extension of the Moratorium concerning the Construction of Nuclear Power Plants and the Limitation of the Nuclear Risk" and "Get out of Nuclear Power – For a Change in the Field of Energy and for the Progressive Closing-Down of Nuclear Power Plants (Get out of Nuclear Power)", filed on 28 September 1999, are still pending.

B. The Federal Act on the Peaceful Use of Nuclear Energy

22. Under section 4(1)(a) of the Federal Act of 23 December 1959 on the Peaceful Use of Nuclear Energy ("the Nuclear Energy Act"), a licence

from the Confederation is required for the construction and operation of nuclear installations and for any changes in the purpose, nature or scale of such installations.

Section 5(1) provides that a licence must be refused or granted subject to appropriate conditions or obligations if that is necessary in order, in particular, to protect people, the property of others or important rights.

Section 6 provides that the Federal Council or a body designated by it decides licence applications. No appeal lies against its decisions.

Section 8 stipulates that nuclear installations and every form of ownership of radioactive nuclear fuels and residues shall be placed under federal supervision; the Federal Council and the body designated by it shall have the right in executing their supervisory function to issue instructions at any time if that becomes necessary in order, in particular, to protect people, the property of others and important rights; they are also entitled to supervise compliance with these instructions.

23. Under the Federal Court's case-law, the safety of nuclear power plants can be considered by the Confederation only in the context of its licensing procedures (Judgments of the Federal Court (*ATF*), vol. 119 Ia, p. 402).

C. Federal order concerning the Nuclear Energy Act

24. In addition to the previously required authorisations, Article 1 of the federal order of 6 October 1978 concerning the Nuclear Energy Act requires a general licence of the Federal Council for all nuclear installations as a prerequisite for granting construction and operating licences. The Federal Council has the exclusive competence to grant licences. The procedure for the granting of the general licence requires, according to Article 5, publication of the application and, according to Article 7, publication of the comments and expert opinions on the application.

The licensing decision is based on the conclusions of the safety authorities reached at the end of the detailed review and assessment of the safety analysis report, of the probabilistic safety analysis, and of additional documents that may be requested from the applicant (see paragraphs 25 and 26 below).

D. Federal ordinance concerning the supervision of nuclear installations

25. The ordinance of 14 March 1983, which deals with the regulation of nuclear installations, entrusts the *HSK* with the regulatory role.

The ordinance formally establishes the *HSK* as the competent authority for supervising nuclear installations as long as they exist, including inspections of nuclear power plants. The *HSK* supervises the operators, and

assesses the nuclear safety and radiation protection of nuclear power plants. It proposes guidelines which are of a directional nature for the operators.

Within the framework of the licensing process, the *HSK* assesses in detail the application and the safety analysis report submitted by the applicant. The objective of this assessment is to verify compliance with the relevant regulations and guidelines. In this work, the *HSK* also has to take into account the established international standard of science and technology. The results and insights of the review and assessment are documented in a safety evaluation report. This report is used by the Federal Council as a basis for deciding upon the approval of applications made by the operator of a nuclear power plant.

The *HSK* provides information on aspects of nuclear safety and radiation protection in Swiss nuclear power plants as well as on its own activities and also draws up annual reports.

After the granting of a licence, the design and construction of the existing nuclear power plants are reassessed periodically, both in the case of incidents and during normal operation. Safety reviews have to be performed at intervals of about ten years. Deficiencies in the nuclear power plants, when compared to the current state of science and technology, have to be assessed. If they affect the safety, they have to be eliminated by means of appropriate backfitting.

The *HSK* is independent from any organisation concerned with the promotion or utilisation of nuclear energy. Although it is part of the Federal Department of Environment, Transport, Energy and Communication and attached to the Federal Energy Office, at the technical level the *HSK* acts independently from the rest of the Office and from the Federal Department. The legally required review and assessment of applications through the *HSK* is conducted solely on the basis of nuclear safety criteria to the exclusion of any other considerations.

E. Federal ordinance concerning the Swiss Federal Nuclear Safety Commission

26. According to section 1 of this ordinance of 14 March 1983, the *KSA* is an advisory body to the Federal Council and the Federal Department of Environment, Transport, Energy and Communication. It is administratively attached to the Federal Office of Energy.

Section 2 provides that the *KSA* gives its opinion on licence applications and on whether necessary and supportable measures to protect persons and the environment against the hazards of ionising radiation are taken, and whether such measures are in conformity with experience and with the state of science and technology.

The role of the *KSA* is to bring in additional professional expertise from outside the administration and to provide a second opinion to the federal

government. The *KSA* reports directly to the Federal Council. It is therefore independent from other governmental bodies concerned with the use of nuclear energy.

F. The Federal Judicature Act

27. Section 97 of the Federal Judicature Act of 16 December 1943 provides that the Federal Court hears, as a final court of appeal, administrative-law appeals against decisions of the federal authorities. However, by virtue of section 100(u) no appeal lies in matters of nuclear energy against decisions concerning licences for nuclear installations and preparatory acts.

