OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 7 April 2005 [1]

I — Introduction

1. This case concerns infringement proceedings brought by the Commission against the Kingdom of Spain on the ground that the latter has contravened Article 7(4) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds [2] (hereinafter: 'the Directive' or the 'Birds Directive').

2. More particularly, the case focuses on the interpretation and application of Articles 7 (4) and 9(1) of the Directive. The former contains a prohibition on the hunting of migratory birds during their return to their rearing grounds. The latter provides for possible derogations from this prohibition.

3. The Spanish Government relies on the provision for derogation. To rely successfully on this provision, one of the conditions to be met is that 'there is no other satisfactory solution'. Woodpigeon are to be found in the province of Guipúzcoa during the normal hunting season, both non-migratory species and migratory species which, during the autumn migration, head for the centre of this province via passes in the Pyrenees. However, they are scarcely found in the coastal strip of this province. The migratory birds do, however, make use of the coastal strip during the spring migration, when they gather there in large numbers. In this case, the requirement of 'no other satisfactory solution' revolves around the question of whether the coastal strip of the Guipúzcoa province can be defined as a totally separate region of the province, with the result that a derogation from the prohibition on the hunting of migratory birds during their return to their rearing grounds can be justified on the ground of the absence of an alternative during the normal hunting season. In other words, what is at issue here is how 'narrowly' a 'region' can be defined.

1 — Original language: Dutch.

2 — OJ 1979 L 103, p. 1.

4. Article 7 of the Directive is worded 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 on the practical application of their hunting regulations.'

5. The woodpigeon is listed in Annex II.

6. Under Article 9(1) of the Birds Directive, Member States may derogate from the provisions of Articles 5, 6, 7 and 8 of the Directive where there is no other satisfactory solution, for the reasons outlined in Article 9 (1)(a) to Article 9(1)(c). More specifically, a derogation is possible 'to permit, under strictly supervised conditions and on a selective basis, the capture, keeping or other judicious use of certain birds in small numbers' (Article 9(1)(c)).

7. Under Spanish legislation, the competent authority can lift the ban on hunting during the various stages of reproduction as well as during the return of birds to their rearing grounds, in the case of migratory species which are not threatened with extinction, in order to permit, under strictly supervised conditions and on a selective basis, the capture, keeping or other judicious use of certain birds in small numbers in traditional places.

8. Every year, the Department of Agriculture and the Environment of the Diputación Foral de Guipúzcoa approves a decree (Orden Foral) to permit, for the corresponding season, the hunting of woodpigeon during their return to their rearing grounds ('a contrapasa' hunting) for the period running from approximately 15 February to 25 March of each year.

II — Matter in dispute

9. The Commission contends that the hunting of woodpigeon during their return to their rearing grounds is prohibited by the Directive and that a derogation from this prohibition in the present case cannot be justified under Article 9(1)(c) of the Directive. It cannot be justified firstly, because the purpose of this derogating measure is in reality to extend the normal hunting period (there are alternatives), and secondly, because historical or cultural traditions, as well as social convention, cannot justify any derogation under Article 9 of the Birds Directive.

10. It is the submission of the Spanish Government, however, that it has satisfied the conditions justifying derogation. It maintains that the regional decrees comply with Spanish legislation and that the Spanish legislation complies with the Directive. Therefore, the regional decrees permitting the hunting of woodpigeon during their return to their rearing grounds comply with the Directive. It also points to Spanish case-law in this regard.

11. More particularly, the Spanish Government argues that the requirement of 'no other satisfactory solution' under Article 9(1) of the Directive, which is in fact specifically directed at the derogations under Article 9 (1)(a) and Article 9(1)(b), has been fulfilled. In this case there are only two solutions: to grant the derogation, or to prohibit it. Since a prohibition is not a realistic alternative, all that remains is to grant the derogation. It also points out that this is the best alternative because the derogation would be granted subject to stringent conditions which would also be strictly supervised. A prohibition would only result in it being breached, given the deep-rooted nature of the tradition of 'a contrapasa' hunting.

12. The Spanish Government also pointed out in its rejoinder that the territory in which woodpigeon may be hunted during the normal hunting season does not coincide with the territory to which the derogation applies. The derogation, it argues, is therefore justified. In this regard it refers to the judgment in Case C-182/02. [3] The relevant

3 — Judgment in Case C-182/02 *Ligue pour la protection des oiseaux and Others*, [2003] ECR I-12105

passage referred to by the Spanish Government is worded as follows:

'The first of the conditions set out in the preceding paragraph [the condition that there must be no other satisfactory solution] 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.' [4]

13. The Spanish Government concludes from this that if the territories do not coincide, the derogation can be justified. It points out that the places where woodpigeon can be observed and hunted in the months of October and November (the period of the autumn migration) are in most cases in different locations to those used during the months of February and March (the period of the spring migration). The latter are mainly situated along the coast, that is to say, in places which the woodpigeon does not often frequent during the months of October and November.

