JUDGMENT OF THE COURT (Third Chamber)

8 February 1996 *

In Case C-202/94,

REFERENCE to the Court under Article 177 of the EC Treaty by the Gerechtshof, 's-Hertogenbosch (Netherlands), for a preliminary ruling in the criminal proceedings before that court against

Godefridus van der Feesten

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

THE COURT (Third Chamber),

composed of: J.-P. Puissochet, President of the Chamber, J. C. Moitinho de Almeida and C. Gulmann (Rapporteur), Judges,

Advocate General: N. Fennelly,
Registrar: H. von Holstein, Deputy Registrar,

* Language of the case: Dutch.

after considering the written observations submitted on behalf of:

— the Openbaar Ministerie (Public Prosecutor's Office), by J. J. M. van der Kaaden, Prosecuting Advocate before the Gerechtshof, 's-Hertogenbosch;

— the Netherlands Government, by A. Bos, Legal Adviser to the Ministry of Foreign Affairs, acting as Agent;

— the French Government, by C. de Salins, Deputy Director in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and J.-L. Falconi, Foreign Affairs Secretary in the same Directorate, acting as Agents;

— the Commission of the European Communities, by M. H. van der Woude, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr van der Feesten, represented by J. Wouters, of the Middelburg Bar; the Netherlands Government, represented by J. S. van den Oosterkamp, Deputy Legal Adviser in the Ministry of Foreign Affairs, acting as Agent; the French Government, represented by J.-M. Belorgey, Special Adviser in the Legal Affairs Directorate of the Ministry of Foreign Affairs, acting as Agent, assisted by J.-L. Pons, Civil Administrator in the Ministry of the Environment; and of the Commission, represented by M. H. van der Woude, assisted by S. Bouche, Commission Administrator, acting in the capacity of expert, at the hearing on 14 September 1995,

after hearing the Opinion of the Advocate General at the sitting on 26 October 1995,

gives the following

Judgment

1 By order of 5 July 1994, received at the Court on 11 July 1994, the Gerechtshof (Regional Court of Appeal), 's-Hertogenbosch, referred for a preliminary ruling under Article 177 of the EC Treaty three questions concerning the interpretation of Articles 1(1) and 14 of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1) (hereinafter 'the Directive').

2 Those questions have arisen in criminal proceedings brought against Mr van der Feesten under the Netherlands Vogelwet (Law on Birds) of 31 December 1936. Following the seizure at his home of a number of birds belonging to the subspecies *Carduelis carduelis caniceps*, or grey-headed goldfinch, imported from Denmark, Mr van der Feesten contested that measure with a view to securing their recovery.

3 According to the documents before the Court, it is, unless otherwise provided, prohibited under the Vogelwet to keep, offer to purchase, purchase, offer for sale, sell, deliver, transport, offer to transport, import, provide for the transit of or export from the territory of the Netherlands any birds belonging to one of the species occurring in the wild in Europe or any derivatives of such birds.

4 The Directive, in particular Articles 5 and 6 thereof, provides that, subject to certain exceptions, there is to be a general prohibition of possessing and trading in all

species of birds occurring naturally in the wild state in the European territory of the Member States to which the Treaty applies.

5 In its order for reference, the national court states that the *Carduelis carduelis*, or black-headed goldfinch, is a species of bird occurring naturally in the wild, and in several subspecies, in the European territory of the Member States to which the Treaty applies. However, the *Carduelis carduelis caniceps* is, it states, a subspecies which occurs naturally in the wild only outside the European territory in question.

6 Since it was unsure whether the Netherlands legislation under which the birds in question were seized correctly transposed the Directive, the national court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is national legislation which protects birds (within the meaning of Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, as subsequently amended on a number of occasions) belonging, according to the evidence, to a subspecies which, as such, does not at all occur naturally in the wild in the European territory of the Member States compatible with the wording and/or the objectives of Directive 79/409, and in particular with Articles 1(1) and 14 thereof, if only because the (main) species and/or other subspecies do occur naturally in the wild in that territory or in the territory of the Member State in question?

2. Does it make any difference to the answer to Question 1 that the competent authorities of the Member State in question may determine that, for the prosecuting authorities which have the requisite degree of expertise, the subspecies

in issue cannot, or can scarcely, be distinguished from birds of the (main) species, of other subspecies of the main species, or of other (sub)species?