G. The Federal Administrative Proceedings Act

28. Section 6 of the Federal Administrative Proceedings Act of 20 December 1968 provides that the persons whose rights could be affected by the decision which will be given are considered as parties, as well as those persons, organisations or authorities who have the right to appeal against that decision. Section 44 lays down the principle that an appeal lies against administrative decisions. By section 46, however, an appeal is inadmissible in particular if it is made against a decision against which an administrative-law appeal lies to the Federal Court or against final decisions given in accordance with other federal laws. Under section 48(a) a person has *locus standi* to appeal if he is affected by the decision and has an interest worthy of protection in having the decision set aside or varied.

H. The Civil Code

29. Article 28 of the Civil Code protects the right to the integrity of the person while actions for nuisance are governed by Article 28 (a).

Other relevant provisions of the Civil Code read as follows:

Article 679

> "Any person who sustains or is exposed to damage because an owner abuses his right may bring an action against that owner requiring him to restore the previous position or to take preventive measures, without prejudice to any damages."

Article 684

> "1. When exercising their right, especially when carrying on industrial processes, owners are required to refrain from acting in a manner detrimental to neighbouring properties.

2. The following, in particular, are prohibited: emissions of smoke or soot, offensive smells, noises, and vibrations which are harmful and exceed the limits of the tolerance which neighbours must show to each other having regard to local custom and the situation and type of the buildings."

I. The Federal Expropriation Act

30. By virtue of section 1 of the Federal Expropriation Act of 20 June 1930, expropriations may be carried out "for the purposes of works that are in the interest of the Confederation or of a substantial area of the country and for any other public-interest aim recognised by federal law".

Section 5(1) provides:

"The following may be expropriated: rights *in rem* over land, rights arising from land ownership that concern relations between owners and occupiers of adjacent premises and the rights *in personam* of tenants or farmers of the property to be expropriated."

31. With regard to the latter provision, the Federal Court has held:

"Actions brought under Articles 679 and 684 to 686 [of the Civil Code] ... are included among the rights which may be expropriated under section 5 ... If the emissions or other allegedly adverse effects result from the construction, in accordance with the applicable law, of a building in the public interest for which land has been expropriated, or are the consequence of using the building for its intended purpose, no private-law action lies for the purpose of obtaining an injunction or compensation. A claim for compensation for expropriation replaces the cause of action under private law and must be made to the expropriations judge, who has jurisdiction not only to assess compensation but also to rule on whether the right ... exists. An expropriating authority's refusal to commence proceedings may be challenged, at last instance, by means of an administrative-law appeal to the Federal Court." (*ATF*, vol. 116 Ib, p. 253)

In another judgment the Federal Court held:

"By virtue of section 5 ..., rights arising from land ownership that concern relations between owners and occupiers of adjacent premises may be expropriated and be forfeited or restricted, temporarily or permanently, provided that the proportionality principle is complied with ..." (*ATF*, vol. 119 Ib, p. 341)

32. Section 5 of the Act has been applied in the case of people living near very busy main roads who were concerned about pollution from exhaust fumes (*ATF*, vol. 118 Ib, p. 205). Under the Federal Court's case-law, compensation is awarded if the nuisance was not foreseeable and resulted in substantial damage and if the owner suffered special loss (loc. cit., p. 205). In order to assess foreseeability, it is necessary to determine whether the owner could reasonably have known of the future nuisance when he became the owner of the property (*ATF*, vol. 111 Ib, p. 234).

THE LAW

I. WITHDRAWAL OF FOUR APPLICANTS

33. On 16 July 1999 the applicants' lawyer informed the Court that four of the applicants, namely Mrs Ursula Brunner, Mr Ernst Haeberli, Mrs Helga Haeberli and Mr Hans Vogt-Gloor, did not intend to pursue the proceedings before the Court.

34. The Court takes note of the declaration of these four applicants and, in so far as their complaints are concerned, strikes the application out of its list (Article 37 § 1 (a) of the Convention).

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

35. The applicants complained that they were denied effective access to a court in breach of Article 6 § 1 of the Convention, the relevant part of which provides:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

The applicants complained in particular that it had not been open to them under Swiss law to seek judicial review contesting the lawfulness of the decision of the Federal Council of 12 December 1994 granting the Nordostschweizerische Kraftwerke AG ("NOK") a limited operation licence for the Beznau II nuclear power plant.

A. The Government's preliminary objection of failure to exhaust domestic remedies

36. The Government raised a preliminary objection of failure to exhaust domestic remedies. As before the Commission, the Government pleaded that the applicants could have filed a civil action based on Articles 679, 684 and 928 and on Article 28 (a) (1) of the Swiss Civil Code. While no appeal lay against the decision to grant an operating licence for a nuclear power plant, civil actions related to property and neighbours' rights would have enabled a court, if the conditions were met, to protect these rights, for instance by ordering the closure of the nuclear power plant, even if such a decision would not have invalidated the operating licence of the nuclear power plant as such.

