

**OUTER HOUSE, COURT OF SESSION**

OPINION OF LORD JOHNSTON

in the Petition

of

(FIRST) THE ROYAL SOCIETY FO  
THE PROTECTION OF BIRDS; AND  
(SECOND) THE WILDFOWL AND  
WETLANDS TRUST LTD

Petitioners;

for

Judicial Review of a decision of the  
Secretary of State to grant licences to  
shoot barnacle geese within SPAs on  
Islay

Respondent:

**Petitioners: Sir Crispin Agnew of Lochnaw, Bt., Q.C.; Tods Murray, W.S,**

**Respondent: Clarke, Q.C., McCreadie; R. Henderson**

14 October 1999

In this petition the petitioners, who are well known and respected conservationists, seek judicially to review a decision of the then Secretary of State to grant licences for limited shooting of barnacle geese on Islay. The licences related to a limited number in each case in respect of two named farms and which were for a limited period, due to expire in January 1999. When this petition was initially presented, *interim* suspension orders were granted in relation to the licences. The case came before me on a first hearing which both the petitioners and the now First Minister for Scotland were represented. Although the initial licences are spent, I was informed by both parties that the matter was a live issue relating to a recurring problem and that therefore a general declaration was sought from the court as the lawfulness of the procedures adopted by the respondent in granting the licences, the contention on behalf of the petitioners being that the respondent had failed to comply with specific terms of certain European Directives which contention, if correct, would render a decision to grant further licences unlawful, if the same procedures were followed again.

The relevant Directives are Council Directive 2 April 1979 on the conservation of wild birds (79/409 EEC) (1) ("the Birds Directive") and Council Directive of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (92/43) ("the Habitat Directive").

Turning first to the Birds Directive, its preambles relate to the need to conserve and protect the relevant species of birds. Provision is contemplated for the creation of Special Preservation Areas (SPA) but the preambles also make reference to certain derogations.

Article 2 is in the following terms:

"Member States shall take the requisite measures to maintain the population of the species referred to in Article 1 at a level which corresponds in particular to ecological scientific and cultural requirements..."

Article 3 makes provision *inter alia* for the creation of protected areas in relation to the species of birds and Article 4 makes provision for the preservation or creation of Special Protection Areas. Article 4(4) is in the following terms:

"In respect of the protection areas referred to in paragraphs 1 and 2 above member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbance affecting the birds in so far as these would be significant having regard to the objectives of this Directive..."

In terms of Article 7 of the Habitat Directive, the provisions of Article 6 of that latter Directive were transposed for Article 4(4) which I have just quoted from the Birds Directive. Article 6 of the Habitat Directive thus becomes part of the Birds Directive and the relevant parts are in the following terms:

"(1) For special areas of conservation member States shall establish the necessary conservation measures..."

(2) Member States shall take appropriate steps to avoid in the special areas of conservation the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated in so far such disturbance could be significant in relation to the objectives of this Directive.

(3) Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant affect thereon... shall be subject to appropriate assessments of its implications for the site in view of the site's conservation objectives..."

Returning to the Birds Directive, Articles 5, 6 and 7 are concerned with shooting, sale and hunting of the relevant species and in general terms effect prohibitions in those respects. However Article 9 is in the following terms'.

"(1) Member States may derogate from the provisions of Article 5, 6 and 7 ... where there is no other satisfactory solution for the following reasons:

a. ....to prevent serious damage to crops"

This European legislation has been incorporated into the law of the United Kingdom by the Wildlife and Countryside Act 1991, ("the Act") as amended and the Wildlife and Countryside Act Amendment Regulations 1995 (S.I. 1995/2825) ("the 1995 Regulations").

With regard to licences for shooting, Section 16(1)(A) of the Act is in the following terms:

"The appropriate authority...

(a) shall not grant a licence to any person for any purpose mentioned in sub-section 1 unless it is satisfied as regards that purpose there is no other satisfactory solution."

