

ENNHRI third party intervention

Duarte Agostinho and Others v. Portugal and Others (ECtHR)¹

Submission of the Public Defender of Rights of the Czech Republic

- 1. Please provide information about jurisprudence or pending legal cases relevant to the case, domestic but also regional and international. This may include legal steps taken that address climate change induced health impairments.**

National judicial case law

- In the past, there were cases which concerned ineffective “programmes of improvement of the air quality”. Such programmes are documents issued by the Ministry of the Environment aiming to rapidly decrease the air pollution in a certain region. However, they tend to be too general, vague, and not very promising regarding any improvement. Hence, there were claims against the Ministry for not implementing proper, effective programmes in four Czech cities. All four claims were successful, programmes were at least partially cancelled, and the Ministry has had to develop new ones.²
- In 2011 and 2016, claimants from Ostrava (a very polluted industrial city close to the Polish border) brought claims against the Ministry of the Environment for the inexistence of any programme of improvement of the air quality. The first claim was upheld by the court and the public administration had to rectify the situation. In the second case, the claimant also required non-pecuniary damages. The court stated that the Ministry had acted against the law, however, it dismissed her claim with the argument that she had not proven the causal nexus between the quality of air and the damage she had suffered.³
- There is a similar case pending before the Supreme Court in which the claimants require non-pecuniary damages from the Ministry of the Environment.

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² <https://frankbold.org/zpravodaj/kategorie/povedlo-se/frank-bold-uspesne-dokoncil-projekt-pravo-na-cisty-vzduch>

³ Decision of the Constitutional Court of 12 May 2020, No. III. ÚS 1957/19.

The Ministry did not adopt any effective measure in regions where the air pollution limits are usually exceeded, and the air is polluted with mutagenic and carcinogenic particles. Thus, the claimants point out the impairment of their health due to air pollution.⁴

- In 2018, a claimant from Ostrava who survived lung cancer and whose husband died from the same condition turned to the court. She alleged the state's responsibility for the failure to implement measures in order to decrease the emissions in this polluted region and claimed non-pecuniary damages for her and her husband's suffering. In December 2020, the first-instance court dismissed the claim with the same argument as in the previously mentioned case: the claimant had not proven the causal link between the air pollution and her and her husband's disease. Now, the case is pending before the court of appeal.⁵

Cases of the Public Defender of Rights

- The Public Defender of Rights dealt with the situation of air pollution in Ostrava. In 2011, it noted that the air pollution limits are exceeded, smog situation is serious, and such conditions are beginning to show in the health of local children. It conducted an investigation of certain bodies of the public administration and found several breaches: (i) the Ministry of Health had not conducted any assessment of the air pollution in Ostrava with respect to its consequences on human health, (ii) the Ministry of the Environment had not done any comparative analysis with the Polish legislation in order to coordinate the cross-border approach to pollution, (iii) the Regional Office in Ostrava had not set sufficiently strict pollution limits, (iv) the City Authority of Ostrava had not sufficiently sanctioned environment-related misdemeanours (such as illegal burning of waste).⁶
- In 2019, the Defender investigated a case of a power plant which had obtained an exception regarding the pollution limits of quicksilver and nitrogen oxide. Even though at the time, no impairment of health had been registered, eventually, this exception was cancelled as unlawful. In this case, the Defender expressed several concerns regarding the national climatic and energetic policy, especially the privatisation of coal power plants, and warned against the negative global climatic development.⁷

⁴ <https://www.right-to-clean-air.eu/cz/soudni-pripady-a-rozhodnouti/ceska-republika/soudni-pripady-a-rozhodnuti/>

⁵ <https://frankbold.org/zpravodaj/kategorie/povedlo-se/frank-bold-uspesne-dokoncil-projekt-pravo-na-cisty-vzduch>; <https://frankbold.org/pro-media/tiskova-zprava/pravni-bitva-za-lepsi-ovzdusi-na-ostravsku-pokracuje-odvolanim-rozhodne-mestsky-soud-v-praze>

⁶ VOP/3792/2009.

⁷ VOP/5689/2019.

