

Case C-659/20

Request for a preliminary ruling

Date lodged:

4 December 2020

Referring court:

Nejvyšší správní soud (Czech Republic)

Date of the decision to refer:

25 November 2020

Applicant

ET

Defendant:

Ministerstvo životního prostředí

ORDER

The Nejvyšší správní soud (the Supreme Administrative Court, Czech Republic) has ruled [...] in the case of the Applicant: **ET**, residing at [...] Hradec Králové, [...] against the Defendant: **Ministerstvo životního prostředí** (the Ministry of the Environment), having its registered office at [...] Prague 10, against the Defendant's decision of 7 November 2016, ref. no. 1329/550/16-Ba, [...], in proceedings concerning the Applicant's appeal on a point of law challenging a judgment of the Krajský soud v Hradci Králové (the Regional Court in Hradec Králové, Czech Republic) of 30 May 2018, ref. no. 30 A 37/2017-35,

as follows:

- I.** The following questions are **hereby submitted** to the Court of Justice of the European Union for a preliminary ruling:
 - 1.** Does 'breeding stock', as defined by Commission Regulation (EC) No 865/2006 laying down detailed rules concerning the implementation of Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein, include specimens that are the parents of specimens bred

by a given breeder, even though that breeder never owned or kept them?

2. **If the answer to the first question is that such parent specimens do not constitute a part of the breeding stock, are competent bodies authorised to verify, in examining compliance with the condition set in Article 54(2) of Commission Regulation (EC) No 865/2006, consisting of the establishment of stock legally and, at the same time, in a manner not detrimental to the survival of wild specimens, the origin of those parent specimens and to infer on that basis whether the breeding stock has been established in accordance with the rules set out in Article 54(2) of the Regulation?**
3. **In examining compliance with the condition set out in Article 54(2) of Commission Regulation (EC) No 865/2006, consisting of the establishment of stock legally and, at the same time, in a manner not detrimental to the survival of wild specimens, can further circumstances of the case be taken into consideration (in particular, good faith in the transfer of the specimens and the legitimate expectation that trading in their potential offspring will be permitted, and potentially also the less stringent legislation applicable in the Czech Republic prior to the country's accession to the European Union)?**

[...]

[OR 2] **Grounds :**

I. Subject of the Proceedings

[1] The Applicant is a parrot breeder. Within the course of his activities, he applied, on 21 January 2015, for an exemption from the prohibition on trading for five specimens of the hyacinth macaw (*Anodorhynchus hyacinthinus*) bred by the Applicant and born in 2014. The administrative body did not grant his application, based on an opinion of a scientific authority.

[2] In the course of the exemption proceedings, the administrative body and the scientific authority found the following information concerning the origin of the parrots subject to evaluation. Their grandparents were imported into the Czech Republic by FU in June 1993 in non-standard circumstances. They were imported by a national of Uruguay, together with other parrots, to Bratislava, from where that national travelled with FU by car to the Czech Republic. At the border, the car was unexpectedly stopped by customs authorities and the grandparent pair was subsequently confiscated from FU by an administrative decision. That administrative decision was, however, overturned by the Vrchní soud v Praze (High Court in Prague, Czech Republic) in 1996. The administrative body subsequently stopped the proceedings and returned the parrots to FU. FU then lent

the grandparent pair to GV, who bred the parental pair from them in 2000 – they are siblings from the same brood (after the chicks were bred, GV returned the grandparent pair to FU, who in turn handed them over to the Zlín Zoo). The Applicant obtained the parental pair from GV (the civil acquisition title is not specified in the administrative documentation, but the validity of the transfer of ownership has not been impugned in any way).

[3] The scientific authority assessed the acquisition of the parrots by the Applicant in 2000 as the establishment of breeding stock and examined whether the establishment violated, in particular, Article 54(2) of Commission Regulation (EC) No 865/2006 laying down detailed rules concerning the implementation of Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein, pursuant to which breeding stock must be *'established in accordance with the legal provisions applicable to it at the time of acquisition and in a manner not detrimental to the survival of the species concerned in the wild'*. In examining compliance with these conditions, the scientific authority concluded that it was not satisfied that the stock had been established in accordance with the legal provisions and, hence, it did not agree to the granting of an exemption. This was because there were many discrepancies in the registration documents of the grandparent specimens from 1998, in particular, the year of acquisition – 1996 – did not correspond to the code stated in the registration documents, because it was assigned only to specimens obtained prior to 1992, and furthermore, no information about the origin of the specimens was stated. In that respect, the scientific authority added that it had expressed its objection to the granting of an exemption on several other occasions for offspring of the same grandparent pair.

