JUDGMENT OF THE COURT (Third Chamber)
12 December 1996 *

In Case C-10/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Belgian Conseil d'État for a preliminary ruling in the proceedings pending before that court between

Ligue Royale Belge pour la Protection des Oiseaux ASBL,

Société d'Études Ornithologiques AVES ASBL

and

Région Wallonne,

intervener: **Fédération Royale Ornithologique Belge ASBL**

on the interpretation of Articles 5, 9 and 18 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: French.

THE COURT (Third Chamber),

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

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

after considering the written observations submitted on behalf of:

— the Ligue Royale Belge pour la Protection des Oiseaux ASBL and the Société d'Études Ornithologiques AVES ASBL, by Alain Lebrun, of the Liège Bar;

— the Fédération Royale Ornithologique Belge ASBL, by Patrick Taquet, of the Welkenraedt Bar;

— the Belgian Government, by Jan Devadder, Director of Administration in the Ministry of Foreign Affairs, Foreign Trade and Cooperation with Developing Countries, acting as Agent;

— the Commission of the European Communities, by Antonio Aresu, of its Legal Service, and Jean-Francis Pasquier, a national civil servant on secondment to its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Ligue Royale Belge pour la Protection des Oiseaux ASBL and the Société d'Études Ornithologiques AVES ASBL, represented by Alain Lebrun; the Région Wallonne, represented by Jean-Marie van der Mersch, of the Brussels Bar; the Belgian Government, represented by Jan Devadder; and the Commission, represented by Jean-Francis Pasquier, at the hearing on 1 October 1996,

after hearing the Opinion of the Advocate General at the sitting on 7 November 1996,

gives the following

Judgment

1 By decision of 10 November 1995, received at the Court on 17 January 1996, the Belgian Conseil d'État submitted for a preliminary ruling under Article 177 of the EC Treaty two questions 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, hereinafter 'the Directive').

2 Those questions arose in an action for annulment brought by the Ligue Royale Belge pour la Protection des Oiseaux ASBL (the Royal Belgian League for the Protection of Birds, hereinafter 'the Ligue Royale') and the Société d'Études Ornithologiques AVES ASBL (Society for Bird Studies AVES, hereinafter 'AVES') against two orders of the Region of Wallonia, which, *inter alia*, authorize the capture, under specified conditions, of certain species of birds protected by the Directive.

3 Member States are required under Article 5(a) of the Directive to take the requisite measures to prohibit generally the killing or capture of all species of birds occurring naturally in the wild state in the European territory of the Member States to which the Treaty applies (hereinafter the 'protected species').

4 Article 9(1)(c) of the Directive, however, provides that Member States may derogate from that prohibition, *inter alia* to permit, under strictly supervised conditions and on a selective basis, any judicious use of certain birds in small numbers, in so far as there is no other satisfactory solution.

5 Article 18(1) of the Directive provides that 'Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive within two years of its notification.'

6 Article 26 of the Order of the Government of Wallonia of 14 July 1994 on the protection of birds in the Region of Wallonia, which appears in Chapter IV entitled 'Capture for breeding purposes', provides that the capture of wild birds with a view to making it possible for breeding alone to provide a satisfactory solution is to be subject to authorization in accordance with the provisions of the said Chapter IV.

7 The first paragraph of Article 27 of that Order provides that 'the species of wild bird of which the capture is authorized and the capture quotas for each species shall be determined on an annually reducing basis and for a period of five years by Government Order from among the species and sub-species listed in Annex III. b to the present Order.'

8 The fourth paragraph of Article 27 provides that 'for the period 1994 to 1998, the capture quotas ... are fixed in Annex XIII to the present Order'.

9 Annex III. b to the Order sets out the species and maximum number of birds which may be captured, while Annex XIII fixes those quantities, at a level lower than the maxima laid down in Annex III. b, on a decreasing basis for the period from 1994 to 1998.

