

## A Comparison of Shin-Kori and Wolsong Lawsuit in Light of the Legal Principles of Judgment under Special Circumstances

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### 1. Introduction

In the lawsuit against Shin-Kori Unit 5 and 6 for canceling the disposition of the construction permit, the court said that although the disposition is illegal, it is recognized that the canceling the disposition is not suitable for public welfare, so it is reasonable to make a decision to reject the plaintiffs' request.[1] On the other hand, in the suit seeking confirmation of nullity of Wolsong unit 1 life extension permit disposition, the court said that the disposition was illegal and should be cancelled.[2] This paper will compare the two cases to review the legal principles of the judgment under special circumstances and expect the outcome of the appeal.

### 2. Overview of judgment under special circumstances

'Administrative Litigation Act' Article 28 says "Eeve in a case where the claims filed by the plaintiff are deemed reasonable, if the revocation of a disposition, etc. is deemed remarkably inappropriate in terms of the public welfare, the court may reject such claims. In this case, the court shall expressly state that the disposition, etc. is illegal in the text of the judgment". Judgment of rejecting a plaintiff's claim based on this provision is called a judgment under special circumstances.

When disposition is performed, legal and factual relations are accumulated on the premise of the disposition. Therefore, cancellation of disposition may be socially and economically unreasonable or impossible. The intention of the system is to deal with the plaintiff's relief by compensating for damages separately.[1]

For example, although the redevelopment project violated the management disposal plan, the court didn't revoke the disposition. Because there are many projects that have already progressed including the completion of the general sale of apartments in thousands, cancellation of the management disposal plan could delay the entry of new buyers.

The requirements are 1) disposition shall be illegal. But it should not be invalid. 2) The revocation of the disposition, etc. shall not be remarkably suitable for public welfare. 3) The time frame for judging revocation is the time of judgment.

### 3. Judgment of Shin-Kori Unit 5&6

#### 3.1. The Progress of construction permit and litigation

The disposition of the construction permit and its revocation proceeded as follows

2012.9.21. apply for construction permit
2013.5. start to examine
2016.4. KINS submit the examination report
2016.5.2. Nuclear Safety Special Committee submit the pre-review result
2016.5.26. 55 <sup>th</sup> . 6.9 56 <sup>th</sup> , 6.23 57 <sup>th</sup> Commission meeting, 7 out of 9 vote for construction approval
2016.6.27. construction permit disposition
2017.7~2018.10. public opinion survey, suspension of construction
2017.1.14. pleading proceedings is closed
2017.2.14. sentence of the first trial

#### 3.2. Illegality of disposition

The first trial court found the disposal illegal. The reason for this was that the disposition was based on a resolution participated by the disqualified members, and the review was found to have been flawed due to the omission of 'radiation effects on the environment due to a serious accident during operation' from the radiation environment impact assessment, which is an attached document when applying for the construction permit..[2]

#### 3.3. Cancellation

##### 1) Need to cancel disposal

The court said the illegality could be resolved for the following reasons: The measure against 'critical accidents' was faithfully reviewed during the construction permit review process and the quorum of the decision is met except for the opinion of the disqualification committee member. It is also likely that the same conclusion will be reached even if the committee is formed legitimately and deliberated and voted.

##### 2) Expected effect of cancellation

A) If the disposition is cancelled and the construction permit procedure is resumed from the beginning, the plant will be completed in about seven to eight years, considering the remaining construction period (3 to four years) and the period expected to be spent on the permit procedure (approximately four years). In that case, it may not be able to meet the proper power facility reserve ratio according to the 8th basic power supply plan.

B) 1.602 businesses are involved in the construction of nuclear power plants in this case. If construction is

suspended, there is a high possibility of complex and various legal disputes, and a considerable number of companies going bankrupt, which could adversely affect certain industries.

C) The official cost of construction interruption was approximately 109.1 billion won for about four months during the public opinion survey process by the Public Debate Commission. The suspension of construction could cost more than 1 trillion won for about four years before the construction resumed after the process of cancellation and reauthorization of the disposition.

#### **4. Comparison with the Wolsong Unit 1 trial**

##### *4.1. The illegality of disposition*

The Wolsong trial said that because the KHNP did not submit a comparative table, the Commission passed the conclusion that it would permit continued operation without knowing the details of changes in the permit for continued operation, and that the Commission could not resolve the illegality of the case by simply accepting the approval of the other members, except those who are disqualified, as it is an agreed-upon administrative body that determines its intention through deliberation and resolution.

