JUDGMENT OF THE COURT (Second Chamber)

9 June 2005 *

In Case C-135/04,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 12 March 2004,

Commission of the European Communities, represented by G. Valero Jordana and M. van Beek, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of Spain, represented by N. Díaz Abad and M. Muñoz Pérez, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: Spanish.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Silva de Lapuerta, C. Gulmann (Rapporteur), R. Schintgen and G. Arestis, Judges,

Advocate General: L.A. Geelhoed,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 24 February 2005,

after considering the observations submitted on behalf of the parties,

after hearing the Opinion of the Advocate General at the sitting on 7 April 2005,

gives the following

Judgment

1 By its action, the Commission of the European Communities asks the Court for a declaration that, by allowing the practice of 'a contrapasa' hunting of woodpigeons in the province of Guipúzcoa, the Kingdom of Spain has failed to fulfil its obligations under Article 7(4) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1) ('the Directive').

Legal framework

The Directive

2 Article 7 of the Directive reads as follows:

'1. Owing to their population level, geographical distribution and reproductive rate throughout the Community, the species listed in Annex II may be hunted under

national legislation. Member States shall ensure that the hunting of these species does not jeopardise conservation efforts in their distribution area.

...

4. Member States shall ensure that the practice of hunting, including falconry if practised, as carried on in accordance with the national measures in force, complies with the principles of wise use and ecologically balanced control of the species of birds concerned and that this practice is compatible as regards the population of these species, in particular migratory species, with the measures resulting from Article 2. They shall see in particular that the species to which hunting laws apply are not hunted during the rearing season nor during the various stages of reproduction. In the case of migratory species, they shall see in particular that the species to which hunting regulations apply are not hunted during their period of reproduction or during their return to their rearing grounds. Member States shall send the Commission all relevant information in the practical application of their hunting regulations.'

3 The woodpigeon is referred to in Annex II to the Directive.

4 Article 9(1) of the Directive provides:

'Member States may derogate from the provisions of Articles 5, 6, 7 and 8, where there is no other satisfactory solution, for the following reasons:

...

(c) to permit, under strictly supervised conditions and on a selective basis, the capture, keeping or other judicious use of certain birds in small numbers.'

National law

5 According to the eighth additional provision of Law No 40/97 of 5 November 1997 amending Law No 4/89 of 27 March 1989 relating to the conservation of natural species, wild flora and fauna (BOE of 6 November 1997), if no other satisfactory solution is possible, the competent administrative authority may, with respect to migratory species which are not in danger of becoming extinct, lift the prohibition on hunting during the various stages of reproduction and during their return to their rearing grounds, with a view to permitting, in traditional areas, under strictly supervised conditions and on a selective basis, the capture, keeping or other judicious use of certain cynegetic species in small numbers within the limits necessary for ensuring the conservation of the species.

6 Each year, the Ministry of Agriculture and the Environment of the Diputación Foral de Guipúzcoa approves a decree (Orden Foral) permitting, for the applicable season, the hunting of woodpigeons during their return to their rearing grounds ('a

contrapasa' hunting), for a period usually running between 15 February and 25 March.

Background to the dispute

7 In February 1998, the Commission received a complaint that 'a contrapasa' hunting of woodpigeons was permitted in Guipúzcoa.

8 On 30 June 1998, the Spanish authorities, when questioned on the subject by letter of 23 March 1998, argued that the permission for that method of hunting was justified by:

— demand and social pressure, since 'a contrapasa' hunting was traditional;

— the minimal or non-existent impact of that hunting on the conservation of the species;

— the restrictive conditions imposed by the Diputación Foral de Guipúzcoa on the hunting of woodpigeons;

— the lack of any other satisfactory solution which might be used instead of permitting, under certain conditions, the capture, keeping or other judicious use of certain birds in small numbers.

9 Taking the view that, by allowing the practice of hunting woodpigeons in Guipúzcoa, the Kingdom of Spain had failed to fulfil its obligations under Article 7(4) of the Directive, on 30 April 1999 the Commission sent a letter of formal notice to the Spanish Government.

10 By letter of 23 July 1999, the Spanish Government stated that, in 1998, 23 875 hunters had taken part in the 'a contrapasa' hunt, and then for a period of only 39 days, which was indicative of the demand and social pressure in favour of such a type of hunt in Guipúzcoa. In the light of that pressure, the only possible solution was to allow the 'a contrapasa' woodpigeon hunt, with all due restrictions imposed, that species, moreover, not being in decline. Lastly, the letter stated that only 1 013 pigeons had been killed in 1998 and 1 158 in 1999. The practice of 'a contrapasa' hunting was thus in keeping with the principle of sound use and balanced regulation of the species in question.

11 Considering that the explanations provided by the Spanish authorities indicated a failure on their part to fulfil their obligations under Article 7(4) of the Directive, on 8 February 2000 the Commission issued a reasoned opinion to the Kingdom of Spain, inviting it to adopt the measures necessary to comply with the reasoned opinion within two months of its notification.

12 Since the Kingdom of Spain did not reply to the reasoned opinion, the Commission considered that the infringement was continuing and decided to bring the present action.