37. The Court considers that the Government's argument is so closely linked to the substance of the applicants' complaints under Article 6 § 1 that the preliminary objection should be joined to the merits (see, for example,

the Kremzow v. Austria judgment of 21 September 1993, Series A no. 268-B, p. 41, § 42).

B. Applicability of Article 6 § 1

1. Arguments before the Court

38. The applicants submitted that their complaints in the present case and the nature of the decision which they contested – the granting of the extension of the operating licence of a nuclear power plant – were identical to the complaints and the nature of the contested decision in the case of Balmer-Schafroth and Others v. Switzerland (judgment of 26 August 1997, *Reports of Judgments and Decisions* 1997-IV). In the present case, however, so they argued, Article 6 § 1 was applicable. The decision to grant NOK an operating licence for the Beznau II nuclear power plant effectively "determined" their civil rights to the protection of their property and physical integrity. The "civil" character of the rights to life and physical integrity followed from the Swiss legal order. The protection of physical integrity was governed by the Civil Code and the Law of Obligations. Section 5 of the Nuclear Energy Act merely put into more concrete terms the civil right to protection in the area of the law relating to nuclear installations. Moreover, there was a serious disagreement between them and the Federal Council about the question whether the legal conditions for the granting of the operating licence were satisfied. Finally, the outcome of the dispute was directly decisive for their entitlement to protection against the activities of the nuclear power plant. The applicants referred in particular to the expert opinion of 26 November 1997 drawn up by the Institute for Applied Ecology in Darmstadt, Germany (see paragraph 18 above). This report pointed to specific safety deficiencies of the Beznau II nuclear power plant and showed, so they argued, that it did not meet the standards of pressurised water reactors in central Europe. In the applicants' submission, the Swiss authorities, in particular the Federal Council, incorrectly and negligently assessed the security standards. Furthermore, the Federal Council neither recognised nor took account of the criticism of the OSART mission concerning the serious deficiencies in the organisational structures and management at the Beznau II power plant. They further pointed out that the report of January 1999 of the International Regulatory Review Team (IRRT) (see paragraph 19 above) not only contained positive observations, but also expressed considerable criticism, for instance with regard to insufficient human resources and the lack of guidelines resulting in too vague a risk assessment, especially in the areas of fire and seismological protection. The applicants claimed that the probative value of the expert report prepared by the Institute for Applied Ecology could not simply be refuted by reference to the authority of the reports submitted by the Swiss

Nuclear Safety Inspectorate (*Hauptabteilung für die Sicherheit der Kernanlagen* – "*HSK*"). They further submitted that the numerous technical safety reports and probability studies produced on the subject of nuclear fission described a large number of concrete malfunctions that could occur – and had already occurred – at various atomic power plants and thus turned the inherent risk into a reality. The applicants concluded that, both in the course of the domestic proceedings relating to the granting of the licence and with the expert report of the Institute for Applied Ecology, they had shown the connection between the extension of the operating licence and the existence of a serious, specific and immediate danger, which justified the application of Article 6 § 1 of the Convention.

According to the applicants, the question whether the relatively high risk was compatible with national legislation and their rights to physical integrity and of property could only be satisfactorily examined by an independent court.

On 28 February 2000 the applicants submitted unsolicited material relating to the supply of nuclear fuel to the Beznau II nuclear power plant (see paragraph 8 above). According to a press communiqué issued by NOK on 24 February 2000, various collaborators of British Nuclear Fuels Ltd (BNFL) at Sellafield producing MOX (mixed oxides of plutonium and uranium) nuclear fuel were engaged in falsification of safety data from 1996 to 1998. The British Nuclear Installations Inspectorate report released on 17 February 2000 revealed that the falsification of safety data for MOX fuel affected BNFL's clients in Japan, Germany and Switzerland. The applicants submitted that NOK had taken no safety measures at all, the Japanese authorities had refused the fuel for safety reasons and the German authorities had closed down the Unterweser reactor which had received four assemblies of MOX fuel from BNFL. In the applicants' view, this whole affair showed, once again, that the Beznau II power plant was operated with intolerable risks for the direct neighbours and that only a court could change this dangerous custom.

The applicants finally asked the Court to clarify its case-law in so far as it required proof of a serious, specific and imminent danger as a condition for the applicability of Article 6 § 1. In their submission, a distinction had to be drawn between, on the one hand, the procedural Convention right to examination by a domestic court of the governmental decision to grant an extension of the operating licence and, on the other hand, the possible right under the substantive national law to have the nuclear power plant closed. As far as the procedural Convention right was concerned, it should be sufficient, they maintained, only to prove the serious nature of the risk. If proof of immediate danger in the sense of a serious accident being imminent had to be furnished for the purposes of Article 6 § 1, there would no longer be any difference in practice between procedural and substantive law.