[4] The decision of the administrative body was based on this opinion of the scientific authority and did not grant the exemption. The Applicant appealed that decision. In particular, he claimed an incorrect definition of breeding stock. According to him, breeding stock comprises only the parental pair and the offspring and, hence, the administrative authority should not have examined the origin of the grandparents at all. The appellate administrative authority (which is the Defendant pursuant to national legislation) refused that line of argument, considering the method of acquisition of the first reproducing pair to be key for evaluating the [manner of] establishment of the breeding stock. The Applicant has not proven the origin of that pair and, hence, it was impossible to grant the exemption.

[5] The Applicant subsequently challenged the Defendant's decision by an application submitted to the Regional Court in Hradec Králové.

[6] The Regional Court set the application aside. First and foremost, it stated that trade in parrots of the genus *Anodorhynchus* is prohibited and may only be permitted subject to exceptional circumstances. The conditions for granting such exemptions are set out in Article 54 of Commission Regulation (EC) No 865/2006. All the conditions must be **[OR 3]** met at the same time and the

administrative body must be satisfied that they have been met by the Applicant, i.e., the facts of the case and the legal aspects must all be entirely certain. In the present case, the subject of the dispute was compliance with the condition set out in Article 54(2) of the Regulation, pursuant to which the Applicant must prove that: (1) the breeding stock was established in accordance with the legal provisions applicable to it at the time of acquisition; and (2) that it was established in a manner not detrimental to the survival of the species concerned in the wild. According to the Court, the Applicant did not meet either of the two sub-conditions, as the grandparent pair was – according to extensive findings of the administrative body – imported into the Czech Republic in June 1993, in wholly non-standard circumstances. At that time, the CITES Convention was already in force in the Czech Republic (the Czechoslovak Federal Republic acceded to it on 18 May 1992), and it had been implemented nationally since 1 June 1992 by Zákon č. 114/1992 Sb., o ochraně přírody a krajiny (Law No 114/1992 on the protection of nature and landscape) (from 1 April 1997 by Zákon č. 16/1997 Sb., o podmínkách dovozu a vývozu ohrožených druhů (Law No 16/1997 on the conditions for the import and export of endangered species)). According to the legislation implementing the CITES Convention, an examination of the origin of the breeding stock is permissible back to the grandparent pair. The breeding stock as defined by Commission Regulation (EC) 865/2006 consists of all three generations, because they are animals in a breeding operation in the Czech Republic that are used for reproduction.

[7] The Applicant lodged an appeal on a point of law against the decision of the Regional Court before the Supreme Administrative Court. He deemed incorrect the legal opinion of the Regional Court that breeding stock is comprised of the specimens concerned, their parents and their grandparents, because they are animals in a breeding operation in the Czech Republic that are used for reproduction. From that the court inferred that administrative bodies are authorised to seek a document of origin of the grandparent pair. According to the Applicant, this interpretation places an undue evidential burden on him. Above all, it is incorrect, because, according to the Regulation quoted, breeding stock includes all animals located in the Applicant's operation who are used for reproduction (and not their ancestors kept in other operations or by other breeders, such as the grandparents). The Applicant inferred that conclusion from Article 1(3) of Commission Regulation (EC) No 865/2006, according to which *'breeding stock' means all the animals in a breeding operation that are used for reproduction*. According to the Applicant, a breeding operation referred to in that definition may mean any breeding operation in the Czech Republic, but always only one specific operation. He himself acquired the parental pair legally, and hence, an undue intervention in his right to property and in his legitimate expectations has taken place.

[8] In its response to the appeal on a point of law, the Defendant refuted the Applicant's conclusions as to the interpretation of breeding stock. It pointed to the wording of Article 54(2) of Commission Regulation (EC) No 865/2006, which uses the term 'establishment' of breeding stock, in accordance with the legal

provisions applicable at the time concerned. The term ‘establishment’ clearly refers to the past and clearly points to the beginning of a breeding line. Because it was highly likely that the grandparents of the parrots under examination were obtained illegally, the administrative body, in consultation with the scientific authority, could not be satisfied that the manner in which the breeding stock was established had been legal. Furthermore, the Defendant stated that the definition of stock is secondary; the manner of establishment of the stock is key.