The action

Arguments of the parties

13 The Commission maintains that because the type of hunting at issue in the present proceedings takes place during the woodpigeon's return to its rearing grounds, it comes within the scope of the prohibition laid down in Article 7(4) of the Directive and cannot be justified under the exception scheme provided for in Article 9 of that directive. Because the authorisation for the 'a contrapasa' hunting of woodpigeons is intended to extend the usual period of hunting of that species in an area where the species is already present during that period, the condition that there must be no other satisfactory solution is not met in the present case.

14 The Spanish Government states that the requirement laid down in Article 9(1) of the Directive that there must be no other satisfactory solution makes sense only with respect to grounds for a derogation other than that referred to in Article 9(1)(c). Apart from a hunting prohibition, no other satisfactory solution is possible instead of allowing, under certain conditions, the capture, keeping or other judicious use of certain birds in small numbers, as provided for in Article 9(1)(c) of the Directive.

The Spanish Government states that, in any event, the hunting of woodpigeons allowed during their return to their rearing grounds is practised in a different area from where they are hunted during the regular season. Thus the hides situated inside the lands and used for that type of hunting in October and November (migration period) are mostly located in different areas from the hides used in February and March (return period), the latter being situated mainly along the coast, in areas not frequented by woodpigeons during the migration in October and November. Accordingly, there is no other satisfactory solution to hunting the woodpigeons during their return to their rearing grounds. Nor does the hunt in any way jeopardise the maintenance of the population of the species in question at a satisfactory level.

Findings of the Court

15 Under Article 7(1) of the Directive, the species listed in Annex II may be hunted pursuant to national legislation. However, Article 7(4) provides that migratory species to which the hunting legislation applies must be not be hunted in particular during their return to their rearing grounds.

16 In the present case, woodpigeons come within the scope of those two provisions. Accordingly, they must not be hunted during their return to their rearing grounds.

17 Article 9(1)(c) does permit authorisation, in compliance with the conditions set out in that provision, for the hunting of species listed in Annex II during the periods referred to in Article 7(4) of the Directive, inter alia during their return to their rearing grounds (see, to that effect, Case C-182/02 *Ligue pour la protection des oiseaux and Others* [2003] ECR I-12105, paragraphs 9 to 11).

18 The conditions which must be met for such a hunt to be authorised under Article 9 (1)(c) of the Directive include the lack of any other satisfactory solution (*Ligue pour la protection des oiseaux*, paragraph 15).

19 That condition cannot be considered to have been satisfied when the hunting period under a derogation coincides, without need, with periods in which the Directive aims to provide particular protection. There would be no such need if the sole purpose of the derogation authorising hunting were to extend the hunting periods for certain species of birds in territories which they already frequent during the hunting periods fixed in accordance with Article 7 of the Directive (*Ligue pour la protection des oiseaux*, paragraph 16).

20 The Court notes that, in the present case, the hunting period in Guipúzcoa under a derogation coincides, without need, with periods in which the Directive aims to provide particular protection.

21 It is apparent from the arguments before the Court that the areas in Guipúzcoa frequented by woodpigeons during the regular hunting season are quite close to those frequented by them during their return to their rearing grounds. Thus, the former areas are easily accessible to hunters residing in the latter areas.

22 It is clear that the decrees adopted each year by the competent authorities in Guipúzcoa to allow the hunt of woodpigeons under a derogation in the territory of that province, in particular in certain municipalities along the coast, which are frequented by woodpigeons only during their return to their rearing grounds, merely serve to extend the woodpigeon hunting season in the territory of Guipúzcoa which, in the light of the foregoing, must be considered as a unique territory already frequented by that species during the hunting period established pursuant to Article 7 of the Directive.

23 Since the condition that there must be no other satisfactory solution is not fulfilled in the present case, the hunting of woodpigeons during their return to their rearing grounds cannot be authorised pursuant to Article 9(1)(c) of the Directive.

24 Accordingly, such a hunt is contrary to Article 7(4) of the Directive.

25 This finding is not affected by the Spanish Government's arguments that, first, woodpigeons are not an endangered species and, second, they are hunted year-round in the United Kingdom and, lastly, Spanish courts have found the decrees authorising 'a contrapasa' hunting of woodpigeons in Guipúzcoa to be in keeping with the Spanish legislation on hunting, which in turn is compatible with the Directive.

26 The first two arguments put forward are not relevant to the condition that there be no other satisfactory solution and, therefore, do not affect the finding in paragraph 22 of this judgment.

27 As to the third argument, it is not relevant since it has been established that 'a contrapasa' hunting is contrary to Article 7(4) of the Directive.

28 The Court finds that, by allowing the practice of 'a contrapasa' hunting of woodpigeons in Guipúzcoa, the Kingdom of Spain has failed to fulfil its obligations under Article 7(4) of the Directive.

Costs

29 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Kingdom of Spain has been unsuccessful in its pleas, the latter must be ordered to pay the costs.

On those grounds, the Court (Second Chamber) hereby:

1. **Declares that, by allowing the practice of 'a contrapasa' hunting of woodpigeons in Guipúzcoa, the Kingdom of Spain has failed to fulfil its obligations under Article 7(4) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds;**

2. **Orders the Kingdom of Spain to pay the costs.**

[Signatures]