39. The Government agreed with the applicants that their complaints in the present case and the nature of the decision which they contested – the granting of the extension of the operating licence of a nuclear power plant – were identical to the complaints and the nature of the contested decision in the Balmer-Schafroth and Others case. They accordingly recalled their submissions in the latter case, where they had maintained that the matters impugned by the applicants did not come within the ambit of Article 6 § 1 of the Convention (see the Balmer-Schafroth and Others judgment cited above, p. 1358, § 35) and had shared the dissenting opinion of six members of the Commission to the effect that "the policy of a country in matters of energy supply is of general interest and must be decided upon in the democratic political process designed for decision-making on the national level" (see the dissenting opinion of Mr Trechsel joined by Mr Gözübüyük, Mr Conforti, Mr Šváby, Mr Lorenzen and Mr Herndl, annexed to the Commission's opinion in the Balmer-Schafroth and Others case, ibid., p. 1376).

On the other hand, the Government took note of the Court's reasoning in the Balmer-Schafroth and Others judgment and no longer disputed that the applicants were relying on rights recognised in Swiss law, namely the rights to life, to physical integrity and of property, and that there was a genuine and serious dispute relating to the extension of the operating licence, having regard in particular to the fact that the Federal Council had declared the applicants' objections admissible (see the Balmer-Schafroth and Others judgment cited above, pp. 1358 and 1359, §§ 34 and 38).

As to the question whether the outcome of the proceedings in issue was directly decisive for the rights asserted, the Government maintained that the applicants had, like the applicants in the Balmer-Schafroth and Others case, failed to show that the operation of the power plant exposed them personally to a danger that was not only serious but also specific and imminent. According to the Government, the new expert opinion drawn up by the Institute for Applied Ecology in Darmstadt took a stand in favour of one party and could not be considered as an independent expert opinion, while the Federal Council, when making its decision of 12 December 1994, relied on serious and detailed expert opinions prepared by the Swiss Nuclear Safety Inspectorate ("*HSK*") and the Federal Nuclear Safety Commission (*Eidgenössische Kommission für die Sicherheit von Kernanlagen* – "*KSA*"), both of which were independent from the company operating the nuclear power plant. Unlike the Institute for Applied Ecology in Darmstadt, these bodies had a clear knowledge of the nuclear installations in Switzerland, which gave them the particular competence to assess the questions linked to the safety of the Beznau II nuclear power plant. It followed from the reports prepared by these bodies that the standard of the Beznau II nuclear power plant was in line with the norms related to nuclear safety. This was shown

by the fact that incidents which had occurred during the operation of this power plant were exceptional and above all minor.

The Government further referred to the OSART and IRRT missions conducted by international experts who had expressed a positive opinion on the safety of the nuclear power plant and the work of the *HSK* (see paragraphs 17 and 19 above).

The Government concluded that the link between the Federal Council's decision and the rights invoked by the applicants was therefore too tenuous and remote. In the Government's submission, Article 6 § 1 was accordingly likewise not applicable in the present case.

The Government added that, in any event, the right to physical integrity was not a civil right so as to attract the application of Article 6 § 1. This provision was applicable where, unlike in the present case, the subject matter of the action was pecuniary in nature and founded on infringement of rights which were also pecuniary rights.

40. The Commission, examining the circumstances of the present case in the light of the Balmer-Schafroth and Others judgment, also concluded on similar grounds that Article 6 § 1 was not applicable.

41. Fifteen dissenting members of the Commission, however, expressed the view that the report of 26 November 1997 prepared by the Institute for Applied Ecology constituted sufficient evidence to establish a specific and immediate danger to which the applicants were exposed by reason of the operation of the Beznau II nuclear power plant. The outcome of the procedure before the Federal Council was therefore directly decisive for the rights relied on by the applicants, with the consequence that Article 6 § 1 of the Convention was applicable in the present case. In the dissenters' view, since the applicants were not entitled in this regard to have access to an independent and impartial tribunal with full jurisdiction to review the factual and legal issues, there had been a violation of that provision.

2. The Court's assessment

42. The Court agrees with the parties that the applicable domestic legislation and the nature of the grievance raised under Article 6 § 1 are the same as in the earlier Balmer-Schafroth and Others case.

The Court will accordingly examine the facts of the present case in the light of the principles applied in the Balmer-Schafroth and Others judgment.