[9] With respect to the burden of proof, the Defendant further pointed to the general prohibition on trade with these animals, due to which any exemptions must be interpreted restrictively. An owner need not obtain documents concerning the origin of grandparents for breeding; this obligation arises only once he intends to trade in a subsequent generation. The opinion of a scientific authority is key for the granting of an exemption and, according to established practice, the authority examines the origin of the grandparents, as is standard practice in the EU. The different approach advanced by the Applicant would result in an easy legalisation of stock based on specimens obtained from the wild. They could easily give rise to the production of animals whose further generations automatically could be traded. So far as concerns the purpose of the CITES Convention, the Defendant did recognise a certain benefit of legal breeding (as it reduces pressure on the capture of specimens in the wild); nevertheless, such stocks must be legally established. As for the right to property, the Defendant noted that that is not the primary concern and it did not question the conclusion concerning the legal ownership of the grandparents of the parrots currently being evaluated or those parrots themselves. The Applicant’s right to property remains unprejudiced; it is only restricted by certain conditions.

[OR 4] **II. Applicable European Union Legislation and National Legislation**

[10] The fundamental principles of environmental protection in the EU are set out in primary legislation. Pursuant to Article 191(2) of the Treaty on the Functioning of the European Union, EU policy on the environment shall ‘aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based **on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source** and that the polluter should pay’.

[11] Nevertheless, EU legislation adopts the rules for trade in endangered species from the CITES Convention. The basic rules of the CITES Convention are transposed by Council Regulation (EC) No 338/97 (**‘Regulation on the protection of wild species’**). Pursuant to Article 8(1) of the Regulation, trade in the animals listed in Annex A is prohibited (pursuant to Article 3(1) of the Regulation, Annex A corresponds to Annex I to the CITES Convention). Parrots of the genus *Anodorhynchus* are such animals.

[12] This prohibition is, however, not absolute and an exemption may be granted on the basis of one of the grounds listed in Article 8(3) of the Regulation on the protection of wild species. The exemption listed under (d) of that provision is key to the questions submitted:

‘3. In accordance with the requirements of other Community legislation on the conservation of wild fauna and flora, exemption from the prohibitions referred to in paragraph 1 may be granted by issuance of a certificate to that effect by a management authority of the Member State in which the specimens are located, on a case-by-case basis where the specimens:

(...)

(d) are captive-born and bred specimens of an animal species or artificially propagated specimens of a plant species or are parts or derivatives of such specimens (...)’

[13] Detailed conditions for granting such exemptions are set in Commission Regulation (EC) No 865/2006 laying down detailed rules concerning the implementation of Council Regulation (EC) No 338/97 (**‘Implementing Regulation’**). The granting of an exemption under Article 8(3) of the Regulation on the protection of wild species is specified in Article 59(2) of the Implementing Regulation:

‘2. The exemption for specimens referred to in Article 8(3)(d) of Regulation (EC) No 338/97 shall be granted only if the applicant has satisfied the competent management authority, the latter having consulted a competent scientific authority, that the conditions referred to in Article 48 of this Regulation are met and that the specimens concerned were born and bred in captivity or artificially propagated in accordance with Articles 54, 55 and 56 of this Regulation.’

[14] In connection with that provision, Article 54 of the Implementing Regulation especially is of further relevance in the present case (Article 48 sets out only general provisions concerning exemption certificates, Article 55 gives authorities the right to examine the origin of specimens by tissue testing, and Article 56 pertains to plants), in particular Article 54(2), in respect of which Czech administrative authorities were not, in their opinion, satisfied that the conditions they had set had been met:

‘Article 54

Specimens born and bred in captivity of animal species

Without prejudice to Article 55, a specimen of an animal species shall be considered to be born and bred in captivity only if a competent management authority, in consultation with a competent scientific authority of the Member State concerned, is satisfied that the following criteria are met:

1. the specimen is, or is derived from, offspring born or otherwise produced in a controlled environment of either of the following:

(a) parents that mated or had gametes otherwise transferred in a controlled environment, if reproduction is sexual;

(b) parents that were in a controlled environment when development of the offspring began, if reproduction is asexual;

[OR 5] 2. *the breeding stock was established in accordance with the legal provisions applicable to it at the time of acquisition and in a manner not detrimental to the survival of the species concerned in the wild;*

3. the breeding stock is maintained without the introduction of specimens from the wild, except for the occasional addition, in accordance with the legal provisions applicable and in a manner not detrimental to the survival of the species concerned in the wild, of animals, eggs or gametes exclusively for one or more of the following purposes:

(a) to prevent or alleviate deleterious inbreeding, the magnitude of such addition being determined by the need for new genetic material;

(b) to dispose of confiscated animals in accordance with Article 16(3) of Regulation (EC) No 338/97;

(c) |exceptionally, for use as breeding stock;

4. the breeding stock has itself produced second or subsequent generation offspring (F2, F3 and so on) in a controlled environment, or is managed in a manner that has been demonstrated to be capable of reliably producing second-generation offspring in a controlled environment.'

