

JUDGMENT OF THE COURT

11 July 1996 *

In Case C-44/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the House of Lords (United Kingdom) for a preliminary ruling in the case, pending before that court, of

Regina

v

Secretary of State for the Environment

ex parte **Royal Society for the Protection of Birds,**

Intervener: **The Port of Sheerness Limited,**

on the interpretation of Articles 2 and 4 of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1),

* Language of the case: English.

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, D. A. O. Edward, J.-P. Puissochet and G. Hirsch (Presidents of Chambers), G. F. Mancini, J. C. Moitinho de Almeida, P. J. G. Kapteyn, C. Gulmann (Rapporteur), J. L. Murray, P. Jann and M. Wathelet, Judges,

Advocate General: N. Fennelly,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- the Royal Society for the Protection of Birds, by R. Gordon QC and R. Buxton, Solicitor;
- the Port of Sheerness Limited, by S. Isaacs QC and C. Lewis, Barrister, instructed by C. Holme, Solicitor;
- the United Kingdom Government, by J. E. Collins, Assistant Treasury Solicitor, acting as Agent, assisted by S. Richards and A. Lindsay, Barristers;
- the French Government, by C. de Salins, Assistant Director, Directorate for Legal Affairs, Ministry of Foreign Affairs, and J.-L. Falconi, Secretary for Foreign Affairs in the same Directorate, acting as Agents;
- the Commission, by C. O'Reilly and M. van der Woude, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing oral argument from the Royal Society for the Protection of Birds, represented by R. Gordon and R. Buxton, the Port of Sheerness Limited, represented by S. Isaacs, the United Kingdom Government, represented by J. E. Collins, S. Richards and A. Lindsay, the French Government, represented by R. Nadal, Deputy Secretary for Foreign Affairs, Directorate for Legal Matters, Ministry of Foreign Affairs, acting as Agent, and the Commission of the European Communities, represented by C. O'Reilly, at the hearing on 7 February 1996,

after hearing the Opinion of the Advocate General at the sitting on 21 March 1996,

gives the following

Judgment

1 By order of 9 February 1995, received at the Court on 24 February 1995, the House of Lords referred to the Court of Justice for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Articles 2 and 4 of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103 p. 1, hereinafter 'the Birds Directive').

2 Those questions were raised in proceedings between an association for the protection of birds, the Royal Society for the Protection of Birds (hereinafter 'the RSPB'), and the Secretary of State for the Environment (hereinafter 'the Secretary of State') concerning a decision designating a special protection area for the protection of wild birds.

- 3 The Birds Directive, which covers all species of birds naturally occurring in the wild in the European territory of the Member States to which the Treaty applies, provides, in Article 2, that the Member States are to take all necessary measures to maintain the population of all those species of birds at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements.
- 4 According to Article 3 of the Birds Directive, the Member States, having regard to the requirements mentioned in Article 2, are to take all necessary measures to preserve, maintain or re-establish a sufficient diversity and area of habitats for all the protected species.
- 5 Pursuant to Article 4(1) of that directive, the species mentioned in Annex I are to be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution. In particular, the Member States are to classify the most suitable territories in terms of number and size as special protection areas for the conservation of those species in the geographical sea and land area where the Directive applies.
- 6 According to Article 4(2), 'Member States shall take similar measures for regularly occurring migratory species not listed in Annex I, bearing in mind their need for protection in the geographical sea and land area where this directive applies, as regards their breeding, moulting and wintering areas and staging posts along their migration routes. To this end, Member States shall pay particular attention to the protection of wetlands and particularly to wetlands of international importance'.
- 7 Finally, according to Article 4(4), '[I]n respect of the areas referred to in paragraphs 1 and 2 above, Member States shall take appropriate steps to avoid pollu-

tion or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this article. Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats’.

8 Council Directive 92/43/EEC of 21 May 1992 on the conservation of the natural habitats of wild fauna and flora (OJ 1992 L 206, p. 7, hereinafter ‘the Habitats Directive’), to be implemented in the United Kingdom by June 1994, provides in Article 7 that the obligations under Article 6(2), (3) and (4) are to replace any obligations arising under the first sentence of Article 4(4) of the Birds Directive in respect of areas classified pursuant to Article 4(1) or similarly recognized under Article 4(2) of that directive. Article 6(2), (3) and (4) of the Habitats Directive is worded as follows:

‘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 as 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 effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site’s conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

9 The United Kingdom did not transpose the Habitats Directive until October 1994.

10 On 15 December 1993, the Secretary of State decided to designate the Medway Estuary and Marshes as a Special Protection Area (hereinafter 'SPA'). At the same time, he decided to exclude from it an area of about 22 hectares known as Lappel Bank.

