OPINION OF ADVOCATE GENERAL TIZZANO

delivered on 3 July 2003 [1]

Introduction

1. In this action the Commission of the European Communities claims that the United Kingdom has failed to fulfil its obligations under Articles 12 and 16 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora ('Directive 92/43' or 'the Directive'). [2]

I — Legal background

The relevant provisions of Community law

2. The aim of Council Directive 92/43, adopted on the basis of Article 130s of the Treaty (now Article 175 EC), is essentially to contribute towards ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora (Article 2). For that purpose it requires the Member States to set up a coherent European ecological network of special conservation areas in order to enable certain types of natural habitat and the habitats of certain species of flora and fauna to be maintained (Article 3 et seq. and Annexes I, II and III).

3. Furthermore, the Directive identifies particular animal and plant species conservation of which demands measures of 'strict protection' (Article 12 et seq. and Annex IV).

4. In particular, Article 12(1) provides:

'Member States shall take the requisite measures to establish a system of strict protection for the animal species listed in

1 — Original language: Italian.
2 — OJ 1992 L 206, p. 7.

Annex IV(a) in their natural range, prohibiting:

(a) all forms of deliberate capture or killing of specimens of these species in the wild;

(b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration;

(c) deliberate destruction or taking of eggs from the wild;

(d) deterioration or destruction of breeding sites or resting places.'

5. Among the species protected under that provision Annex IV mentions, for our purposes here, the great crested newt (*Triturus cristatus*).

6. Article 16(1) of the Directive introduces a limited exception to that duty of 'strict protection' imposed by Article 12, providing in particular that:

'Provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, Member States may derogate from the provisions of Articles 12, 13, 14 and 15(a) and (b):

(a) in the interest of protecting wild fauna and flora and conserving natural habitats;

(b) to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property;

(c) in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment;

(d) for the purpose of research and education, of repopulating and re-introducing these species and for the breed-

ings operations necessary for these purposes, including the artificial propagation of plants;

(e) to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities'.

The relevant provisions of national law

7. Articles 12 and 16 of the Directive were transposed into the national law of the United Kingdom by the Conservation (Natural Habitats) Regulations of 1994 ('the Regulations').

8. In particular, Regulation 39(1) prohibits the capture, killing or disturbance in their natural habitat of animals of species protected at European level, the taking or destruction of their eggs and the damaging or destroying of their breeding sites or resting places.

9. Under Regulation 44, however, the competent authorities may license activity in derogation from the system of protection for species protected at European level ('derogation licences'), where the derogation is necessary in order to achieve certain purposes, including in particular:

'...

(c) conserving wild animals or wild plants or introducing them to particular areas;

...

(e) preserving public health or public safety or other imperative reasons of overriding public interest including those of a social or economic nature and beneficial consequences of primary importance for the environment;

...'. [3]

3 — Footnote not applicable in English.

10. Under Regulation 44(3), derogation licences may be granted only when the competent authorities are sure that there is no satisfactory alternative and that the derogation will not be detrimental to the maintenance of the populations of species concerned at a favourable conservation status in their 'natural range'.

11. The authorities competent to grant derogation licences under Regulation 44(4) and Regulation 4 are defined as the appropriate nature conservation body for the territory (namely, the Nature Conservancy Council (for England), the Countryside Council for Wales and Scottish Natural Heritage) for the cases referred to in Regulation 44(2)(a) to (d) and the Minister for Agriculture, Fisheries and Food or the Secretary of State for the cases referred to in subparagraphs (e) to (g).

12. In addition, in accordance with Regulation 3(4) all public authorities in Great Britain must have regard to the provisions of Directive 92/43 when exercising their functions.

13. It may be deduced from the documents in the file that Regulation 3(4) is particularly applicable where the activity which might give rise to 'disturbance' is also relevant from the point of view of town and country planning rules.

14. In such a case indeed — still according to what the file gives us to understand — the person concerned must first of all apply to the local planning authority for planning permission. The authority may refuse to grant permission, on account of the danger of 'disturbance' of a protected species, or grant it on the condition that a derogation licence under Regulation 44 is obtained.

15. In exercising that discretion, the planning authorities abide by planning guidelines (in the case of Wales, 'Planning Guidance Wales' of 1999). Under those guidelines, in particular, when there are protected species on the site in respect of which permission is sought, the local planning authorities must, before granting permission, consult the authorities competent to grant derogation licences (Planning Guidance Wales, paragraph 5.3.20). In any case, however, the planning permission applied for ought not to be refused 'if development can be subject to conditions that will prevent damaging impacts on wildlife habitats... or if other material factors are sufficient to override nature conservation considerations' (Planning Guidance Wales, paragraph 5.3.21). [4]

4 — Footnote not applicable in English.

