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Case Report: C-118/94: Wild Birds

Case C-118/94: Associazione Italiana per il World Wildlife Fund, Ente Nazionale per la Protezione Animali, Lega per l'Ambiente Comitato Regionale, Lega Anti-Vivisezione Delegazione Regionale and others and Regione Veneto: Directive 79/409/EEC (Wild Birds) (not yet reported)

Background

By order of 27 May 1993, received at the Court on 21 April 1994, the *Tribunale Amministrativo per il Veneto* (Regional Administrative Court for the Veneto Region) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Article 9 of Council Directive 79/409 on the conservation of wild birds (OJ 1979 No L 103/1).

The question was raised in proceedings brought by Associazione Italiana per il World Wildlife Fund ("WWF Italiana") and other associations for the protection of nature ("the applicants") against the Regione Veneto, supported by the Federazione Italiana della Caccia (Italian Hunting Federation, hereinafter "the Federation") for

annulment of the measure adopted by the Regional Council of Veneto on 21 July 1992 fixing the hunting calendar for the 1992/93 season, alleging infringement *inter alia* of the principles referred to in the Directive. Article 5(a) of that Directive imposes a general prohibition on the killing or capture of all species of birds naturally occurring in the wild state in the European territory of the Member States to which the Treaty applies (hereinafter "protected species"). However, Article 7(1) of the Directive provides that the species listed in Annex II may be hunted under national legislation. Furthermore, Member States may derogate from the hunting restrictions, and from the other restrictions and prohibitions contained in Articles 5, 6 and 8 of the Directive, for the reasons listed in Article 9(1)(a), (b) and (c) thereof, namely, first, in the interests of public health and safety and air safety, to prevent serious damage to agriculture, or for the protection of flora and fauna; secondly, for the purposes of research and teaching, of repopulation, of reintroduction and for the breeding necessary for those purposes; thirdly, to permit under strictly supervised conditions and on a selective basis the capture, keeping or other judicious use of certain birds in small numbers, but, in each of the three cases, only where there is no other satisfactory solution. In accordance with Article 9(2), derogations must specify the species subject to the derogations; the means, arrangements or methods authorised for capture or killing; the conditions of risk, and circumstances of time and place under which such derogations may be granted; the authority empowered to declare that the required conditions obtain and to decide what means, arrangements or methods may be used and by whom; and, finally, the controls which will be carried out.

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Under Article 1(3) of the Italian Law no 157 of 11 February 1992 on the protection of warm-blooded wild fauna and on hunting (GURI No 46 of 25 February 1992, supplement, p 3, "Law No 157"), ordinary regions (*regioni a statuto ordinario*) are to adopt regulations governing the management and protection of all species of wild fauna in accordance with Law No.157 which wholly transposes and implements Directive 79/409/EEC in the manner and within the limits prescribed by that Law. Article 18(1) lists among the species of animals which may be hunted certain species of birds which are not included in Annex II to the Directive. In order to adapt domestic law on hunting to Community and international law, Article 18(3) provides that on a proposal made by the competent minister, and after consulting the National Institute for Wild Fauna (INFS), the President of the Council of Ministers may amend the list of species which may be hunted, in conformity with the Community directives in force and with the conventions signed, taking into account the numbers of different species on the territory. Finally, it is apparent from Article 18(4) that it is for the regions to fix regional calendars and rules concerning the entire hunting season, having regard *inter alia* to Article 18(1) and (3).

Before the Tribunale Amministrativo Regionale per il Veneto, the applicants claimed that the hunting calendar drawn up by the Regione Veneto authorised the hunting of certain species of birds which were not among the species listed in Annex II to the Directive, whereas in the circumstances it was not possible for the defendant to rely on the right to derogate laid down in Article 9 of the Directive, since the special and overriding conditions which might justify such derogation had not been met and had been neither investigated nor appropriately demonstrated. According to the national court, the validity of the act at issue did not depend directly on the Directive, in view of the intervening Law No 157, which operates not only as an implementing measure but also as a filter and which henceforth alone sets the criteria for assessing the validity of the administrative acts adopted to give effect to the Law. It therefore followed that the lawfulness of the contested hunting calendar depended exclusively on Article 18 of Law No 157, and it was not possible to refer directly to the lists contained in the annexes now transposed into the national legal system. The Italian Court then observed that the national legislature did not consider its discretion to be constrained by Article 9 of the Directive since, by exercising the power to derogate conferred on it by that article, without however, expressly saying so, it included in the list referred to in Article 18 of Law No 157 certain species of birds the hunting of which is prohibited by the Directive.

Taking the view that the resolution of the dispute pending before it depended on the interpretation of Article 9 of the Directive, the Tribunale Amministrativo Regionale per il Veneto decided to stay proceedings and to ask the Court to give a preliminary ruling on the question "whether Article 9 of Directive 79/409/EEC requires the Italian Republic to demonstrate the existence of the individual grounds justifying the derogation, as specified in the Directive, by means of an express legal provision or an administrative measure (depending on whether legislative or administrative means are employed).