[15] A definition of breeding stock is set out in Article 1(3) of the Implementing Regulation: *"breeding stock" means all the animals in a breeding operation that are used for reproduction'*.

[16] National legislation applies to the case only to a limited degree and primarily it determines the administrative bodies that implement the EU law described above. The bodies are determined by Zákon č. 100/2004 Sb., o obchodování s ohroženými druhy (Law No 100/2004 on trade in endangered species). Pursuant to Paragraph 3(3) of the Law, the role of the administrative body shall, for the purpose of the granting of an exemption from the prohibition on trade activities, be performed by the regional authority. Pursuant to Paragraph 27 of the Law, the role of the scientific authority as defined by the Regulations referred to above and the CITES Convention shall be performed in the Czech Republic by the Agentura ochrany přírody a krajiny ČR (the Nature Conservation Agency of the Czech Republic), an organisational unit of the state established by the Ministerstvo životního prostředí (the Ministry of the Environment). Hence, the regional

authority fulfilled the role of an administrative body described in the previous part and, on the basis of an opinion of the Nature Conservation Agency of the Czech Republic, it rendered a first degree administrative decision. Pursuant to general rules of Czech administrative procedure, such a decision may be appealed by an appeal lodged with the Ministry of the Environment, which acted as the appellate administrative body and represented the administrative bodies before the administrative courts.

III. Analysis of the questions submitted for a preliminary ruling

[17] In deliberating on the appeal on a point of law, the Supreme Administrative Court found that the case primarily concerns interpretation of EU law, that no Court of Justice case-law exists on the issue, and it is not an issue that could be clearly resolved by a contextual interpretation of EU law without leaving any scope for reasonable doubt in respect of the interpretation (compare judgment of the Court of Justice of 6 October 1982, [CILFIT], C-283/81, EU:C:1982:335). Hence, the Supreme Administrative Court is obliged to submit a question to the Court of Justice for a preliminary ruling, in accordance with Article 267 of the Treaty on the Functioning of the European Union.

[18] At the outset, the Supreme Administrative Court noted that there was no dispute between the parties as to the problematic origin of the grandparent generation or to the birth of the parental pair in 2000 in captivity in the Czech Republic and its legal transfer to the Applicant. In the Defendant's view, however, the problematic origin of the grandparent pair 'burdens' any future generations, whereas according to the Applicant, the 'spell' was broken with the transfer to his own stock. On the other hand, the Applicant does not challenge the legal evaluation according to which the grandparent pair is subject to the CITES Convention and related legislation, or the adverse conclusions arising from the application of those regulations to the grandparent pair. The Applicant does, however, take the view that those conclusions cannot be related to his specimens, for two main reasons: the first is the interpretation of the term breeding stock, which according to him includes only his specimens, and hence, administrative bodies should not have considered the origins of the grandparent pair at all. The second reason is his legitimate expectations. He acquired the specimens in a due manner [OR 6] and he himself had no doubts as to the origin of the grandparent pair at the time he acquired the parrots, as they had been returned to their then-owner on the basis of a court decision.

[19] The interpretation of the term breeding stock led the Supreme Administrative Court to raise the first part of the issue referred for a preliminary ruling. The Applicant argues using a linguistic interpretation of Article 1(3) of the Implementing Regulation, according to which it consists of all the animals in a breeding operation that are used for reproduction. Conversely, the Defendant points to the general prohibition on trade in the parrots and on the adverse impact in the form of easy legalisation of stocks based on questionably imported specimens (all that would be required is 'breaking' the line by transferring the

offspring). The Supreme Administrative Court considers the definition of breeding stock to be relatively clear and, as regards this step, it tended more towards the Applicant's interpretation. On the other hand, that court does not attribute an excessive value to the significance of the issue of the definition of breeding stock (more on that below in the analysis of the other questions referred). It is, however, necessary to draw attention to the structure of the individual questions referred. If the Court of Justice accepted a broader definition of breeding stock, including in it the grandparent pair of 'dubious' origin, the second question becomes meaningless. On the other hand, that answer would not reduce the importance of the third question. [...]