The Shin-Kori trial first stated that the voting was illegal because the radiation effects of the severe accidents were not recorded and the disqualified members participated. However, it lowered the need to cancel the disposition by stressing that the contents of the resolution and the contents of the KINS review and the pre-review by the Nuclear Safety Commission are the same and that the quorum of the vote is met even if the disqualified members are excluded.

##### *4.2. Effects on the Power Supply Plan*

The Wolsong trial said that problems in the country's electricity supply and economy of continued operation are not matters for the Nuclear Safety and Security Commission to be involved. However, the court did not take into account the impact of the cancellation of the operation permit on the public welfare in its decision, even though the court could have made the decision not to cancel without the parties' argument. The Shin-Kori trial did not say that the supply of electricity would cure the illegality of the disposal, but did not cancel the construction permit because of the power supply. However, in Wolsong's case, even if the first court considered it, or even if the second court considered it in the future, it would be difficult to judge that the revocation of the life extension permit disposition would have a greater impact on public welfare than the revocation of the construction permit disposition in Shin-Kori. This is because the power generation capacity of Wolsong is 679MW, while that of Shin-Kori per unit is 1400MW, which is four times that of Wolsong because it is two.

##### *4.3. Cost due to construction interruption*

The court of the Wolsong trial said that it is not only illegal but also undesirable in policy for the KHNP to conduct facility replacement for continued operation before the NSSC's review and approval. It added that KHNP will be given the expectation that it will be allowed to continue operating, and that it will be difficult to expect independent and fair screening of KINS and NSSC employees who have discussed the facility replacement. After all, it is highly likely that the court will not consider the costs incurred by the KHNP before the operational change permit (according to the 57th meeting minutes of the NSSC, one member claims to be 600 billion won) because they are illegal and are not desirable in policy terms.

Looking at the 57th meeting minutes of the NSSC, which discussed the construction permit for the Shin-Kori power plant, there is a similar discussion with Wolsong. There was a commission member's claim that the KHNP signed contracts and made open bids without a construction permit. However, if the KHNP did actual construction work, such as concrete, before the construction permit, it is illegal, but it is not a violation that it prepared the contract in advance for self-risk. It is unclear exactly how much the KHNP spent before and after the construction permit. According to the claim by the KHNP, the construction of the nuclear power plant went ahead with a process rate of about 40 percent, spending about 2.5 trillion won, and the court also acknowledged that 109.1 billion won in losses were incurred during the four months when the construction was suspended from around July 2017. In the case of Shin-Kori, the costs spent after construction permit are likely to be taken into account by the court.

##### *4.4. Wolsong case and judgment under special circumstances*

In Wolsong trial, the plaintiff sought to confirm the nullity of the disposition, but the court canceled the disposition on the grounds that the flaw was not clear. According to the precedent, a judgment under special circumstances is not possible if the disposition is null because there exists no disposition to survive (대판 1996.3.22; 95 누 5509). Thus, if the court of the Wolsong had ruled that the permit was invalid instead of canceling it, it would have been difficult for the court of Shin-Kori to make a judgment under special circumstances.

#### **5. Conclusion**

The judgment under special circumstances is an infringement of legitimate private interests on the grounds of public interest and should only be allowed if it is inevitable, which is at the discretion of the court.

In the Shin-Kori trial, the plaintiffs appealed on the grounds that the first trial court did not cancel the disposition even though the court acknowledged the illegality of the construction permit. If the second trial court additionally acknowledges the reasons for the violation that the first court did not recognize, the conclusion could change as the legitimate private interest grows. However, compared to Wolsong case, the construction of Shin-Kori Units 5 and 6 has four times the impact on power supply, the number of related businesses since the construction volume is large, and the KHNP spent a large amount of money after the construction permit. In the Shin-Kori trial, the decision by the Public Debate Commission to resume construction must have been largely affected. These differences would have affected the decision of the Public Debate Commission, and the appeals court would have to consider them.

#### **REFERENCES**

- [1] 서울행정법원, 2016 구합 75142
- [2] 서울행정법원, 20155 구합 5856
- [3] J. Hong, 행정법특강, p.746 The 8th Edition, 박영사, 2009.