Within sub-section 1 of the same section there is an incorporation of the power to derogate found in Article 9 of the Birds Directive *inter alia* in relation to the prevention of damage to crops.

The incorporation into the United Kingdom legislation of the Directives is, with some minor wording differences, substantially complete and this case therefore requires for the determination of the relevant issues a construction of the Birds Directive as amended by the Habitat Directive in respect of the provisions I have quoted.

The factual background is that Islay is the winter home for a substantial number of migratory geese including the Greenland barnacle goose and the Greenland white fronted goose. There is no dispute that these birds congregate in large numbers in specific areas on the island, which include the two farms whose farmers applied for the relevant licences. Both these farms are included within Special Protection Areas designated under the legislation and now managed, in that respect, by Scottish Natural Heritage (SNH). Quite apart, therefore, for the validity of the granting of the licence with regard to the power to derogate in Article 9 of the Birds Directive, Article 6 of the Habitat Directive applies in both cases and requires to be construed in that content. In addition, it is not disputed that the birds, in large numbers, can and do cause damage to crops particularly to grass which is cultivated by the fanners to provide either hay or silage for their stock. It also has to be recorded since it was not disputed that various methods of scaring have apparently been tried at considerable expense without any practical success and no factual issue turned in this case on that matter.

Before turning to the particular aspects of this case, I require to deal with a preliminary but important matter which was put in issue by counsel for the petitioners, relating to the function of this court in applications of this type, concerning the construction or application of European legislation.

Counsel for the petitioners accepted that in the normal judicial review process in this court of an administrative decision, the power of the court was limited or governed by the so called *Wednesbury Principles* as stated originally in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* 1948 1 K.B. 233 and restated in *Wordie Property Co v The Secretary of State for Scotland* 1984 S.L.T. 345 and *The Council of Civil Service Unions v Minister for Civil*

Since 1985 A.C.374. Without quoting from these cases, I can summarise the position upon the basis that a successful judicial review of a relevant decision would only be achieved on grounds of irrationality if it is established that the decision-maker took into account material he should have left out of account, left out of account material that he should have taken into account or generally acted in such an irrational way in reaching his decision on the relevant material before him as to vitiate its substance, on that ground. Thus there is no power to this court to review the factual content of any such decision particularly in relation to any dispute thereon.

Against that background, it was the contention of counsel for the petitioners that the European law had moved on, to the extent that this court was now required to resolve, if necessary by proof, any factual dispute relating to the substance of the relevant decision if such was put in issue in order, to quote him; "to ensure that the court was satisfied that the decision-maker had complied with the relevant European law".

This proposition he based on the so called "Dutch Dykes" case namely, *C-72/95 Aannemersbedrijf P K Kraaijeveld BV v Staten van Zuid-Holland* [1996] ECR I-5403 and the ECJ at 55 and 60.

"55 First of all it should be recalled that the obligation of a Member State to take all the measures necessary to achieve the result prescribed by a Directive is a binding, obligation imposed by the third paragraph of Article 189 of the EC Treaty and by the Directive itself (see Case 51 /76 *Verbond van Nederlandse Ondernemingen* [1977] ECR I 113, paragraph 22, and Case 152/84 *Marshall* [1986] ECR 723, paragraph 48). That duty to take all appropriate measures, whether general or particular, is binding on all the authorities of Member States including, for matters within (their jurisdiction, the courts (see Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8).

60 Consequently where, pursuant to national law, a court must or may raise of its own motion pleas in law based on a binding national rule which were not put forward by the parties, it must, for matters within its jurisdiction, examine of its own motion whether the legislative or administrative authorities of the Member State remained within the limits of their discretion under Articles 2(1) and 4(2) of the Directive, and take account thereof when examining the action for annulment".