Cases before the European Court of Justice

- In 2010, based on an application filed by the European Commission, the European Court of Justice (ECJ) ruled that the Czech Republic had not complied with its obligations under the Directive on Environmental Impact Assessment (2011/92/EU) ("EIA Directive"). It failed to transpose the parts of this directive which enshrine the access to justice of persons with a sufficient interest who allege a violation of their right in relation to decisions, acts or omissions made under this directive (Case C-378/09).
- In April 2019, the Commission filed an application with the ECJ, alleging that the Czech Republic had not complied with its obligation to transpose the Directive 2010/31/EU of the European Parliament and the Council (Case C-305/19). Namely, the Commission claimed that the Czech Republic had only transposed the obligation to issue energy performance certificates for buildings with an area larger than 500m² which are used by state authorities. The directive, however, requires the issuance of such a certificate with respect to both private and state entities. In 2020, the application was subsequently withdrawn by the Commission as a result of the Czech Republic's compliance with its obligations. The case was removed from the case register.⁸

Proceedings before the European Commission

- Between the Czech Republic and Poland, there has been a long-term tension over the operations of the Turów mine located on the Polish territory in the proximity of the Czech and German border. It has been reported that the mining in the mine and its continuous extending towards the Czech border is the source of higher air pollution, noise and lowering of the underground water levels.⁹

The mine is operated by a state-owned Polish company whose permission to carry out mining in the Turów mine expired at the end of April 2020. Subsequently, it obtained an extension of the permission for six more years in proceedings without any participation of the public.

In September 2020, the Czech Republic submitted a complaint to the European Commission under Article 259 TFEU.¹⁰ The Commission concluded that Poland had

⁸ See, Judgment of the Court. InfoCuria:

<http://curia.europa.eu/juris/document/document.jsf?docid=78579&mode=lst&pageIndex=1&dir=&occ=first&part=1&text=&doclang=CS&cid=2708893>

⁹ Greenpeace. Polsko chce navzdory kritice EU znovu prodlužovat těžbu v dole Turów do roku 2044. Nová petice žádá českou vládu, aby na něj podala žalobu. 2 February 2021.

<https://www.greenpeace.org/czech/tiskova-zprava/12828/polsko-chce-navzdory-kritice-z-eu-znovu-prodluzovat-tezbu-v-dole-turow-do-roku-2044-nova-petice-zada-ceskou-vladu-aby-na-nej-podala-zalobu/>

¹⁰ Ministerstvo životního prostředí. Kauza Turów: ČR je přesvědčena, že došlo k porušení unijního práva. Poslala podnět k EK. https://www.mzp.cz/cz/news_20200930-Kauza-Turow-CR-je-presvedcena-ze-doslo-k-poruseniu-unijniho-prava-Poslala-podnet-k-EK.

[Sem zadejte text.]

failed to transpose the part of EIA Directive which incorporates the access to justice relevant to this directive into the national law. Moreover, the Commission found that Poland erroneously applied the EIA Directive in relation to the access of the public to information, as well as the Access to Information Directive (2003/3/EC). Furthermore, according to the Commission, Poland breached the principle of loyal cooperation embedded in the TEU.¹¹

The proceedings before the Commission are the last step which a state needs to take before bringing an application to the Court of Justice of the European Union (Article 259 TFE (“CJEU”). Currently, there are initiatives, e.g. led by the Greenpeace Czech Republic, which aim to incentivise the Czech Government to file such an application to the CJEU.¹²

- A similar complaint against the developments regarding the Turów mine has been brought to the European Commission by German representatives who claim that the mining has affected the level of the underground waters in the region adjacent to the Polish border and allege a violation of the procedural rights of the region’s inhabitants.¹³
- Currently, there are also active infringement cases against the Czech Republic pending before the European Commission concerning the compliance of the Czech Republic with the Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner a Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe. The Commission has criticised the Czech Republic for an insufficient transposition of this directive into its national law, in particular the Directive’s part regarding the limit values and certain definitions (infringement No. 20182262). Also, the Czech Republic has been criticised for exceeding the limits set for the fine dust particles (PM10) (infringement No 20082186) and NO₂ (infringement No. 20162062).

Cases before the European Court of Human Rights

- So far, there have been very few cases brought to the European Court of Human Rights (ECtHR) against the Czech Republic alleging the violation of environmental rights. One of them is the **Folkman ETA and others v. the Czech Republic** (App no. 23673/03) which concerned two Czech citizens and

¹¹ European Commission. Environmental Impact Assessment: Commission adopts reasoned opinion in case brought by Czechia against Poland. 17 October 2020.

https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2452

¹² Michael Polák. Novinky.cz. Žalujte Polsko kvůli Turóvu, žádá po vládě Liberecký kraj.

<https://www.novinky.cz/ekonomika/clanek/zalujete-polsko-kvuli-turowu-zada-po-vlade-liberecky-kraj-40321975>;

Greenpeace. Polsko chce navzdory kritice EU znovu prodlužovat těžbu v dole Turów do roku 2044.

