



9 February 2015

PRESS SUMMARY

Sustainable Shetland (Appellant) v The Scottish Ministers and another (Respondents)
(Scotland) [2015] UKSC 4
On appeal from [2014] CSIH 60

JUSTICES: Lord Neuberger (President), Lord Sumption, Lord Reed, Lord Carnwath, Lord Hodge

BACKGROUND TO THE APPEALS

Sustainable Shetland (“SS”) challenged a consent for a large windfarm in the Central Mainland of Shetland granted under s.36 of the Electricity Act 1989 on 4 April 2012 by the Scottish Ministers. SS alleged that the Ministers had failed to take proper account of the Birds Directive (2009/147/EC) (particularly articles 2 and 4(2)) in respect of the whimbrel, a protected migratory bird. By Article 2 Member States must take measures to maintain the population of wild birds species “at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements”, or adapt them up to that level. Article 4(1) requires “special conservation measures” to be taken in respect of species mentioned in Annex I of the Directive and Article 4(2) requires “similar measures” for regularly occurring migratory species not listed in Annex I, which includes whimbrel. Pursuant to this duty the Fetlar Special Protection Area (“SPA”) had been designated. Under Article 4(4), in respect of SPAs Member States shall take appropriate steps to avoid pollution or deterioration of habitats or disturbances of the birds, and outside SPAs they shall also strive to avoid pollution or deterioration of habitats. The whimbrel in Shetland represent around 95% of the UK population and a 2009 survey showed they are in decline.

The application was accompanied by an Environmental Statement (“ES”). Scottish National Heritage (“SNH”) made objections, including on impact on the whimbrel. In response the developers submitted a new Addendum to the ES dealing in detail with likely effects on whimbrel. It included a Habitat Management Plan (“HMP”) with proposed habitat management actions e.g. to control predators. The SNH maintained their objections in respect of whimbrel, specifically referencing the Birds Directive.

In their decision letter the Scottish Ministers considered various representations (including from SNH) and stated that they had had regard to their “obligations under EU environmental legislation” and to the potential for environmental impact “in particular on species of wild birds”. In a section headed “Whimbrel” the letter discussed the respective submissions on the subject. The estimate of 3.7 annual collision deaths was regarded as “very small” in the context of 72-108 annual deaths from other causes. The Ministers were not satisfied that the estimated impact of the development on whimbrel was significant, and considered that the potential beneficial effects of the HMP could reasonably be expected to provide counterbalancing positive benefits. In any case if, despite the HMP, the estimated negative impact on the species were to remain, the Ministers considered that the level of impact was outweighed by the benefits of the project, e.g. tackling climate change. The letter also stated that the HMP represented “currently the sole opportunity” to try to improve the species’ conservation status and that without the windfarm “there currently appears to be no prospect of any significant work being undertaken to reverse the decline of the whimbrel in the UK.” Conditions on the consent would ensure monitoring of the effects of the development and the success of mitigation measures.

SS's challenge was upheld by the Lord Ordinary on other grounds but she indicated that, if necessary, she would have upheld the challenge under the Directive. The Inner House unanimously allowed the Ministers' appeal.

JUDGMENT

The Supreme Court unanimously dismisses the appeal. Lord Carnwath gives the only substantive judgment, with which the other members of the court agree.

REASONS FOR THE JUDGMENT

- The Ministers concluded that even without mitigation the impact on whimbrel was not significant. [27] Although the decision letter did not mention the Directive as such, the detailed consideration given to SNH's advice leaves no serious doubt that it was taken into account. In the context of this proposal the Ministers' duty was not to establish the precise scope of Article 2 duties to determine an "appropriate level" for the whimbrel but to determine whether to grant consent, taking account of all material considerations, of which the Directive formed part. [30- 32] If there had been evidence that the development might prejudice the fulfilment of the Ministers' duties under the Directive that would have required consideration. However, the appellants' suggestions were unsupported by the evidence, and had not been raised by anyone (including SNH) in their representations on this proposal. The investigations conducted in connection with the windfarm proposal had highlighted the present status of the whimbrel. There was no reason to think that SNH's omission to call for designation of further SPAs or other special measures under article 4(2) reflected any misunderstanding of the law or material facts. [33-35] In any event the Ministers did have regard to improving the conservation status of the whimbrel, and were entitled to have regard to the limited anticipated impact of the proposal, combined with the prospect of the HMP improving their conservation status. [36]
- It is clear from the context of the relevant passage that reference to the benefits of the project as balancing considerations was a fall-back position which would only come into play if the primary reasoning were not accepted. Interpretation of Article 2 raises some difficulties, one of which is the precise role of the economic factors there referred to. Another is the obligation of member states in relation to setting an appropriate level for the maintenance of different species. Since Article 2 applies to wild birds of all kinds it seems unlikely that it was intended to require an equally prescriptive approach in all cases, by contrast with the more specific measures required for the particular species protected by Article 4. The need for a reference to the CJEU may arise in a case in which the resolution of these issues is necessary for a decision; this is not such a case. [38-39]

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

www.supremecourt.uk/decided-cases/index.html