He reinforced the position the position by reference to *W. W.F. v Bozen* E.C.J. 16 September 1999 where at paragraph 48 the court said;

"It is for the national court to review whether on the basis of the individual examination carried out by the competent authorities which resulted in the exclusion of the Specific project at issue in the main proceeding from the assessment procedure established by the Directive, those authorities correctly assessed in accordance with the Directive the significance of the effects of that project on the environment".

Without elaborating it further, counsel sought to construct a dispute of fact into the question of whether or not "disturbance" by shooting would be "significant" and maintained that this court would have to resolve that issue before determining the whole matter.

Counsel for the respondent disputed the essential basis of the proposition I have just enunciated, both as a matter of construction of the cases upon which counsel for the petitioners had founded which it was submitted did not base the proposition he contended for on a proper examination and also by reference to certain other authorities, the principal one of which was *Upjohn Ltd v The Licensing Authority established by the Medicines Act 1968 and Others case* (C 120/97) E.C.J. The important passage is in paragraph 34 which is in the following terms:

"According to the court's case law where a community authority is called upon in performance of its duty to make complex assessments it enjoys a wide measure of discretion the exercise of which is subject to a limited judicial review in the course of which the community judicature may not substitute its assessment of the facts for the

assessment made by the authority concerned. Thus in such cases the community judicature must restrict itself to examining the accuracy of the findings of fact and law made by the authority concerned and to verifying in particular that the action taken by that authority is not vitiated by a manifest error or a misuse of powers and that it did not clearly exceed the bounds of its discretion".

It is appropriate that I deal with this matter as a preliminary question before turning to the merits of this case.

In my opinion, the proposition contended for by counsel for the petitioners is wholly without authority or substance. Examination of the cases that he founds upon, makes it clear that the European Court was in act merely reaffirming that its powers were limited to considering how the relevant decision was reached and did not extend to a factual review as to its substance. The recent *Upjohn* case which I have quoted puts that position beyond doubt. In my opinion, the power to be exercised by this court in relation to a decision made in respect of powers provided by the Community legislation is no different from the power it has in relation to judicial review in the domestic or national content. Thus I am not concerned with the merits of the decision in question but merely have to be satisfied that the Minister had material before him relevant to the issue which rationally based his decision (c.f. *W. W.F-U.K. and Another v Secretary of State for Scotland* 1999 ENV.L.R. 632) I would merely add that to accede in general terms to the proposition contended for by counsel for the petitioners would, in my opinion, create a potential situation of instability with regard to decisions that have been taken by an appropriate authority, to the point of probable chaos.

Turning to the merits, the argument turned on a consideration of the Birds Directive, Article 9 and in turn the Habitat Directive Article 6 as incorporated into the Birds Directive by Article 7 of the former. In simple terms, counsel's position in terms of Article 9 was that given that the derogation power to prevent serious damage to crops was governed by the proviso that there had to be no other satisfactory solution. He maintained in the present case that such a solution existed in the form of certain compensation schemes that had been put in place to relieve the economic damage caused to the farmers by the presence of the geese. I was told that such schemes had been in operation for some time and were still operating, albeit at a reduced financial level, in respect of some farms. However, the two applicants in the present case had declined to enter the scheme and in turn had sought the licences in question. Counsel quoted extensively from *A.P.S. v Prefet de Maine et Loire* 1994 E.C.R. 1-67 and in particular the advice of the Advocat General at paragraphs 14 and 15 in order to give content to the general scope of the Birds Directive and also pointed to the close relationship between the Birds Directive on the one hand and the Habitat Directive generally on the other when two preambles were examined. He submitted that the phrase "no other satisfactory solution" should be given a very wide meaning equiparating it to "alternative" which is featured in the Habitat Directive. He submitted that the various derogatory opportunities in Article 9 were all in respect of a benefit to people in one way or another and accordingly the problem to be addressed was essentially an economic or social one in the context. Given that the whole thrust of the legislation was for the protection and conservation of birds, it was entirely consistent he submitted with that approach that compensation was an alternative solution, preferable to killing by shooting. He also derived support from *Ligue Royale Beige Pour Protection de Oiseaux v Region Wallone* 1996 E.C.R 1-6775, again from the advice of the Advocat General at paragraphs 32-37 and from the decision of the Court at paragraphs 17 and 27 in the context of how the phrase "satisfactory solution" should be construed.