14. Moreover, the Spanish Government maintains that the Commission has not proved that the sole purpose of the measure is to extend the normal hunting period. It is established case-law in infringement proceedings that the onus is on the Commission to prove the infringement which it alleges.

15. The Commission's strict interpretation is also, according to the Spanish Government, contrary to the spirit of the Directive. The Directive does not exclude the possibility of hunting. In this regard, the Spanish Government draws attention to the 11th recital in the preamble to the Directive.

16. The Spanish Government points out that there are approximately 4 674 752 woodpigeon on the Iberian peninsula and that of these only about one million are taken annually, compared with about five million in France. The number of woodpigeon taken during their return to their rearing grounds remains well under the number permitted under the Orden Foral. [5]

17. Finally, according to the Spanish Government, account should be taken of the fact that in other Member States, such as the United Kingdom, for example, the hunting of

4 — See paragraph 16 of this judgment.

5 — In 1998 this number stood at 1 013, in 1999 at 1 158, in 2000 at 1 230, in 2001 at 1 129, in 2002 at 1 107, in 2003 at 2 012 and in 2004 at 2 052. It is permissible to shoot 4 000 woodpigeon during the spring migration. Approximately 23 875 hunters are thought to participate in this form of hunting in this region.

woodpigeon is permitted all year round because the woodpigeon there is a non-migratory species. The Spanish Government contends, however, that the genetic differences between woodpigeon in the United Kingdom and the continental variety are not so great as to justify the hunting of woodpigeon in the United Kingdom all year round.

III — Appraisal

18. According to Article 7(1) of the Directive, read in conjunction with Annex II to the Directive, the hunting of woodpigeon is permitted. However, Article 7(4) stipulates that migratory species may not be hunted during their period of reproduction or during their return to their rearing grounds ('the spring migration').

19. This means that Member States must organise their hunting season in compliance with this prohibition and other prohibitions set out in Article 7(4) of the Directive. In this regard, the Court has on numerous occasions ruled in its case-law that the purpose of Article 7(4) of the Directive is to guarantee a general system of protection for wild birds during the period in which their survival is particularly threatened. [6]

20. Article 9, however, also provides for a number of clearly defined derogations from the prohibitions pursuant to, inter alia, Article 7(4). Derogation from the prohibitory provisions is limited to cases in which there is no other satisfactory solution; it must be based on at least one of the grounds specified in Article 9(1)(a), Article 9(1)(b) or Article 9 (1)(c), and the derogation must comply with the carefully formulated procedural requirements set out in Article 9(2).

21. In the present case, reliance is placed on the ground for derogation set out in Article 9 (1)(c), which in turn contains a number of specific preconditions (the hunt must be selective and must take place under strictly supervised conditions, and must be limited to certain birds in small numbers). These preconditions have not been satisfied in this case, and neither have the procedural requirements set out in Article 9(2).

6 — Judgments in Case C-157/89 *Commission* v *Italy* [1991] ECR I-57, Case C-435/92 *Association pour la Protection des Animaux Sauvages and Others* [1994] ECR I-67, and Case C-38/99 *Commission* v *France* [2000] ECR I-10941.

22. I mention in passing that it is the Commission's contention that what is at issue here is an infringement of Article 7(4). Spain in fact does not deny that hunting has taken place outside the normal hunting season. It is up to the Spanish Government to prove that there are grounds to justify this.

23. The crucial issue in this case is whether the requirement of 'no other satisfactory solution' has been met. The key question is how broadly or narrowly the concept of 'territory' must be interpreted. The Spanish Government highlights the fact that during the normal hunting season there are few, if any, woodpigeon in the coastal strip of the Guipúzcoa province. The only possible solution to the hunting of woodpigeon in this 'territory' therefore is, according to the Spanish Government, to do so during the spring migration, when the woodpigeon return to their rearing grounds elsewhere in Europe (and in so doing fly along the coast of Guipúzcoa). The Commission, by contrast, contends that such alternatives do in fact exist and that the measure therefore amounts in reality merely to an extension of the normal hunting season. Besides, a territory cannot be defined too narrowly. Both the Commission and the Spanish Government have referred to the judgment in Case C-182/02, cited above.

24. It can indeed be concluded from the latter judgment that the fact that a particular species does not occur in a particular territory during the normal hunting season can be a factor that justifies a derogation from the hunting ban during the spring migration. The question is, however, how broadly that territory should be defined in order to determine whether there is any possibility of another solution.