II — Facts and procedure

16. Prompted by complaints laid by individuals, describing 'disturbance' of populations of great crested newts at sites at Broughton Park, Pontblyddyn and Connah's Quay in Wales, the Commission, after requesting explanations of the British authorities, sent the United Kingdom Government a letter of formal notice on 28 April 1999. That letter was followed by a reasoned opinion of 2 February 2001, alleging failure to comply with Articles 12 and 16 of the Directive and, in particular, failure to satisfy the conditions laid down in Article 16(1)(a) and (c) for the grant of licences for certain activity in derogation from the system of 'strict protection' provided for by Article 12.

17. Finding the responses and explanations supplied by the United Kingdom Government unsatisfactory, the Commission brought this action before the Court.

III — Legal analysis

18. In the written procedure the Commission, taking formal notice of certain legislative amendments made, though belatedly, by the United Kingdom, has in effect withdrawn its allegation of incorrect application of Article 16(1)(a) of the Directive. [5]

19. The subject-matter of these proceedings is therefore now limited to the Commission's charging the United Kingdom with failure to implement correctly Article 16(1)(c) of the Directive in situations where the danger of 'disturbing' a species which is protected for the purposes of Article 12 and Annex IV of the Directive arises from activity in respect of which planning permission is sought.

Arguments of the parties

20. The Commission's complaints are focused, essentially, on the allocation of powers between local planning authorities, which are competent to grant permission for development, and the authorities competent to grant derogation licences under Regulation 44.

21. The Commission states that British practice is for the grant of planning permission in respect of a site populated by a protected species to predate the application for derogation.

5 — Commission's reply, paragraphs 1 to 3.

22. In its opinion, in such circumstances the authority competent to grant derogation licences, receiving the application after planning permission has already been granted, is no longer in a position to determine whether or not there is any satisfactory alternative to the development project concerned, as required by Article 16(1) of the Directive.

23. Moreover, in assessing the application for a derogation licence in accordance with Article 16(1)(c), that authority cannot even question whether or not there exist 'imperative reasons of overriding public interest', especially as its decision will generally be based on the same factual grounds as those previously taken into consideration by the planning authority that has already granted development permission.

24. According to the Commission, that is in substance borne out by the statements contained in a letter of 25 October 2000 sent by the Department of Environment, Transport and the Regions to one of the individuals whose complaints launched the infringement proceedings. That letter stated that in the consideration of an application for a derogation licence 'it is taken into account that a public authority, in line with proper procedures and the framework of planning policy, has decided to grant permission for the development to proceed. In such cases it will be recognised that the planning authority has already decided that the material considerations on balance weigh in favour of the development'. [6]

25. Nor, submits the Commission, is the general provision laid down in Regulation 3, that all public authorities, including planning authorities, must 'have regard' to the Directive when exercising their functions sufficient to ensure proper implementation of Article 16 of the Directive. Moreover, Planning Guidance, paragraph 5.3.21 (see paragraph 15 above), by providing that the planning permission applied for may not be refused if development can be subject to conditions that will prevent damaging impact on wildlife habitats or 'if other material factors are sufficient to override nature conservation considerations', confirms that the British practice is not based on an approach as rigorous as that required by Article 16(1) of the Directive.

26. For its part, the United Kingdom maintains, first, that local planning authorities are required to have regard to the Directive when exercising their functions. They may not, therefore, grant planning permission where making use of that permission would raise the risk of endangering a protected species if they are not persuaded that the conditions laid down by Article 16 of the Directive have been satisfied.

6 — Footnote not applicable in English.

27. The defendant Government claims that what is more important is that compliance with Article 16 of the Directive is ensured directly by the authorities competent to grant a derogation licence in accordance with Regulation 44. The fact that those authorities may by and large base their decisions on facts communicated to them by the local planning authority does not in any way restrict the power of discretion, still less make binding on them the assessments expressly made on the basis of those facts by the local planning authority which granted planning permission.

28. According to the United Kingdom, it cannot even be asserted, as the Commission appears to assert, that the letter of 25 October 2000 (see paragraph 24 above) proves that the British authorities' practice was incorrect in application. In its submission, the Commission's quotation from that letter is incomplete and misleading, for it leaves out the last sentence, which makes it clear that the competent authority is fully responsible for the determination of whether or not the conditions under Regulation 44 have been satisfied, despite the fact that planning permission has already been granted by the local planning authority.

Assessment

29. Before I start evaluating the conflicting arguments of applicant and defendant, I must remark that there is in this case no dispute as to the interpretation of the relevant provisions of Community law.