Nová petice žádá českou vládu, aby na něj podala žalobu. 2 February 2021. See,

<https://www.greenpeace.org/czech/tiskova-zprava/12828/polsko-chce-navzdory-kritice-z-eu-znovu-prodluzovat-tezbu-v-dole-turow-do-roku-2044-nova-petice-zada-ceskou-vladu-aby-na-nej-podala-zalobu/>.

¹³ Frank Bold. Na těžbu v dole Turów podali stížnost i němečtí obyvatelé. <https://frankbold.org/pro-media/tiskova-zprava/na-tezbu-v-dole-turow-podali-stiznost-i-nemecti-obyvatele>.

one NGO which claimed that they were in immediate danger of a nuclear crash of the nuclear plant Temelín located in the south of Czech Republic. The applicants alleged that the trial operations of the Temelín plant put their lives, health, and property, as well as the environment in danger. They claimed that the operations of the power plant were preceded by authorisation proceedings before the National Authority for Nuclear Safety in which they had not had the right to participate. As a result, they considered their right to life (Article 2 of the European Convention on Human Rights (ECHR)), a fair trial (Article 6), private life (Article 8), an effective remedy (Article 13), and private property (Article 1 Protocol No 1 to the ECHR) violated.

As to Articles 6 and 13 ECHR, the ECtHR concluded that the applicants had failed to prove that the conditions set for the operations of the power plant were deficient enough to interfere with the precautionary principle. Nor did, according to the ECtHR, the administrative decisions envisage any foreseeable risks to the applicants' lives, health or property posed by the power plant. The ECtHR ruled that the risks complained of by the applicants were of a general nature and the admission of the applicants' claim under Article 6 would lead to the passing of the responsibility for decision-making over technical issues related to the authorisation proceedings from the executive branch to the judicial branch. It concluded that these administrative proceedings in which the applicants did not have the right to participate did not have any direct effect on the applicants' civil rights enshrined in the Czech legal order. It thus found the applicants' claims under Articles 6 and 13 ECHR inadmissible *ratione materiae*.

As to the rights enshrined in Articles 2 and 8 ECHR and Article 1 of Protocol No. 1, the Court found that the authorisation of the operations of the power plant was not capable of interfering with them. In this part, the ECtHR also declared the application inadmissible.¹⁴

- Another environmental-rights-related case against the Czech Republic which the ECtHR addressed was the **Sdružení Jihočeské matky v. the Czech Republic** (App No. 19101/03). It also concerned the Temelin nuclear power plant. The Applicant (an NGO) alleged a violation of her right to a fair trial, freedom of expression and right to an effective remedy as a result of a denial of access to technical information about the power plant, and a denial of the right to participate in administrative proceedings related to the authorisation of the power plant's operations.

As to Article 10 ECHR, the ECtHR found that the applicant mainly alleged a violation of the right to access to information rather than to freedom of expression. It concluded that the domestic courts' decisions to deny access to the demanded technical information were reasoned accordingly and no violation had occurred.

¹⁴ Folkman ETA and others v. the Czech Republic (App no. 23673/03). 10 July 2006. <http://hudoc.echr.coe.int/eng?i=001-160499>.

[Sem zadejte text.]

With respect to claims related to Articles 6 and 13, the ECtHR applied the very same reasoning as in the aforementioned *Folkman* case and concluded that the application was inadmissible *ratione materiae*.¹⁵

2. Please provide data and facts on your country's climate ambition and targets, including your country's commitments made under the United Nations Framework Convention on Climate Change (UNFCCC), including the Paris Climate Agreement (cf. Article 2, 1.5 °C limit) as well as national and/or regional commitments, agreements and policies.

The Czech Republic ratified the Paris Agreement in 2007. In its framework of nationally determined contributions (Article 3), the Czech Republic established the "*Climate Protection Policy in the Czech Republic*"¹⁶ with its own specific goals: to decrease its emissions of greenhouse gases by 47% until 2030 and by 80% until 2050 (both in comparison with 1990). Since December 2020, the Czech Republic has been bound by the EU goal: 55% reduction of emissions by 2030.

According to the estimates, in order to contribute to maintaining of the global temperature rise below 1,5° C, the Czech Republic will have to transform into a climatically neutral economy by 2030¹⁷ and stop mining and burning coal by 2031.¹⁸ Currently, there is a governmental debate regarding the end of coal usage. Some members of the Government wish to do so even after 2038, some support its termination by 2033.¹⁹

i. Has your country met its commitments, such as with regard to fulfilling its (previous) climate targets?