(a) Applicable general principles

43. The Court reiterates that, according to its well-established case-law, Article 6 § 1 of the Convention may be relied on by individuals who consider that an interference with the exercise of one of their (civil) rights is unlawful and complain that they have not had the possibility of submitting that claim to a court meeting the requirements of Article 6 § 1 (see the Le Compte, Van Leuven and De Meyere v. Belgium judgment of 23 June

1981, Series A no. 43, p. 20, § 44). In the words of the Court's Golder judgment, Article 6 § 1 embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect (see the Golder v. the United Kingdom judgment of 21 February 1975, Series A no. 18, p. 18, § 36). This right to a court extends only to "disputes" ("*contestations*" in the French text) over "civil rights and obligations" which can be said, at least on arguable grounds, to be recognised under domestic law; Article 6 § 1 does not in itself guarantee any particular content for "civil rights and obligations" in the substantive law of the Contracting States. The "dispute" must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise. The outcome of the proceedings must be directly decisive for the right in question. As the Court has consistently held, mere tenuous connections or remote consequences are not sufficient to bring Article 6 § 1 into play (see the following judgments: Le Compte, Van Leuven and De Meyere cited above, pp. 21-22, § 47; Fayed v. the United Kingdom, 21 September 1994, Series A no. 294-B, pp. 45-46, § 56; Masson and Van Zon v. the Netherlands, 28 September 1995, Series A no. 327-A, p. 17, § 44; Balmer-Schafroth and Others cited above, p. 1357, § 32; Le Calvez v. France, 29 July 1998, *Reports* 1998-V, pp. 1899-900, § 56).

(b) Existence of one or more "rights" recognised under domestic law

44. According to the applicants, they wanted to be able to challenge before the courts the lawfulness of the Federal Council's decision of 12 December 1994 to grant NOK the renewal of its operating licence in order to vindicate their rights to life, to physical integrity and of property. The terms of the earlier objections lodged on 28 April 1992 under section 48(a) of the Federal Administrative Proceedings Act (see paragraph 28 above), relying as they did on section 5(1) of the Nuclear Energy Act which refers to the protection of "people, the property of others and important rights" (see paragraph 22 above), bear out that such concerns did indeed underlie the applicants' opposition to the renewal of the licence (see paragraph 11 above). The rights adverted to by the applicants are, as the Government have always conceded, ones accorded to individuals under Swiss law, notably in the Constitution and in the provisions of the Civil Code governing neighbours' rights (see paragraphs 29 to 32 above).

(c) Existence of a justiciable "dispute" ("*contestation*") over those "rights"

45. It was not contested by the Government in the light of the Court's Balmer-Schafroth and Others judgment that there was a "genuine and serious" dispute of a justiciable nature between the applicants and the decision-making authorities as to whether the licence for the operation of

the nuclear power plant should be extended. On this point, the Court recalls its reasoning in that judgment:

> " ... Although, as the Government indicated, the decision to be taken necessarily had to be based on technical data of great complexity – a fact which does not in itself prevent Article 6 being applicable – the only purpose of the data was to enable the Federal Council to verify whether the conditions laid down by law for the grant of an extension had been met.
>
> ... Inasmuch as it sought to review whether the statutory requirements had been complied with, the Federal Council's decision was therefore more akin to a judicial act than to a general policy decision ...
>
> Moreover, in the light of the above considerations and the fact that the Federal Council declared the applicants' objection admissible, there can be no doubt that the dispute was genuine and serious." (loc. cit., pp. 1358-59, §§ 37-38).

The Court is of the opinion that the same considerations and the same conclusion apply in the present case, where the Federal Council likewise examined the applicants' objections on their merits and dismissed them as ill-founded (see paragraph 14 above).

46. It remains to be determined whether the "dispute" as to the lawfulness of the Federal Council's decision to renew the operating licence can be said to have been over the domestic-law rights that the applicants have identified as being ones they wished to vindicate before a court, that is whether the outcome of the procedure leading to the renewal decision was directly decisive for those domestic-law rights. This raises the same issue of remoteness as in the Balmer-Schafroth and Others case as to whether the link between the Federal Council's decision and the applicants' rights to adequate protection of their life, physical integrity and property was sufficiently close to bring Article 6 § 1 into play, and was not too tenuous or remote. In the Balmer-Schafroth and Others judgment the Court found as follows:

> "[The applicants] did not ... establish a direct link between the operating conditions of the power station which were contested by them and their right to protection of their physical integrity, as they failed to show that the operation of Mühleberg power station exposed them personally to a danger that was not only serious but also specific and, above all, imminent. In the absence of such a finding, the effects on the population of the measures which the Federal Council could have ordered to be taken in the instant case therefore remained hypothetical. Consequently, neither the dangers nor the remedies were established with a degree of probability that made the outcome of the proceedings directly decisive within the meaning of the Court's case-law for the right relied on by the applicants. In the Court's view, the connection between the Federal Council's decision and the right invoked by the applicants was too tenuous and remote.
>
> Article 6 § 1 is accordingly not applicable in the instant case." (loc. cit., p. 1359, § 40)

47. As recalled above (at paragraphs 38 and 41), both the applicants and the dissenters in the Commission considered that the facts of the present case were to be distinguished from those in Balmer-Schafroth and Others, in that the present applicants, unlike the applicants in the earlier case, had adduced sufficient evidence in the form of the report of the Institute for Applied Ecology in Darmstadt to establish a specific and immediate danger to which they were exposed by reason of the operation of the Beznau II nuclear power plant.