30. As a matter of fact it is not in dispute that, for the purpose of authorising derogation from the system of 'strict protection' of protected species, the Member State concerned is required to consider whether the conditions laid down by Article 16 of the Directive have been satisfied. Nor is it in dispute that Regulation 44 constitutes full implementation, at formal level, of Article 16 of the Directive.

31. What is in issue here is whether, as applied in practice, the British system is liable to interfere with observance of the obligations imposed by the Directive.

32. Having said that, I must first of all mention that, according to settled case-law, in proceedings under Article 226 EC for failure to fulfil obligations it is incumbent upon the Commission to prove the allegation that the obligation has not been fulfilled. It must place before the Court the

information needed to enable the Court to establish that the obligation has not been fulfilled, and in so doing the Commission may not rely on any presumption. [7]

33. In the circumstances of this case, therefore, the issue is to establish whether the information supplied by the Commission is sufficient to prove that in practice the operation of the British system determines authorisation of 'disturbing' activity in derogation from the 'strict protection' regime without its previously having been established that there is no satisfactory alternative and that there exists one of the justifications specifically set out in Article 16(1)(c).

34. The Commission then criticises the fact (which the United Kingdom does not accept is a fact) that the local planning authorities, although bound in a general way to comply with the Directive, are not bound, in their deciding whether or not to grant planning permission, by standards as stringent as those laid down by Article 16 of the Directive for the purposes of granting derogation licences.

7 — Case 141/87 *Commission* v *Italy* [1989] ECR 943, paragraph 15; Case C-249/88 *Commission* v *Belgium* [1991] ECR I-1275, paragraph 6; Case C-210/91 *Commission* v *Greece* [1992] ECR I-6735, paragraph 22; Case C-279/94 *Commission* v *Italy* [1997] ECR I-4743, paragraph 33; Case C-408/97 *Commission* v *Netherlands* [2000] ECR I-6417, paragraph 15, and Case C-139/00 *Commission* v *Spain* [2002] ECR I-6407, paragraph 45.

35. That fact would appear to be crucial to this case, given that, again in the applicant's submission, the decision as to the grant of planning permission substantially prejudices the later decision on the grant of a derogation licence made by the authorities referred to by Regulation 44 in conjunction with Regulation 4.

36. As a matter of fact, according to the Commission, the assessment by those authorities of the application for a derogation licence depends upon the information supplied by the local planning authorities that considered the planning application and cannot therefore be dissociated from the assessment made by those authorities.

37. The only evidence adduced in support of the argument described would seem to be a letter of 25 October 2000 sent by the Department of Environment, Transport and the Regions to one of the complainants. In that letter it is claimed that the assessment made by the authority competent to grant derogation licences takes into account the fact that a public authority has already decided to grant development permission, it being recognised that 'material considerations' weigh in favour of the development concerned.

38. Nevertheless, that same letter also states — though the Commission did not quote this passage — that the final administrative decision is the responsibility of the authority competent to grant derogation

licences, and that the grant of that licence will be conditional upon the requirements of Regulation 44 and Article 16 of the Directive having been satisfied.

39. Leaving out of consideration the arguable question of whether or not the standards of assessment applied by local authorities in the grant of planning permission are compatible with the Directive, the fact remains that the Commission has not proved the central point of its argument.

40. Indeed, it seems to me that it is not possible to infer, either from the letter quoted or from any other evidence adduced by the Commission, that the powers of scrutiny of the central authorities are rendered meaningless simply because those authorities make use of information supplied by local authorities and make their decision after planning permission has been granted.

41. It also seems plain to me, as to the United Kingdom Government, that the fact that two different authorities are called on in turn to assess the same facts is certainly not enough to make the decision of the first a prejudgment capable of binding the second, especially as, in the circumstances of this case, the authorities making their successive decisions apply different legislative models: on the one hand, the general duty to have regard to the Directive laid down in Regulation 3(4), and on the other the strict requirements under Regulation 44.

42. Therefore, in the absence of any evidence that might establish the alleged inability of the authorities mentioned in Regulation 44 and Regulation 4 to ensure correct implementation of Article 16(1)(c) of the Directive, I believe that the complaint made by the Commission has not been adequately proved.

43. In conclusion, I propose that the action brought by the Commission should be dismissed, inasmuch as evidence of the alleged failure to fulfil obligations has not been put forward.

IV — Costs

44. 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. Since the United Kingdom has applied for costs, and the Commission has been unsuccessful, the latter must be ordered to pay the costs.

V — Conclusion

45. In light of the foregoing considerations, I suggest that the Court should:

(1) dismiss the action brought by the Commission;

(2) order the Commission to pay the costs.