Counsel for the respondent's reply to this proposition was based on an assertion that it failed to address the essential substance of the derogation power or the reason for it, namely to prevent damage to crops. Any solution to be found therefore must relate to the avoidance of or at least to address the issue of crop damage and not its economic consequences. It was maintained that beyond the farmers' obvious interest, maintenance of the crop on an undamaged state benefited the geese as provision of food for them. That point was not addressed if compensation was an alternative solution. Counsel derived support from the same case relied upon by the petitioners namely the *Ligue & Royale Beige supra* and particular at paragraphs 17 to 21 of the ECJ judgement.

It is appropriate that I deal with the point at this stage, since if counsel for the petitioners' position is correct, there was an invalid exercise of the power to grant a licence in as much as *ex hypothesi*

there was an alternative solution by way of compensation.

I have no hesitation in concluding that the approach by counsel for the petitioners in this respect is unsound. I agree with the general proposition that the problem being addressed in granting the power to derogate in relation to the prevention of damage to crops is precisely that, namely physical damage to the grass. It is important to note from the *Ligue* case that the question was whether the alternative solution being put forward could be properly regarded as such because there were certain questions as to its feasibility or indeed whether in every case it was properly to be regarded as available. This I take from paragraph 21 of the decision of the Court in the following terms:

"Consequently the fact that breeding and reproduction in captivity of the species concerned are not yet feasible on a large scale by reason of the installations and the inveterate habits of bird fanciers, habits which moreover have been encouraged by domestic rules derogating from the general scheme of the Directive is not in itself such as to cast doubt in a satisfactory nature of the alternative solution to capturing birds in the wild".

The importance of that passage is that it focuses, correctly in my opinion, the attention of the court on the merits of the alternative solution to which they are being directed and to which they are prepared to give a generous and even lenient interpretation as to its practicability thus leaving derogation as a last resort. In the present case, given my construction of the nature of the problem to be addressed and given that scaring is not put forward as an alternative, there is no alternative being advanced which can be described as a solution in fact. Given therefore that the problem exists, and that a power to derogate by shooting is available, in my opinion, the Minister acted entirely rationally in exercising the power in this respect on the general issue of principle and against the relevant factual background. The approach of the petitioners on this question is therefore wholly unsound.

Having said that, the crux of this case, in my view, depends upon the interpretation to be put on particularly Article 6(2) of the Habitat Directive which applies in the present case by reason of the fact that the licences are to be operated in a SPA. Not only therefore must the Minister properly use the derogation power but he also must not in so doing conflict with the provisions of that article. Counsel also had a submission based on Article 6(3) which I will put aside for the time being in considering the position under Article 6(2).

The critical phrase is "disturbance of the species so far as such disturbance could be "significant" in relation to the objectives of the Directive which is the Birds Directive by reason of the transposition. It is therefore a two stage process. First it has to be determined whether or not what is proposed, which here, is shooting should be regarded as "disturbance" and secondly, such as could be "significant" in relation to the objectives of the relevant Directive.

In this respect the basic contention of counsel for the petitioners was that, by definition shooting disturbs the birds. He referred to certain productions and reports in support of this contention to which I need not make detailed reference since I am not concerned with the factual issue. However his main point was, having regard to the objectives of the Directives, the decision of the Minister on the face of the documents in respect of which he received advice, proceeded only on an overall assessment of effect on the general population of the birds in determining the questioning of significant disturbance. He had misdirected himself since he should have taken account of local impact on the site. It should be noted again from the productions that that is a correct analysis of the approach of the Minister who defined disturbance in the context of disturbance of the species in its overall population and did not address the local issue. I am quite satisfied that the Minister had material before him to justify a decision based upon that approach but the issue is whether or not that approach was correct.