48. The Court must ascertain whether the applicants' arguments were sufficiently tenable; it does not have to decide whether they were well-founded in terms of the applicable Swiss legislation (see, *mutatis mutandis*, the Le Calvez judgment cited above, pp. 1899-900, § 56, and the Editions Périscope v. France judgment of 26 March 1992, Series A no. 234-B, p. 65, § 38).

49. To begin with, the Court notes that, as in the Balmer-Schafroth and Others case, the Federal Council based its licensing decision of 12 December 1994 in the present case on the conclusions reached at the end of the detailed review and assessment of the safety analysis report submitted by the operating company, on the safety evaluation report prepared by the *HSK* on the basis of nuclear safety criteria and on the statement of the *KSA* reviewing and commenting both on the licence application and on the corresponding safety evaluation report of the *HSK* (see paragraph 15 above). At the technical level the *HSK* acts independently from the Federal Office of Energy and the Federal Department of Environment, Transport, Energy and Communication (see paragraph 25 above). The *KSA*, on the other hand, is administratively attached to the Federal Energy Office, but reports directly to the Federal Council (see paragraph 26 above). It is therefore independent from the other governmental bodies concerned with the use of nuclear energy. Both safety authorities, the *HSK* and the *KSA*, are independent of the operator.

50. The Court also notes that subsequent inspections and reports, including some carried out by international bodies, whilst not having a direct bearing on the dangers existing at the time of the impugned renewal decision, go towards confirming rather than undermining the expertise relied on by the Federal Council. The international OSART and IRRT missions conducted so far have noted "the stringent requirements with regard to quality and safety, the professional qualities of the staff at all levels as well as the very satisfactory condition of the Beznau II nuclear power plant", although additional safety improvements have been recommended. They have also identified "a number of good practices which had been recorded for the benefit of other nuclear regulatory bodies" (see paragraphs 17 and 19 above). Furthermore, according to the annual reports of the *HSK*, the condition and the operational management of the Beznau II nuclear power plant had been rated as good with regard to nuclear safety

and radiation protection. It followed in particular from the annual report of 1997 that the incidents which had occurred were of minor relevance to nuclear safety and appropriate improvements had been carried out. The Beznau II nuclear power plant had been progressively backfitted to address the major on-going developments in nuclear power plant safety technology. NOK had complied with the licensing conditions in connection with the operating licence of 12 December 1994 and some conditions had in part to be updated periodically with respect to plant documentation and analyses (see paragraph 16 above).

51. Having regard to the foregoing, the Court considers that the facts of the present case provide an insufficient basis for distinguishing it from the Balmer-Schafroth and Others case. In particular, it does not perceive any material difference between the present case and the Balmer-Schafroth and Others case as regards the personal circumstances of the applicants. In neither case had the applicants at any stage of the proceedings claimed to have suffered any loss, economic or other, for which they intended to seek compensation (see paragraph 12 above, and the Balmer-Schafroth and Others judgment cited above, pp. 1352 and 1357-58, §§ 9 and 33). In the earlier case also, the applicants had attached "several expert opinions" to the objection which they lodged with the Federal Council against the operating company's application for an extension of its operating licence (loc. cit.). Contrary to the view of the applicants and the fifteen dissenters in the Commission (see paragraphs 38 and 41 above), it cannot be said that the new report of the Institute for Applied Ecology in the present case, any more than the expert reports adduced by the objectors in the Balmer-Schafroth and Others case, showed that at the relevant time the operation of the Beznau II power plant exposed the applicants personally to a danger that was not only serious but also specific and, above all, imminent. Neither is such a consequence shown by the unsolicited material, relating to the supply of nuclear fuel to the power plant during a subsequent period, which was submitted by the applicants after the close of the written procedure (see paragraph 8 above). The Court consequently cannot but arrive in the present case at the same conclusion on the facts as in the Balmer-Schafroth and Others case (see the extract from the Balmer-Schafroth and Others judgment quoted above at paragraph 45), namely that the connection between the Federal Council's decision and the domestic-law rights invoked by the applicants was too tenuous and remote.

52. Indeed, the applicants in their pleadings before the Court appear to accept that they were alleging not so much a specific and imminent danger in their personal regard as a general danger in relation to all nuclear power plants; and many of the grounds they relied on related to safety, environmental and technical features inherent in the use of nuclear energy. Thus, in their reply to the questions put by the Court, the applicants linked the danger to their physical integrity to the alleged fact that "every atomic

power station releases radiation during normal operation ... and thus puts the health of human beings at risk", and they concluded:

> "To summarise, it needs to be said that, from the medical point of view, the operation of an atomic power plant involves a specific and direct risk to health both when the plant is working normally and when minor malfunctions occur. ... [I]t is necessary to take a decision of principle in respect of nuclear energy. The operation of atomic power plants involves high risks and it may – and with a considerable degree of probability will – damage the property and physical integrity of those living in the vicinity."