Admissibility of the Question

The Federation claimed that the request for a preliminary ruling was inadmissible, on the ground that the question raised by the national court concerned the conformity of the Italian implementing provisions with Article 9 of the Directive, rather than the interpretation of that article.

The Court dismissed that objection. It was clear from the actual wording of the order for reference that the national court was seeking an interpretation by the Court of Article 9 of the Directive. Provided that questions submitted concern the interpretation of a provision of Community law, the Court would give a preliminary ruling without, in principle, having to look into the circumstances in which the national courts had been prompted to submit the questions and envisage applying the provision of Community law which they had asked the Court to interpret (Joined Cases C-297/88 and C-197/89 *Dzodzi v Belgium* [1990] ECR I-3763, paras 35 and 39). The matter would be different only if it were apparent either that the procedure provided for in Article 177 had been diverted from its true purpose and had been used in fact to lead the Court to give a ruling by means of a contrived dispute, or that the provision of Community law referred to the Court for interpretation was manifestly incapable of applying (*Dzodzi, op cit*, para 40). That was not so in this case. An answer therefore had to be given to the question referred.

The Question

The question referred asked the Court essentially to clarify the conditions under which Article 9 authorises Member States to derogate from the general prohibition on hunting protected species laid down in Articles 5 and 7 of the Directive.

As a preliminary point, the Court observed that in applying the national law and in particular the provisions of a national law specifically in order to implement a Community directive, the national court called upon to interpret and apply that law must do so, as far as possible, in the light of the wording and the purpose of the directive so as to achieve the result intended by the directive and thereby comply with the third paragraph of Article 189 of the Treaty (Case 14/83, *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891, para 26 and Case C-91/92, *Faccini Dori v Recreb* [1994] ECR I-3325, para 26).

Next, where by means of a directive the Community authorities had placed Member States under a duty to adopt a certain course of action, the effectiveness of such a measure would be diminished if persons were to be prevented from relying upon it in proceedings before the courts, and if national courts were to be prevented from taking it into consideration as an element of Community law (Case 8/81, *Becker v Finanzamt Münster-Innenstadt* [1982] ECR 53, para 23). Consequently, wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by an individual against any authority of a Member State where that State has either failed to implement the directive in

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national law by the end of the period prescribed, or has failed to implement it correctly (Case 103/88, *Fratelli Costanzo v Comune di Milano* [1989] ECR 1839, paras 29 and 30). Moreover, a national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law, is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it was not necessary for the court to request or await the prior setting aside of such provisions by legislative or other constitutional means (Case 106/77, *Amministrazione della Finanze State v Simmenthal* [1987] ECR 629 and joined Cases C-31/91 and C-113/91, *Debus* [1992] ECR I-3617 para 32).

The Court observed that, in order to answer the question, it had to be noted that the Court had already held, with regard to the Directive, in its judgment in Case 252/85, *Commission v France* [1988] ECR 2243, para 5, that while transposition into national law does not necessarily require the relevant provisions to be enacted in precisely the same words in a specific express legal provision, and a general legal context may be sufficient if it actually ensures the full application of the directive in a sufficiently clear and precise manner, faithful transposition becomes particularly important in a case such as this in which the management of the common heritage is entrusted to Member States in their respective territories.

It was also important to bear in mind that the Court had stated that the possibility provided for in Article 9 of derogating from the restrictions on hunting, as well as from the other restrictions and prohibitions contained in Articles 5, 6 and 8 of the Directive, is subject to three conditions. First, the Member State must restrict the derogation to cases in which there is no other satisfactory solution. Secondly, the derogation must be based on at least one of the reasons exhaustively listed in Article 9(1)(a), (b) and (c). Thirdly, the derogation must comply with the precise formal conditions set out in Article 9(2), which are intended to limit derogations to what is strictly necessary and to enable the Commission to supervise them. Although Article 9 therefore authorises wide derogations from the general system of protection, it had to be applied appropriately in order to deal with precise requirements and specific situations (Case 247/85, *Commission v Belgium* [1987] ECR 3029, para 7, and Case 262/85, *Commission v Italy* [1987] ECR 3073, para 7).

It had already been stated that with regard to the conservation of wild birds, the criteria which the Member States must meet in order to derogate from the prohibitions laid down in the Directive must be reproduced in specific national provisions (Case C-339/87, *Commission v Netherlands* [1990] ECR I-851, para 28).