11 According to the order for reference, the Medway Estuary and Marshes are an area of wetland of international importance covering 4 681 hectares on the north coast of Kent and listed under the Ramsar Convention. They are used by a number of wildfowl and wader species as a breeding and wintering area and as a staging post during spring and autumn migration. The site also supports breeding populations of the avocet and the little tern, which are listed in Annex I to the Birds Directive.

- 12 Lappel Bank is an area of inter-tidal mudflat immediately adjoining, at its northern end, the Port of Sheerness and falling geographically within the bounds of the Medway Estuary and Marshes. Lappel Bank shares several of the important ornithological qualities of the area as a whole. Although it does not support any of the species referred to in Article 4(1) of the Birds Directive, some of the bird species of the area are represented in significantly greater numbers than elsewhere in the Medway SPA. Lappel Bank is an important component of the overall estuarine ecosystem and the loss of that inter-tidal area would probably result in a reduction in the wader and wildfowl populations of the Medway Estuary and Marshes.
- 13 The Port of Sheerness is at present the fifth largest in the United Kingdom for cargo and freight handling. It is a flourishing commercial undertaking, well located for sea traffic and access to its main domestic markets. The Port, which is also a significant employer in an area with a serious unemployment problem, plans extended facilities for car storage and value added activities on vehicles and in the fruit and paper product market, in order better to compete with continental ports offering similar facilities. Lappel Bank is the only area into which the Port of Sheerness can realistically envisage expanding.
- 14 Accordingly, taking the view that the need not to inhibit the viability of the port and the significant contribution that expansion into the area of Lappel Bank would make to the local and national economy outweighed its nature conservation value, the Secretary of State decided to exclude that area from the Medway SPA.
- 15 The RSPB applied to the Divisional Court of the Queen's Bench Division to have the Secretary of State's decision quashed on the ground that he was not entitled, by virtue of the Birds Directive, to have regard to economic considerations when classifying an SPA. The Divisional Court found against the RSPB. On appeal by the RSPB, the Court of Appeal upheld that judgment. The RSPB therefore appealed to the House of Lords.

16 Uncertain as to how the directive should be interpreted, the House of Lords stayed proceedings pending a preliminary ruling from the Court of Justice on the following questions:

- ‘1. Is a Member State entitled to take account of the considerations mentioned in Article 2 of Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds in classification of an area as a Special Protection Area and/or in defining the boundaries of such an area pursuant to Article 4(1) and/or 4(2) of that Directive?

2. If the answer to Question 1 is “no”, may a Member State nevertheless take account of Article 2 considerations in the classification process in so far as:
 - (a) they amount to a general interest which is superior to the general interest which is represented by the ecological objective of the Directive (i. e. the test which the European Court has laid down in, for example, *Commission v Germany* (“Leybucht Dykes”) Case 57/89, for derogation from the requirements of Article 4(4)); or

 - (b) they amount to imperative reasons of overriding public interest such as might be taken into account under Article 6(4) of Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora?’

The first question

17 The point of this question is whether Article 4(1) or (2) of the Birds Directive is to be interpreted as meaning that a Member State is authorized to take account of the economic requirements mentioned in Article 2 thereof when designating an SPA and defining its boundaries.

- 18 As a preliminary point, it must be borne in mind that, according to the ninth recital in the preamble to the Birds Directive, 'the preservation, maintenance or restoration of a sufficient diversity and area of habitats is essential to the conservation of all species of birds [covered by the directive]', that 'certain species of birds should be the subject of special conservation measures concerning their habitats in order to ensure their survival and reproduction in their area of distribution', and, finally, that 'such measures must also take account of migratory species'.
- 19 That recital is formally reflected in Articles 3 and 4 of the directive. In paragraph 23 of its judgment in Case C-355/90 *Commission v Spain* [1993] ECR I-4221 (hereinafter '*Santoña Marshes*') the Court pointed out that the first of those provisions imposes obligations of a general character, namely the obligation to ensure a sufficient diversity and area of habitats for all the birds referred to in the directive, while the second contains specific obligations with regard to the species of birds listed in Annex I and the migratory species not listed in that annex.
- 20 According to the United Kingdom Government and the Port of Sheerness Limited, Article 4 cannot be considered in isolation from Article 3. They state that Article 4 provides, in relation to certain species of particular interest, for the specific application of the general obligation imposed by Article 3. Since the latter provision allows account to be taken of economic requirements, the same should apply to Article 4(1) and (2).
- 21 The French Government reaches the same conclusion, observing that, when an SPA is created, the Member States take account of all the criteria mentioned in Article 2 of the Birds Directive, which is general in scope, and, therefore, *inter alia*, of economic requirements.
- 22 Those arguments cannot be upheld.