Counsel for the respondents submitted that for some considerable time, the position of the United Kingdom Government in relation to the Birds Directive, derived as much from the preamble as anything else, was to the effect that it was concerned with survival and reproduction of the species concerned on a general rather than a particular basis. This was taken particularly from

*Commission of the European Communities v Federal Republic of Germany* ("the German Dykes") 1991 E.C.R. 1883 in particular paragraphs 13, 21 and 27 of the Court's judgment. Those observations, it was submitted clearly overrule the opinion of the Advocate General in paragraph 33 of his advice where he rejected the United Kingdom's position. Reference was also made to *Commission of the European Communities v The Italian Republic* 1987 E.C.R. 3073.

In my opinion, this matter falls to be resolved in favour of the respondents, In approaching the matter against the background of a general affect on population with regard to survival and reproduction to assess the question of significance, in my opinion, the Minister was applying the right test and was not required to consider in addition or at all the local impact. Obviously shooting has a disturbing effect physically on the site. That is not the point. I consider that the German Dykes case settles the issue so as not even to leave it open as to what should be the proper approach, since the Advocate General had specifically put the matter at issue and his advice has been rejected (see paras to which I have referred). It is noteworthy that if the question of significance was restricted to the area concerned with the licence to kill, frequently an anomalous situation would arise in as much that, unless he was looking at the position overall, the Minister could, in my view, not properly be meeting the general objectives of the Birds Directive with regard to conservation of the species. What Article 6(2) in my opinion contemplates is the avoidance of activities within an SPA which will have a significant effect on the species overall in respect of its survival and this, in my opinion, is entirely in accordance with common sense. To determine the issue solely on a local basis would defeat the basic objective of the Directive, since it would lose sight of the primary object of the Directive and create *ad hoc* results.

In this respect the Minister undoubtedly had material before him in the shape of advice from SNH and in particular now has advice from the local officer (7/8), which although expressed in somewhat convoluted terms, appears to recognise that limited shooting is an acceptable means at least of ameliorating damage to crops which, in my opinion, is contemplated by the overall notion of prevention.

Accordingly in relation to the granting of any licences in the future, the Minister, in my opinion, is required if proposing to grant one in the context of Article 9, in an SPA, to consider in relation to Article 6(2) what impact such is likely to have on the population of the species in question overall, with particular reference to survival and reproduction and is entitled to determine that the granting of the licence is lawful if he is satisfied on the material before that no significant damage would occur against that perspective. In the context of the licences granted last year, such a conclusion is simple given the number of geese that it is proposed to shoot on the licence compared to the overall population. It could be regarded, so far from being significant, as *de minimis*.

That is sufficient to dispose of what I regard as the main point in this case which is of some importance, but I require to deal with the subsidiary position raised by counsel for the petitioner under Article 6(3). It was predicated upon the proposition that in the absence of a definition of the phrase "plan or project", a very wide or extensive meaning should be given to it to embrace any decision relating to the area which would result in some activity upon it and this covered the decision to grant a licence to shoot. He derived support from *Commission v France* 16 September 1999 (see 256/98) in the opinion of the Advocate General at paragraph 33. He submitted that a programme to cull birds, thus described as a plan or project was not directly related to the management of the site, since it was concerned with managing birds. It was, he submitted, likely to have a significant effect in relation to the local site and in these circumstances there was a need for an assessment as required by the Directive. Such had not been carried out and the decision to grant the licences was therefore unlawful.