The Public Defender of Rights does not have the mandate to evaluate the possible fulfilment of such commitments. However, he can provide general public information regarding the issue. Thus, to merely describe the trend, in 2016, the Czech emissions were 32% lower than in 1990. Nevertheless, it is necessary to recall that the emissions in the 1990s were extremely high as a relic of the communist-rule-era industry.²⁰ The decrease occurred merely thanks to the closing down or modernising of the factories built during the communist rule. It is estimated that from now on, a further decrease will require more active and dynamic steps.

¹⁵ the *Sdružení Jihočeské matky v. the Czech Republic* (App No. 19101/03). 10 July 2006.

<http://hudoc.echr.coe.int/eng?i=001-161630>.

¹⁶ [https://www.mzp.cz/C1257458002F0DC7/cz/politika_ochrany_klimatu_2017/\\$FILE/OEOK-POK-20170329.pdf](https://www.mzp.cz/C1257458002F0DC7/cz/politika_ochrany_klimatu_2017/$FILE/OEOK-POK-20170329.pdf), p. 6 and 17.

¹⁷ <https://www.czechsight.cz/ceska-republika-nesplnuje-parizskou-dohodu/>

¹⁸ Social Watch. Czech Republic 2020: Chaotic Czech Climate Politics are not bringing us closer to fulfilling the goals of the Paris Agreement; quite the opposite. September 2022. Available at: http://www.socialwatch.cz/wp-content/uploads/sw_zprava_klima_2020_en.pdf

¹⁹ <https://www.greenpeace.org/czech/tiskova-zprava/12825/vlada-neprijala-doporuceni-uhelne-komise-pujde-do-mezirostu-cast-ministru-chce-totiz-konec-uhli-v-roce-2033/>

²⁰ <https://www.czechsight.cz/ceska-republika-nesplnuje-parizskou-dohodu/>

[Sem zadejte text.]

3. Please provide information about your country's climate policies and practices relevant to the case:

The Czech Republic has adopted the following policy documents concerning the environment and climate:

- Strategic Framework of the Czech Republic 2030,
- Implementation Plan of the Strategic Framework of the Czech Republic 2030,
- National Environmental Policy 2012-2020,
- Strategy of the Adaptation to the Climate Change in the Czech Republic,
- National Programme of Reducing Emissions,
- Climate Protection Policy in the Czech Republic,
- and currently, there is a draft of the National Environmental Policy 2030 with views up to 2050²¹.

The Czech Republic has implemented the following practices and steps:

- modernisation of heavy industry between 2000 and 2017,
- grant programme for individuals and legal entities concerning the exchange of combustion boilers using solid fuel for more renewable sources of heating (so-called "boiler grant"),
- grant programme for more sustainable housing, especially sustainable sources of energy, for individuals (so-called "New Green Savings"),
- grant programme "RESTART" meant to re-structuralise the most polluted regions (Ústí, Moravian-Silesian region, and Karlovy Vary),
- projects on drought management,
- plans to build new water resources,
- purchase of electric cars for the public administration,
- establishment of a specialised governmental advisory body in order to provide a neutral opinion on the future usage of lignite (so-called "Coal Committee").²²

Are these policies and practices in line with your country's obligations under the provisions of the ECHR invoked (refer to question 4), in particular read in light of other relevant provisions and principles, such as the principles of precaution and intergenerational equity contained in international environmental law, and considering the margin of appreciation?

The Public Defender of Rights may not evaluate such compliance.

In particular:

²¹[https://www.mzp.cz/C1257458002F0DC7/cz/news_20200710_statni_politika_zivotniho_prostredi_2030/\\$FILE/O_PZPUR-SPZP_2030_pro_verejnou_konzultaci-20200710.pdf](https://www.mzp.cz/C1257458002F0DC7/cz/news_20200710_statni_politika_zivotniho_prostredi_2030/$FILE/O_PZPUR-SPZP_2030_pro_verejnou_konzultaci-20200710.pdf)

²² <https://www.vlada.cz/cz/media-centrum/aktualne/boj-s-klimatickou-zmenou-bude-cesko-stat-biliony-korun--zapojit-se-ale-musi-cely-svet-178312/>

[Sem zadejte text.]