- 5 It must be noted first that Article 4 of the Birds Directive lays down a protection regime which is specifically targeted and reinforced both for the species listed in Annex I and for migratory species, an approach justified by the fact that they are, respectively, the most endangered species and the species constituting a common heritage of the Community (see Case C-169/89 *Van den Burg* [1990] ECR I-2143, paragraph 11).
- 24 Whilst Article 3 of the Birds Directive provides for account to be taken of the requirements mentioned in Article 2 for the implementation of general conservation measures, including the creation of protection areas, Article 4 makes no such reference for the implementation of special conservation measures, in particular the creation of SPAs.
- 25 Consequently, having regard to the aim of special protection pursued by Article 4 and the fact that, according to settled case-law (see in particular Case C-435/92 *APAS v Préfets de Maine-et-Loire and de la Loire Atlantique* [1994] ECR I-67, paragraph 20), Article 2 does not constitute an autonomous derogation from the general system of protection established by the directive, it must be held (see paragraphs 17 and 18 of *Santoña Marshes*) — that the ecological requirements laid down by the former provision do not have to be balanced against the interests listed in the latter, in particular economic requirements.
- 26 It is the criteria laid down in paragraphs (1) and (2) of Article 4 which are to guide the Member States in designating and defining the boundaries of SPAs. It is clear from paragraphs 26 and 27 of *Santoña Marshes* that, notwithstanding the divergences between the various language versions of the last subparagraph of Article 4(1), the criteria in question are ornithological criteria.
- 27 In view of the foregoing, the answer to the first question must be that Article 4(1) or (2) of the Birds Directive is to be interpreted as meaning that a Member State is not authorized to take account of the economic requirements mentioned in Article 2 thereof when designating an SPA and defining its boundaries.

The second question

The first part of the second question

- 28 By the first part of the second question, the national court seeks to ascertain whether Article 4(1) or (2) of the Birds Directive must be interpreted as allowing a Member State, when designating an SPA and defining its boundaries, to take account of economic requirements as constituting a general interest superior to that represented by the ecological objective of that directive.
- 29 In its judgment in Case C-57/89 *Commission v Germany* [1991] ECR I-883, paragraphs 21 and 22 (hereinafter '*Leybucht Dykes*'), the Court held that the Member States may, in the context of Article 4(4) of the Birds Directive, reduce the extent of a SPA only on exceptional grounds, being grounds corresponding to a general interest superior to the general interest represented by the ecological objective of the directive. It was held that economic requirements cannot be invoked in that context.
- 30 It is also clear from paragraph 19 of *Santoña Marshes* that, in the context of Article 4 of that directive, considered as a whole, economic requirements cannot on any view correspond to a general interest superior to that represented by the ecological objective of the directive.
- 31 Accordingly, without its being necessary to rule on the possible relevance of the grounds corresponding to a superior general interest for the purpose of classifying an SPA, the answer to the first part of the second question must be that Article 4(1) or (2) of the Birds Directive is to be interpreted as meaning that a Member State may not, when designating an SPA and defining its boundaries, take account of economic requirements as constituting a general interest superior to that represented by the ecological objective of that directive.