Furthermore, it had to be noted that in *Commission v Italy* cited above, the Court had to give a ruling on the interpretation of Article 9 of the Directive with respect to a national provision concerning hunting, according to which the regions could operate or authorise the operation, by means of specific regulations, of arrangements for capturing and selling, even outside the period when hunting was allowed, migratory birds of species to be specified among those which might be hunted under that law, with a view to their being kept for use as live decoys in cover shooting, or

for recreational purposes in traditional fairs and markets. In that judgment, the Court had observed first that the provision concerned made no reference to Article 9(1), which provides that a derogation from Articles 7 and 8 of the Directive may be granted only if there is no other satisfactory solution, and secondly that the provision of national law did not, contrary to the requirements of Article 9(2) of the Directive, specify the means, arrangements or methods of capture authorised, the circumstances of time and place under which the derogations might be granted or the species covered by the derogations. The Court had stated that since the provision in question did not establish the criteria and conditions provided for in Article 9(2) of the Directive or require the regions to take account of those criteria and conditions, it introduced an element of uncertainty as regards the obligations which the regions must observe when adopting their regulations. Therefore, there was no guarantee that the capture of certain species of wild birds would be limited to the strict minimum, as required by Article 9(1)(c), that the period of capture would not coincide necessarily with periods in which the Directive aims to provide special protection or that the means, arrangements or methods for capture were not large-scale, non-selective or capable of causing the local disappearance of a species. It followed that the essential elements of Article 9 of the Directive had not been transposed completely, clearly and unequivocally into the Italian rules (*Commission v Italy*, cited above, para 39).

The Court noted that it had also held that national legislation which declares the hunting of certain species open in principle, without prejudice to provisions to the contrary laid down by the regional authorities, does not satisfy the requirements of protection laid down by the Directive and is contrary to the principle of legal certainty (Case C-157/89, *Commission v Italy* [1991] ECR I-57, paras 16 and 17). Consequently, national legislation which authorises the hunting of certain species of birds not included in the list in Annex II to the Directive, without, however, listing the criteria for derogation or clearly and specifically obliging the regions to take account of those criteria and apply them, does not satisfy the conditions to which the derogations provided for by Article 9 of the Directive are subject.

In the light of the foregoing, the answer to the question had to be that Article 9 of the Directive is to be interpreted as meaning that it authorises the Member States to derogate from the general prohibition on hunting protected species laid down by Articles 5 and 7 of the Directive only by measures which refer in sufficient detail to the factors mentioned in Article 9(1) and (2).

Comment

The margin of discretion left to Member States in the formal implementation (ie the adoption of national administrative or legal provisions transposing the terms of the Directive) as well as practical implementation (application in practice for example by the issuing of permits authorising the killing of certain birds protected by the Directive) of Article 9 of Directive 79/409 has been subject to numerous judgments by the European Court of Justice. It is therefore not self-

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evident that for the resolution of the dispute before it, this case law did not suffice and therefore that the reference for a preliminary ruling was, strictly speaking, necessary in this particular instance. Meanwhile, this does not affect the admissibility of the request. As the Court properly points out, provided that the questions submitted concern the interpretation of a provision of Community law and that the dispute is a genuine one, the Court will provide the national court with the guidance it seeks.

Even though the request was admissible, the Court's unsolicited reflections on the doctrine of indirect effect, that is, the national courts' duty to interpret national law in the light of EC law as interpreted by the European Court in past judgments, may indicate that the Court itself also felt that the Italian Tribunal could have resolved this dispute without the intervention of the Court through Article 177. Indeed, the question how a national court would review the legality of national law or practice against (directly effective) provisions of secondary Community law is more complex than the issue of the interpretation of Article 9 of the Directive as such. Jans makes a distinction between "concrete" and "abstract" review. Concrete review involves the direct review of administrative practice against the provisions of the Directive (eg in the form of the annulment of a permit authorising the hunting of a protected bird under conditions other than those specified in Article 9). Concrete review allows the competent authorities to continue to grant permits provided they ensure that the conditions in the individual permits accord with the conditions in the Directive.

Abstract review on the other hand requires the interpretation of the national legislation on the basis of which the permit has been granted in the light of the Directive. Where

national law is found not to comply with EC law, the former will not be applied and the legal basis for the permit to hunt birds will hence have disappeared, as a result of which the permit will be quashed, meaning that the competent authorities will be unable to act legally for as long as the national law in question has not been amended. As Jans points out, the practical consequences of concrete or abstract review are not identical and it needs to be ascertained which type of review leads to the consequences which best agree with the objectives of the Directive. In the case of Article 9 of the birds directive, it appears that it does not grant hunters any subjective *right* to have their application to hunt protected birds considered by the competent authorities. In such a case, abstract review appears more appropriate as it ensures that speedy legislative action will be taken to remove any discrepancies between EC law and national law.

In other cases, however, secondary Community environmental law may grant individuals a subjective right to have their applications for permits considered by the competent authorities, as under, for example, the framework Directive 76/464 on discharges of dangerous substances into the aquatic environment. Were applicants for permits to discharge substances into the aquatic environment to be confronted with abstract review of the national legislation against the provision of this Directive, they would see their subjective *right* to have their applications considered undermined. Examining the scheme of this Directive, it appears that such an outcome would be incompatible with the spirit of the Directive.

These distinctions, important as they are, have yet to be fully elaborated by the Court of Justice and at this stage therefore remain somewhat speculative.