10 Following the judgment of the Belgian Conseil d'État of 7 October 1994 temporarily suspending implementation of the fourth paragraph of Article 27 of and Annex XIII to the Order of 14 July 1994, the Government of Wallonia, in the light of the need to supply bird breeders from 1994 in order to accelerate the development of breeding, adopted an Order on 13 October 1994 authorizing the capture of the same quantities and species of birds as those covered by Annex XIII to the first Order. By judgment of 14 October 1994, the Conseil d'État ordered that implementation of this second Order be suspended immediately.

11 By application of 17 November 1994, the Ligue Royale and AVES requested the Conseil d'État to annul the fourth paragraph of Article 27 of and Annex XIII to the Order of 14 July 1994, and also the Order of 13 October 1994, on the ground that they infringed Articles 5(a) and 9(1) of the Directive. They argued that the contested provisions authorized the capture of wild birds, even though such capture was in principle prohibited by the Directive and derogations from that prohibition could, according to Article 9 of the Directive, be permitted only if there was no other satisfactory solution, such as breeding in captivity. According to the applicants in those proceedings, there were extensive and adequate opportunities for breeding the species whose capture was authorized by the contested Orders.

12 The Region of Wallonia, supported by the Fédération Royale Ornithologique Belge (Royal Belgian Ornithological Federation), replied that breeding was not yet in itself a satisfactory solution, but that it would become so on condition that the captures envisaged were authorized from 1994 to 1998. According to both those parties, it would be possible to avoid capture entirely at the end of this period, which would be marked by transitional legal arrangements.

13 In those circumstances, the Conseil d'État stayed proceedings and referred the following questions to the Court for a preliminary ruling:

'1. Do Articles 5, 9 and 18 of Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds allow a Member State to take account, on a decreasing basis and over a specified period, of the fact that the prohibition of capturing birds for recreational purposes would compel numerous fanciers to alter their

installations and to abandon certain habits where that State recognizes that breeding is possible but is not yet feasible on a large scale for that reason?

2. Do Articles 5, 9 and 18 of Directive 79/409/EEC allow Member States, and if so to what extent, to authorize the capture of birds living naturally in the wild state within European territory with a view to obviating, in bird breeding for recreational purposes, the problems of consanguinity which would result from too many endogenous crossings?'

The first question

14 By its first question, the national court is asking in substance whether the Directive, and in particular Article 9(1)(c) thereof, must be interpreted as meaning that a Member State may, on a decreasing basis and for a limited period, authorize the capture of certain protected species in order to enable bird fanciers to stock their aviaries, where breeding and reproduction of those species in captivity are possible but not yet practicable on a large scale by reason of the fact that many fanciers would be compelled to alter their installations and change their habits.

15 It should first be pointed out that the Court has held, at paragraph 38 of its judgment in Case 262/85 *Commission* v *Italy* [1987] ECR 3073, that the capture and sale of wild birds with a view to keeping them for use as live decoys or for recreational purposes in fairs and markets may constitute judicious use authorized by Article 9(1)(c) of the Directive.

16 It cannot therefore be ruled out that the capture of certain protected species for recreational purposes, such as that intended to enable fanciers to stock their aviaries, may also constitute judicious use within the meaning of Article 9(1)(c).

17 That said, it must, however, be pointed out that a derogation from the system of protection established by the Directive and, in particular, from the prohibition of killing or capturing protected species, as laid down in Article 5(a), can be accorded only if there is no other satisfactory solution.

18 The breeding and reproduction of protected species in captivity may constitute such a solution if they prove to be possible (Case 247/85 *Commission* v *Belgium* [1987] ECR 3029, paragraph 41).

19 It should be observed in that regard that, as is clear from the documents before the Court, the breeding and reproduction in captivity of the species concerned in the main proceedings are not only scientifically and technically feasible, but those activities have also been successfully carried on by some breeders in Wallonia and, on a larger scale, by breeders in Flanders.