The second part of the second question

- 32 By the second part of the second question, the House of Lords asks essentially whether Article 4(1) or (2) of the Birds Directive is to be interpreted as meaning that a Member State may, when designating an SPA and defining its boundaries, take account of economic requirements to the extent that they reflect imperative reasons of overriding public interest of the kind referred to in Article 6(4) of the Habitats Directive.
- 33 The United Kingdom Government considers that that question is relevant only to cases of classification decisions made after the expiry of the period for transposition of the Habitats Directive. Since that is not the case in the main proceedings, it considers that it is unnecessary to answer the question.
- 34 It is well settled that it is for the national courts alone, before which the proceedings are pending and which will be responsible for the eventual judgment, to determine, having regard to the particular features of each case, both the need for a preliminary ruling to enable them to give judgment and the relevance of the questions which they refer to the Court. A request for a preliminary ruling from a national court may be rejected only if it is clear that the interpretation of Community law requested bears no relation to the true nature of the case or the subject-matter of the main action (see in particular Case C-129/94 *Ruiz Barnáldez* [1996] ECR I-1829, paragraph 7). That is, however, not the case in the main proceedings.
- 35 Consequently, it is necessary to examine the second part of the second question submitted by the national court.
- 36 It is important first to bear in mind that Article 7 of the Habitats Directive provides in particular that the obligations arising under Article 6(4) thereof are to apply, in place of any obligations arising under the first sentence of Article 4(4) of

the Birds Directive, to the areas classified under Article 4(1) or similarly recognized under Article 4(2) of that directive as from the date of implementation of the Habitats Directive or the date of classification or recognition by a Member State under the Birds Directive, whichever is the later.

37 As the Commission submits in its observations, Article 6(4) of the Habitats Directive, as inserted in the Birds Directive, has, following *Leybucht Dykes* where the point in issue was the reduction of an area already classified, widened the range of grounds justifying encroachment upon SPAs by expressly including therein reasons of a social or economic nature.

38 Thus, the imperative reasons of overriding public interest which may, pursuant to Article 6(4) of the Habitats Directive, justify a plan or project which would significantly affect an SPA in any event include grounds relating to a superior general interest of the kind identified in *Leybucht Dykes* and may where appropriate include grounds of a social or economic nature.

39 Next, although Article 6(3) and (4) of the Habitats Directive, in so far as it amended the first sentence of Article 4(4) of the Birds Directive, established a procedure enabling the Member States to adopt, for imperative reasons of overriding public interest and subject to certain conditions, a plan or a project adversely affecting an SPA and so made it possible to go back on a decision classifying such an area by reducing its extent, it nevertheless did not make any amendments regarding the initial stage of classification of an area as an SPA referred to in Article 4(1) and (2) of the Birds Directive.

40 It follows that, even under the Habitats Directive, the classification of sites as SPAs must in all circumstances be carried out in accordance with the criteria permitted under Article 4(1) and (2) of the Birds Directive.

- 41 Economic requirements, as an imperative reason of overriding public interest allowing a derogation from the obligation to classify a site according to its ecological value, cannot enter into consideration at that stage. But that does not, as the Commission has rightly pointed out, mean that they cannot be taken into account at a later stage under the procedure provided for by Article 6(3) and (4) of the Habitats Directive.
- 42 The answer to the second part of the second question must therefore be that Article 4(1) or (2) of the Birds Directive is to be interpreted as meaning that a Member State may not, when designating an SPA and defining its boundaries, take account of economic requirements which may constitute imperative reasons of overriding public interest of the kind referred to in Article 6(4) of the Habitats Directive.

Costs

- 43 The costs incurred by the Governments of the French Republic and the United Kingdom and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions submitted to it by the House of Lords, by order of 9 February 1995, hereby rules:

1. Article 4(1) or (2) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds is to be interpreted as meaning that a Member

State is not authorized to take account of the economic requirements mentioned in Article 2 thereof when designating a Special Protection Area and defining its boundaries.

2. Article 4(1) or (2) of Directive 79/409 is to be interpreted as meaning that a Member State may not, when designating a Special Protection Area and defining its boundaries, take account of economic requirements as constituting a general interest superior to that represented by the ecological objective of that directive.

3. Article 4(1) or (2) of Directive 79/409 is to be interpreted as meaning that a Member State may not, when designating a Special Protection Area and defining its boundaries, take account of economic requirements which may constitute imperative reasons of overriding public interest of the kind referred to in Article 6(4) of Directive 92/43/EEC of 21 May 1992 on the conservation of the natural habitats of wild fauna and flora.

Rodríguez Iglesias

Edward

Puissochet

Hirsch

Mancini

Moitinho de Almeida

Kapteyn

Gulmann

Murray

Jann

Wathelet

Delivered in open court in Luxembourg on 11 July 1996.

R. Grass

G. C. Rodríguez Iglesias

Registrar

President