- i. **Are these policies and practices appropriate, adequate and sufficient to meet your country's climate commitments such as to achieve the objective of containing the rise in temperature to 1.5 °C (Article 2, Paris Agreement) (refer to question 6)?**

The Public Defender of Rights may not evaluate such compliance.

- ii. **Are your country's climate change mitigation regulations and policies, i.e. on the reduction of greenhouse gas emissions, based on appropriate surveys and studies ensuring effective public participation, as provided for in the Aarhus Convention 1998 on Access to Information, Public Participation decision-making and access to justice in environmental matters?**

As the Public Defender of Rights is not the national human rights institution, it is not in the position to evaluate whether the state's regulations and policies are based on appropriate surveys and studies (there is no legal basis for such evaluation in the Act on the Public Defender of Rights). However, we can provide a brief overview of the public participation rights in environmental matters in the Czech Republic.

There are several main points we would like to make in this regard. First, the public participation rights in environmental matters in general are imbedded in the legislation – the Construction Code, the Act on the Protection of the Nature, and the Countryside etc. It is worthy to mention that there are ongoing legislative negotiations concerning the new Construction Code. This legislative proposal has been controversial, among other things, also because of its approach to the public participation rights in environmental matters (the clear attempt to significantly restrict these rights). The Public Defender of Rights took part in the stakeholders' consultation prior the presentation of the draft legislation to the Chamber of Deputies and criticized this deficiency several times.

At the present time, the draft legislation is being discussed in the Chamber of Deputies. The draft legislation went through many changes and compromises during the stakeholders' consultations, and there are already several amendments of the MPs to the draft legislation at the present time. Therefore, it is very difficult to predict what will be the exact outcome of the legislative process. However, there is a clear tendency to rather restrict the public participation rights in environmental matter (it has been argued that it is necessary to speed up the construction proceedings) which also proves the final draft legislation of the new Construction Code submitted to the Chamber of Deputies.

Second, the Constitutional Court of the Czech Republic announced the decision in the case Pl. ÚS 22/17²³ concerning the public participation rights in environmental matters on Tuesday 2nd February 2020. The application was filed by a group of Senators in

²³ More information available at: https://www.usoud.cz/projednavane-plenarni-veci?tx_odroom%5Bdetail%5D=2429&cHash=6083bf203fe0f10960fe3e744002bde3

[Sem zadejte text.]

2017 seeking the abolishment of several provisions of the Construction Code and of the Act on the Protection of the Nature, and the Countryside. According to their view, the legal provisions in question impeded the public participation rights in environmental matters by excluding environmental associations from the participation in several types of proceedings according to the Construction Code. The Constitutional Court decided that the provisions in question are not unconstitutional and therefore remain in force. It argued that the participation rights of the environmental associations have been narrowed, but not entirely erased from the Construction Code. It concluded that the restriction of participation rights was legitimate, rational, and not contrary to the international obligations of the Czech Republic (namely the Aarhus Convention). It is also important to mention that seven judges of the Plenary presented their dissenting opinions in the case.

Regarding the policy documents, usually, they are drafted with public participation. For example, the National Programme on Reduction of Emissions derives from open public consultations.²⁴ The same applies also to the National Environmental Policy²⁵ and the draft of the National Environmental Policy 2030 with views up to 2050.²⁶

²⁴ [https://www.mzp.cz/C1257458002F0DC7/cz/strategicke_dokumenty/\\$FILE/000-verejna_konzultace_I_vyporadani_fin-20200217.pdf](https://www.mzp.cz/C1257458002F0DC7/cz/strategicke_dokumenty/$FILE/000-verejna_konzultace_I_vyporadani_fin-20200217.pdf),
[https://www.mzp.cz/C1257458002F0DC7/cz/strategicke_dokumenty/\\$FILE/000-verejna_konzultace_II_vyporadani_final-20200217.pdf](https://www.mzp.cz/C1257458002F0DC7/cz/strategicke_dokumenty/$FILE/000-verejna_konzultace_II_vyporadani_final-20200217.pdf)

²⁵ https://www.mzp.cz/cz/statni_politika_zivotniho_prostredi

²⁶ [https://www.mzp.cz/C1257458002F0DC7/cz/news_20200710_statni_politika_zivotniho_prostredi_2030/\\$FILE/O_PZPUR-SPZP_2030_pro_verejnou_konzultaci-20200710.pdf](https://www.mzp.cz/C1257458002F0DC7/cz/news_20200710_statni_politika_zivotniho_prostredi_2030/$FILE/O_PZPUR-SPZP_2030_pro_verejnou_konzultaci-20200710.pdf)