53. To this extent, the applicants are seeking to derive from Article 6 § 1 of the Convention a remedy to contest the very principle of the use of nuclear energy, or at the least a means for transferring from the government to the courts the responsibility for taking, on the basis of the technical evidence, the ultimate decision on the operation of individual nuclear power stations. As the applicants put it in their memorial, "if the authority responsible is to take proper account of such risks" – namely "a high residual risk of unforeseen scenarios and of an unforeseen sequence of events leading to serious damage" – "and assess whether the relevant back-up systems are acceptable, then it is required to be particularly independent, and only courts usually possess this independence". In their reply to the Court's questions they furnished an explanation of their position in similar terms: "Only a judicial examination in adversarial proceedings would appear to be the appropriate way to recognise and examine all possible deficiencies before it is too late."

54. The Court considers, however, that how best to regulate the use of nuclear power is a policy decision for each Contracting State to take according to its democratic processes. Article 6 § 1 cannot be read as dictating any one scheme rather than another. What Article 6 § 1 requires is that individuals be granted access to a court whenever they have an arguable claim that there has been an unlawful interference with the exercise of one of their (civil) rights recognised under domestic law. In this respect, Swiss law empowered the applicants to object to the extension of the operating licence of the power station on the grounds specified in section 5 of the Federal Nuclear Act. It did not, however, give them any rights as regards the subsequent extension of the licence and operation of the station beyond those under the ordinary Civil Code for nuisance and *de facto* expropriation of property (see paragraphs 29-32 above). It is not for the Court to examine the hypothetical question whether, if the applicants had been able to demonstrate a serious, specific and imminent danger in their personal regard as a result of the operation of the Beznau II power plant, the Civil Code remedies would have been sufficient to satisfy these requirements of Article 6 § 1, as the Government contended in the context of their preliminary objection.

This being so, there is likewise no necessity for the Court to rule on the Government's preliminary objection (see paragraphs 36-37 above).

55. In sum, the outcome of the procedure before the Federal Council was decisive for the general question whether the operating licence of the power plant should be extended, but not for the "determination" of any "civil right", such as the rights to life, to physical integrity and of property, which Swiss law conferred on the applicants in their individual capacity.

Article 6 § 1 is consequently not applicable in the present case.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

56. Before the Commission, the applicants also alleged a violation of Article 13 of the Convention on the ground that, in relation to the decision to renew the operating licence of the Beznau II nuclear power plant, no effective remedy was available to them under domestic law enabling them to complain of a violation either of their right to life under Article 2 or of their right to respect for physical integrity as safeguarded under Article 8. Article 13 provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

57. The Commission and the Government considered Article 13 to be inapplicable for the same reasons as for Article 6 § 1. The Government further submitted that, in so far as Articles 2 and 8 of the Convention could have any pertinence in the present case, the Civil Code action referred to in the context of the plea of non-exhaustion of domestic remedies under Article 6 § 1 (see paragraphs 29-32 above) constituted an effective judicial remedy available to the applicants for the protection of their life, physical integrity and property.

58. Article 13 has been consistently interpreted by the Court as requiring a remedy only in respect of grievances which can be regarded as "arguable" in terms of the Convention (see, for example, the Boyle and Rice v. the United Kingdom judgment of 27 April 1988, Series A no. 131, p. 23, § 52).

59. As pleaded, the applicants' complaint under Article 13, like that under Article 6 § 1, was directed against the denial under Swiss law of a judicial remedy to challenge the Federal Council's decision. The Court has found that the connection between that decision and the domestic-law rights to protection of life, physical integrity and property invoked by the applicants was too tenuous and remote to attract the application of Article 6 § 1 (see paragraphs 48-51 above). The reasons for that finding likewise lead to the conclusion, on grounds of remoteness, that in relation to the Federal Council's decision as such no arguable claim of violation of Article-2 or Article 8 of the Convention and, consequently, no entitlement to a remedy

under Article 13 have been made out by the applicants. In sum, as in the Balmer-Schafroth and Others case the Court finds Article 13 to be inapplicable.

60. As in relation to Article 6 § 1 (see paragraph 54 above), it is not for the Court to examine in the present case the further, hypothetical question whether, in the event of an arguable claim of violation of Articles 2 and 8 as a result of the operation of the Beznau II nuclear power plant, the Civil Code action relied on by the Government would have provided an effective remedy for the purposes of Article 13.

FOR THESE REASONS, THE COURT

1. *Decides* unanimously to strike the application out of its list in so far as the complaints of Mrs Ursula Brunner, Mr Ernst Haeberli, Mrs Helga Haeberli and Mr Hans Vogt-Gloor are concerned;

2. *Joins* unanimously the Government's preliminary objection of failure to exhaust domestic remedies to the merits and *decides* unanimously that it is unnecessary to rule on it;

3. *Holds* by twelve votes to five that Article 6 § 1 of the Convention is not applicable in the instant case;

4. *Holds* by twelve votes to five that Article 13 of the Convention is not applicable in the instant case.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 6 April 2000.