[20] Conversely, if the Court of Justice accepted the narrower variant of the interpretation of breeding stock, not including in it the grandparent pair, it would be necessary to answer the second question referred. The administrative bodies refused to grant an exemption to the Applicant on the basis of an opinion of a scientific authority with reference to Article 54(2) of the Implementing Regulation, according to which the 'establishment' of breeding stock is examined. The Applicant links the establishment to the obtaining of a specimen from the parental generation which took place in accordance with the requirements set out in Article 54(2) of the Implementing Regulation (legally and in a manner not detrimental to the survival of the species concerned in the wild). The Defendant does not question that the Applicant obtained the parental pair in a due manner. But, in its opinion, the term 'establishment' must be interpreted as the beginning of the breeding line.

[21] The Supreme Administrative Court found two possible interpretations. First, the term 'establishment' of breeding stock may be interpreted with a view to the fact that it evokes an examination of the line of ancestry of the parrots under examination. This interpretation could potentially stand even in a more complex interpretation, as it prevents easy legalisation of 'questionable' stocks, for example, by means of (a potentially bogus) transfer. That would be the case in a situation when a breeder transfers specimens to another person who would breed subsequent generations (actually, or would only act as a 'front' owner), thereby breaking the 'spell' of their origin. On the other hand, present legislation may be used to counter this interpretation. Currently, it is impossible to duly acquire specimens of the animals listed in Annex A to the Regulation on the protection of wild species in the European Union without obtaining an exemption. A 'bogus' transfer is therefore not possible in the EU, because it would not obtain a decision on an exemption. Hence, an examination of the beginning of a breeding line is of no practical significance in the EU, and from the systematic viewpoint, the interpretation linking 'establishment' to a specific stock can be consented to more easily. This approach would result in the unquestionable advantage of addressing atypical situations such as that which arose in the present case. The Applicant legally acquired parrots prior to the Czech Republic's accession to the EU when no exemption was required for a national transfer, thereby gaining a legitimate expectation which the contrary interpretation would disrupt. Furthermore, if the first interpretative option were to apply, it would be necessary also to examine

how far into the past the acquisition of stock should be examined, which may place unrealistic requirements on owners of protected animals. After all, the present case concerns a situation when the probably illegal obtaining of the grandparent pair occurred more than 20 years prior to the birth of the specimens currently examined, and subsequently, both the grandparent and the parent pairs were kept legally.

[22] The third part of the issue referred presents the dilemma whether individual circumstances may be considered and, if so, of what type. It is undisputed between the Applicant and the administrative bodies that the present case did not concern a ‘bogus’ transfer and that the acquisition of the parental pair in 2000 was legal. It must be noted in this context that the CITES Convention did apply in the Czech Republic at that time [OR 7] and that it was implemented by Law No 16/1997 on the conditions for the import and export of endangered species, but that law did not require issuance of certificates pursuant to the CITES convention in the event of a national transfer. In that case, ‘only’ an official inspection of the specimens and their registration took place. That national legislation was in line with the CITES Convention which focuses primarily on regulating international trade. Nevertheless, Article XIV of the CITES Convention does permit the parties to adopt stricter regulation, which is the case of stricter EU regulation that requires the issuance of a certificate even for a transfer within the EU and within an individual Member State. However that regulation has been in force in the Czech Republic since its EU accession, on 1 May 2004, while the transfer of the parental pair took place in 2000.

[23] The Applicant therefore could have had the legitimate expectation since 2000 that he would be able to trade in any offspring at least within the Czech Republic, but probably also internationally (the approach of the authorities at that time gave rise to no uncertainty as to the potential granting of an exemption under the CITES Convention in respect of the offspring). The return of the grandparent pair to its then-holder in 1996 on the basis of a decision of an administrative court also plays an important role. Furthermore, the Applicant points out that his breeding of the parrots has a positive environmental impact. He is of the opinion that the sale of specimens bred by him in captivity would reduce market demand for illegal purchases of specimens captured in the wild. Conversely, the Defendant draws attention to the general prohibition on trade in animals of the said genus, embodied in Article 8(1) of the Regulation on the protection of wild species, and hence the need to interpret the exemptions restrictively.

[24] If an exemption is not granted, protection of the right to property under Article 17 of the Charter of Fundamental Rights of the EU must also be taken into consideration. Essentially, of the entire contents of the right to property, the Applicant is left only with the right to possess the parrots. He may also hold their offspring, but he cannot dispose of them legally. Ultimately, there is no dispute between the Applicant and the administrative bodies as to these strict legal consequences of the non-granting of the exemption. With a view to the special circumstances described above, however, the Applicant considers them unduly

strict and, in his view, these circumstances should be considered in combination with a reduction of demand for parrots from the wild that the 'placement on the market' of his parrots would cause. Conversely, the Defendant considers the strict impact of the regulation on the Applicant to constitute the due functioning of the applicable legislation.

[...]

WORKING DOCUMENT