20 In those circumstances, breeding and reproduction in captivity could be regarded as not constituting an 'other satisfactory solution' only if it were established that, were it not for the capture of birds in the wild, those activities could not prosper.

21 Consequently, the fact that the breeding and reproduction in captivity of the species concerned are not yet feasible on a large scale by reason of the installations

and the inveterate habits of bird fanciers, habits which, moreover, have been encouraged by domestic rules derogating from the general scheme of the Directive, is not in itself such as to cast doubt on the satisfactory nature of the alternative solution to capturing birds in the wild.

22 In view of the foregoing considerations, the answer to the first question must be that the Directive, and in particular Article 9(1)(c) thereof, must be interpreted as meaning that a Member State may not, on a decreasing basis and for a limited period, authorize the capture of certain protected species in order to enable bird fanciers to stock their aviaries, where breeding and reproduction of those species in captivity are possible but are not yet practicable on a large scale by reason of the fact that many fanciers would be compelled to alter their installations and change their habits.

The second question

23 By its second question, the national court seeks to ascertain whether, and if so to what extent, national authorities are authorized under the Directive, and in particular under Article 9(1)(c) thereof, to allow the capture of protected species with a view to obviating, in bird breeding for recreational purposes, the problems of consanguinity resulting from too many endogenous crossings.

24 It must first be noted that, if the capture of protected species, in so far as it is intended to enable fanciers to stock their aviaries, may, as held in paragraph 16 of this judgment, constitute judicious use within the meaning of Article 9(1)(c) of the Directive, the same must hold true as regards the capture of protected species for the purpose of obviating the problems of consanguinity in bird breeding for recreational purposes.

25 It must next be borne in mind that, as already indicated in paragraph 17 of this judgment, a derogation from Article 5(a) of the Directive may be accorded only if there is no other satisfactory solution. In particular, that condition would not be met if it were possible to obviate the problems of consanguinity by cooperation and exchanges of specimens between breeding establishments.

26 Finally, as regards the extent to which the capture of protected species may be permitted, it is for the competent authorities of the Member State concerned to fix the number of wild specimens which may be captured at the level of what proves to be objectively necessary in order to ensure sufficient genetic diversity of the species bred in captivity, subject always to observance of the maximum limit of 'small numbers' referred to in Article 9(1)(c) of the Directive.

27 The answer to the second question must therefore be that national authorities are authorized under the Directive, and in particular under Article 9(1)(c) thereof, to permit the capture of protected species with a view to obviating, in bird breeding for recreational purposes, the problems of consanguinity which would result from too many endogenous crossings, on condition that there is no other satisfactory solution, it being understood that the number of specimens which may be captured must be fixed at the level of what proves to be objectively necessary to provide a solution for those problems, subject always to observance of the maximum limit of 'small numbers' referred to in that provision.

Costs

28 The costs incurred by the Belgian Government 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 action 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 Belgian Conseil d'État by decision of 10 November 1995, hereby rules:

1. **Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, and in particular Article 9(1)(c) thereof, must be interpreted as meaning that a Member State may not, on a decreasing basis and for a limited period, authorize the capture of certain protected species in order to enable bird fanciers to stock their aviaries, where breeding and reproduction of those species in captivity are possible but are not yet practicable on a large scale by reason of the fact that many fanciers would be compelled to alter their installations and change their habits.**

2. **National authorities are authorized under Directive 79/409, and in particular under Article 9(1)(c) thereof, to permit the capture of protected species with a view to obviating, in bird breeding for recreational purposes, the problems of consanguinity which would result from too many endogenous crossings, on condition that there is no other satisfactory solution, it being understood that the number of specimens which may be captured must be fixed at the level of what proves to be objectively necessary to provide a solution for those problems, subject always to observance of the maximum limit of 'small numbers' referred to in that provision.**

Moitinho de Almeida Gulmann Puissochet

Delivered in open court in Luxembourg on 12 December 1996.

R. Grass

Registrar

J. C. Moitinho de Almeida

President of the Third Chamber