Elisabeth PALM
President

Paul MAHONEY
Deputy Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint dissenting opinion of Mr Costa, Mrs Tulkens, Mr Fischbach, Mr Casadevall and Mr Maruste is annexed to this judgment.

E.P.
P.J.M.

JOINT DISSENTING OPINION OF JUDGES COSTA, TULKENS, FISCHBACH, CASADEVALL AND MARUSTE

(Translation)

We regret that we were unable, on legal grounds, to agree with the majority's finding that Article 6 § 1 and Article 13 of the Convention were inapplicable in the instant case.

As regards Article 6 § 1, the applicants complained that they were denied access to a court. They did so on the ground that although they had been able to file an objection with the Federal Council opposing the NOK company's application for an extension of its licence to operate the Beznau II nuclear power plant for an indefinite period, and although their objection was upheld in part in that the Federal Council decided on 12 December 1994 to renew the licence for ten years only, they were prevented by Swiss law, and in particular section 100(u) of the Federal Judicature Act (see paragraph 27 of the judgment), from lodging an appeal, such as an administrative-law appeal to the Federal Court, against the Federal Council's decision (which, on the main issues, was unfavourable to them).

It may be considered at the outset that there was a violation of Article 6 § 1 since the impugned decision was taken by an executive body, the Federal Council (in other words the government), without judicial review or court proceedings. In most European countries, it is a well-established general principle of law that executive acts must be judicially reviewable by a court which is able to ensure that the law has been properly applied and the procedural rules followed. That principle was unambiguously recognised (in connection with the European Union, it is true) by the Court of Justice of the European Communities (see the Marguerite Johnston judgment of 15 May 1986, Case no. 222/84, ECR [1986] 1651, with special reference to paragraph 18). The nature of administrative decisions to grant or refuse applications for licences to operate nuclear power plants does not mean that they should be exempt from judicial review; on the contrary, the dangers presented to the environment and the population by such installations make it, if anything, more necessary for such decisions to be subject to review by an independent and impartial tribunal in adversarial proceedings aided, of course, by expert evidence.

The fact that popular initiatives have enabled the public democratically to declare itself in favour of the State nuclear programme does not to our mind mean that a concrete judicial review would be devoid of purpose.

Indeed the majority have not challenged the principle that judicial review should lie, but have made it contingent on the existence of an arguable claim relating to the exercise of (civil) rights recognised in domestic law (see paragraph 54 of the judgment). Nor did they deny that such rights – for

example the rights to life, to physical integrity and of property – were available to the applicants in the instant case under the Swiss legal order (see paragraph 55 of the judgment). However, they considered that the proceedings before the Federal Council did not "determine" a dispute (*contestation*) over those rights (loc. cit.), as, in their view, the link between the Council's decision and the applicants' rights was too tenuous and remote (see paragraph 46 of the judgment). In reaching that conclusion, they referred in paragraph 51 to the finding in the Balmer-Schafroth and Others v. Switzerland judgment of 26 August 1997 (*Reports of Judgments and Decisions* 1997-IV) and, in particular, paragraph 40 thereof, that the applicants had failed to show that the operation of the power plant had exposed them personally to a danger that was not only serious but also specific and, above all, imminent. The majority added (see paragraph 48 of the judgment) that the applicants' arguments had to be sufficiently tenable.

One might of course question whether it is possible to establish that the danger exists to the requisite degree. For example, it is virtually impossible to prove imminent danger in the case of inherently dangerous installations: the catastrophes that have happened in a number of countries were obviously unforeseeable or, in any event, unforeseen.

That, however, is not the fundamental issue. Without judicial review, the executive's decision could not be challenged before the domestic courts. To our minds, it was for the domestic courts to assess whether the applicants had established a sufficiently close link between the operation of the power plant and their rights, in particular to life and to physical integrity. By substituting its own (judicial) assessment for that of a non-existent domestic court, we consider that our Court has effectively reversed the subsidiarity principle on which its case-law is largely based. It has in effect acted as a court of first instance; yet paragraph 51 of the judgment, for instance, shows the extent to which the analysis which the Court had to carry out was of a technical nature. By allowing a governmental body to act as both judge and party, it has not taken the principle of the rule of law expressed in the Preamble to the Convention to its logical conclusion. It is obviously prudent to avoid an *actio popularis*. It is in our view, however, preferable for the national courts who are better placed, rather than the European Court, to decide whether appeals such as the applicants' amount to that type of action.

Like considerations lead us, *mutatis mutandis*, to consider that Article 13 was applicable in the instant case. The claim was arguable and an effective remedy should therefore have existed. Filing an objection with the Federal Council, from which body no appeal lay, did not constitute such a remedy.

For these reasons, we have voted against the opinion of the majority on these two points.