Counsel for the respondent submitted in reply that the petitioners' definition of plan or project was far too wide. The proper approach was to restrict the definition at least to matters which could be generally described as development or use of the land if not necessarily restricted to what could be categorised as actual planning matters. This was plain he submitted on the face of the Directive but in any event was support by the opinion of the Advocate General in case C256/98 *Commission v France*, already cited, at paragraph 33 which is in the following terms:

"In the contexts of Article 6(3) the term "plan" must in my view be interpreted

extensively. The sites likely to be affected by such plans are by definition sites of Community importance which benefit for the protection regime established in accordance with Article 6(1) and (2)... It seems to me that the obligation *ratione materiae* to carry out a site assessment must therefore cover all development activities with the exception of those which are unlikely to have any significant effect..."

It is somewhat ironic that both parties rely upon the same case but in my opinion, the contention of the respondent must prevail. Counsel for the petitioner was forced to accept that his definition covered any activity on the ground and this to my mind goes far too far in considering the construction or definition of the words "plan or project". In my opinion, it is important to look at the context of 6(3) in the overall picture presented by the Directive and not least that it follow upon the general provisions of Article 6(2) which are much more important. The proper approach in my view, is to observe that in Article 6(2) there are general requirements to avoid what could be described as damage by any activity. In Article 6(3) there is a limiting but further inhibition that where the land is to be developed in any way which is quite separate, by definition, from the direct management of the site with regard to conservation, an assessment must be made as to the likely impact of the proposed development on that aspect, namely conservation. I also derive support from the form which the 1995 Regulations have implemented these requirements in as much that it has put them in Regulation 20, supplementary to the general requirements to implement Article 6(2) which are in Regulation 18. It is therefore proper, in my opinion, to regard Article 6(3) as a safety provision with regard to extraneous development of the land unrelated to its management as a special protection or conservation area.

On that basis, counsel for the petitioners' position is defeated without it being necessary to consider the further requirements namely firstly whether or not such a plan if thus defined i.e. to shoot geese is to be regarded as directly related to the management of the site. However, in my opinion, if it was to be regarded as a plan, it certainly must be related to the management of the site since it is concerned with the control and culling for conservation reasons, amongst others, of the geese, given that they must be provided with food and steps taken if possible to prevent them from destroying their own food supply.

Finally, in this respect if it had been necessary for me to determine whether or not the number of geese that were contemplated to be shot by the licences was likely to have a significant effect on the local site, in my opinion it would not, given the limited numbers involved.

In these circumstances, it is my opinion that the Minister was under no requirement in terms of the Birds Directive to apply his mind to the terms of Article 6(3) of the Habitat Directive, I note in passing that in part of the advice given to the Minister from SNH, an assumption was made by the writer that an assessment would be carried out. That advice was coming from a scientist and not from a lawyer and in any event, the Minister would not be bound to accept such advice. If he should have taken it into account as a matter of law that could have affected the validity of the decision, but I have consider otherwise for the reasons given.

In these circumstance, in my opinion, by not applying his mind to Article 6(3) the Minister was acting both properly in terms of the Birds Directive and lawfully in terms of the result.

That is sufficient to dispose of the matter but I should record that at various stages of the argument, counsel for the petitioners submitted that I should make a reference to the European Court of Justice in relation to certain questions, not least with the regard to the inter-relation of the Birds and Habitat Directives and as to the proper approach on the question of "significant disturbance". He urged upon me the well known passage from Lord Bingham in *R v International Stock Exchange of UK ex parte Else* 1993 Q.B. 534 an approach which I understand was recently endorsed by the First Division although I was not given a reference.

Suffice it say for this purpose that I do not find within this case an unresolved question of European law nor with respect to counsel for the petitioners do I find any difficulty in reaching the decisions I have on the construction of the Directives against the relevant authorities and as a matter of natural construction, I therefore feel under no compulsion or even pressure to make a

reference to the European Court of Justice and have not accordingly done so.

For these reasons, I consider that the petitioners have not relevantly constructed a case for the declarator he seeks and the petition will accordingly be dismissed.