25. The purpose of Article 7(4) of the Directive is to protect the bird species that may be hunted, by stipulating that they may not be hunted during the various stages of reproduction, while the young are still in the nest, and during the spring migration to their rearing grounds. Article 9(1)(c) provides for a limited derogation from this main rule for 'territories' where there are no other solutions. Such a derogation may not, however, detract from the purpose of Article 7(4), which is to guarantee a general system of protection during the period in which bird populations living in the wild must safeguard their survival.

26. One of the characteristics of bird migration is that the birds concerned, depending on species, follow set routes on which, at specific points, such as coastal strips, isthmuses, straits and mountain passes, large concentrations of these birds can gather, whereas at other times of the year they are rarely, if ever, to be found there. If these places were deemed to be territories 'where

there is no other satisfactory solution' in the sense of Article 9(1), this would strike at the very heart of the purpose of Article 7(4). It would mean that, for the species concerned, the hunting season would be extended to the period of the spring migration, with the result that they would be liable to be hunted in those places where they would be at their most vulnerable, namely in those places where, compelled by natural obstacles, they gather in large numbers. Such geographically limited areas of concentration can therefore not be deemed to be 'territories' for the purpose of Article 9(1) of the Directive.

27. If we look at the migration patterns of woodpigeon flying to and from Spain, the following picture emerges. During the autumn migration, huge numbers of woodpigeon make their way into Spain over this province, avoiding the high Pyrenees, in order to spend the winter further inland. They therefore overfly this province. Some of them remain behind in this province, mainly in the south. I might mention in passing that, as elsewhere in Spain, there are also woodpigeon in this province which do not migrate.

28. The spring migration, which is the migration back to their rearing grounds in the more northerly parts of Europe, takes place via the coastal strip of Guipúzcoa. The question is whether it is justifiable to grant a derogation from the hunting ban during the spring migration for this relatively narrow strip in Guipúzcoa.

29. In the light of the foregoing, the answer to this must be negative. In the first place, these birds are present during the normal hunting season, not only in this province, but throughout the whole of Spain. It is therefore possible to hunt both the woodpigeon that migrate further inland during the autumn migration and the woodpigeon that remain behind in this region. It is also possible to hunt woodpigeon that do not migrate. The fact that fewer, or even none, of these birds are to be found along the relatively narrow coastal strip of Guipúzcoa does not detract from this. There are, after all, alternatives present in the close vicinity and in more distant parts of this region. In the second place, it follows from what was stated in point 26 above that there can be no question of granting an extension of the hunting period to the spring migration for the geographically limited areas in which the birds gather during this migration. An extension to the hunting of woodpigeon in an area limited to a number of coastal communities in the Guipúzcoa province is therefore in conflict with Article 7(4) of the Directive.

30. The Spanish Government has also argued that the requirement of no satisfac-

tory solution makes more sense in the context of Article 9(1)(a) and Article 9(1)(b) (there are conceivable alternatives that have less far-reaching consequences), but is less suited to the grounds for derogation contained in Article 9(1)(c) of the Directive (in terms of which the alternatives are either to grant or to prohibit the derogation). This argument is irrelevant. Moreover, the Court has stated clearly in its case-law that the derogation under Article 9(1)(c) of the Directive can be granted when no other satisfactory solution exists. [7] It is once again abundantly clear from that case-law that the condition of no satisfactory solution is not satisfied in the case where the exceptional hunting period coincides unnecessarily with the very periods for which the Directive intended to provide special protection.

31. The Spanish Government has also argued that this case does not concern an endangered species. This argument is irrelevant. Article 9(1) lays down the requirement that no other satisfactory solution must exist. It is clear from the foregoing that this requirement has not been met.

32. Hunting practices in the United Kingdom, to which reference was made, have a different background and are not relevant to the present case. The woodpigeon there is a non-migratory species, and the hunting ban during the migration to the rearing grounds is for that reason not applicable. Furthermore, the derogation under Article 9(1)(a) of the Directive is applicable to the United Kingdom because woodpigeon there cause considerable damage to agricultural crops.

33. In conclusion, no value whatsoever can be given to the argument that the hunting ban would lead to illegal practices on the ground that what is at issue here is a deep-rooted tradition. Moreover, as the Commission has also noted, the resources that are employed in monitoring compliance with the conditions attached to the derogations can also be employed to monitor the prohibition.

34. The Spanish Government's assertion that the relevant decrees of the competent regional authorities comply with Spanish hunting legislation, which in turn complies with the Birds Directive, is completely wide of the mark as it has been established that the regional decrees sanction a hunting practice during the spring migration that is in conflict with Article 7(4) of the aforementioned Directive.

7 — Case C-182/02, cited in footnote 3.

IV — Conclusion

35. In view of the foregoing, I propose that the Court should:

(1) find that 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) order the Kingdom of Spain to pay the costs.