3. If it should be decided that the measure here in issue is a stricter measure within the meaning of Article 14 of Directive 79/409, does it then make any difference that the birds of the subspecies found in the Member State in question were imported from another Member State which could have introduced the same stricter measure, but which, in this case, had not (yet) adopted any such measure at the time of the material events?'

The first question

7 By this question the national court is seeking to determine whether the Directive applies to bird subspecies which occur naturally in the wild only outside the European territory of the Member States, where the species to which they belong or other subspecies of that species do occur naturally in the wild state within the territory in question.

8 It should be noted at the outset that the second and third recitals in the preamble to the Directive state that:

'... a large number of species of wild birds naturally occurring in the European territory of the Member States are declining in number, very rapidly in some cases; ... this decline represents a serious threat to the conservation of the natural environment, particularly because of the biological balances threatened thereby;

... the species of wild birds naturally occurring in the European territory of the Member States are mainly migratory species; ... such species constitute a common heritage and ... effective bird protection is typically a trans-frontier environment problem entailing common responsibilities'.

9 With regard to the Directive's scope, Article 1(1) provides that: 'This Directive relates to the conservation of all species of naturally occurring birds in the wild state in the European territory of the Member States to which the Treaty applies. It covers the protection, management and control of these species and lays down rules for their exploitation.'

10 It follows both from those recitals and from Article 1 of the Directive, as well as, more generally, from the Directive considered as a whole, that it is intended to provide effective protection for European avifauna and that this protection is centred on the concept of species.

11 In avian taxonomy, the concept of species includes, by definition, all of a species' subdivisions, such as breeds and subspecies. Consequently, a specimen belonging to a subspecies will always belong to the species comprising the subspecies in question.

12 Assuming that the scope of the Directive is to be defined on the basis of the taxonomic concept of species, it follows that, if a subspecies occurs naturally in the wild in the European territory of the Member States to which the Treaty applies, the species to which the subspecies belongs must be considered to be a European

species and, consequently, all the other subspecies of the species in question, including those which are not European, will be covered by the Directive.

13 While the concept of species covers a biological entity, the scientific definition of which is generally accepted and is based on characteristics forming part of the genetic heritage of individual members of the species in question, the same does not apply to the concept of subspecies. This designates a population which, within a species, differs from other populations of the same species on the basis of criteria such as morphology, habitat or the behaviour of its members.

14 In support of those considerations, it should be noted, as the French Government and the Commission have pointed out, that specimens which are the offspring of creatures belonging to different species will generally be sterile, whereas specimens which are the offspring of creatures belonging to subspecies of the same species will be fertile.

15 It would therefore appear that the concept of subspecies is not based on distinguishing criteria which are as strict and objective as those defining species *inter se*. Thus, it is not rare for there to be disagreements in scientific circles as to how certain subspecies can be identified and distinguished from one another.

16 It follows that, if the scope of the Directive were to be limited to those subspecies which occur within European territory and did not extend to non-European subspecies, it would, as the French and Netherlands Governments and the

Commission essentially argue, be difficult to implement the Directive in the Member States, with the consequent risk that it might not be uniformly applied within the Community. Such an outcome would run counter to the aim of providing effective protection for European avifauna and could also give rise to distortions of competition within the Community.

17 Indeed, if non-European subspecies could be freely imported into the Community, the risk, referred to in particular by the French Government and the Commission, that exotic subspecies might be released into the wild there, leading possibly to artificial alterations of the natural avifauna occurring in the Community, could not be excluded. This would be incompatible with the objective of safeguarding biological balances mentioned in the second recital in the preamble to the Directive.

18 In the light of the foregoing, the answer to the first question must be that the Directive applies to bird subspecies which occur naturally in the wild only outside the European territory of the Member States if the species to which they belong or other subspecies of that species occur naturally in the wild within the territory in question.

The remaining questions

19 In view of the reply to the first question, the second and third questions are redundant.

Costs

20 The costs incurred by the French and Netherlands Governments and 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 proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Third Chamber),

in answer to the questions referred to it by the Gerechtshof, 's-Hertogenbosch, by order of 5 July 1994, hereby rules:

Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds applies to bird subspecies which occur naturally in the wild only outside the European territory of the Member States if the species to which they belong or other subspecies of that species occur naturally in the wild within the territory in question.

Puissochet Moitinho de Almeida Gulmann

Delivered in open court in Luxembourg on 8 February 1996.

R. Grass J.-P. Puissochet

Registrar President of the Third Chamber