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OPINION OF ADVOCATE GENERAL FENNELLY

delivered on 21 March 1996 *

Case C-44/95

Regina
v
Secretary of State for the Environment ex parte Royal Society for the Protection of Birds

* Original language: English.

Table of Contents

I — Introduction . . . . I - 2
II — Facts and procedure . . . . I - 2
III — The relevant provisions of Community law . . . . I - 6
IV — Observations of the parties . . . . I - 10
(i) On the first question — the relationship between Articles 2 and 4(1) of the Birds Directive . . . . I - 11
(ii) On the second question — the possibility of taking economic requirements into account in accordance with the 'Leybucht Dykes' judgment or the Habitats Directive . . . . I - 14
V — Examination of the questions submitted by the national court . . . . I - 14
(i) The first question: the application of Article 2 in classification decisions . . . . I - 15
(a) The context of the Directive . . . . I - 16
(b) The general scheme of the Directive . . . . I - 19
(c) The interpretation of Article 2 of the Directive . . . . I - 20
(d) The relationship between Articles 3 and 4 of the Directive . . . . I - 22
(e) The extent and character of the discretion of the Member States in selecting SPAs . . . . I - 27
(f) 'Common sense' arguments . . . . I - 30
(ii) Part (a) of the second question: the possibility of taking account of economic requirements amounting to superior general interests in classifying SPAs . . . . I - 31
(iii) Part (b) of the second question: the possibility of taking account of economic requirements amounting to an overriding public interest within the meaning of Article 6(4) of the Habitats Directive in classifying SPAs . . . . I - 33
VI — Conclusion . . . . I - 34

I — Introduction

1. This case concerns the right of Member States to take economic requirements into account in deciding on the classification of a site as a special protection area (hereinafter 'SPA') under the Birds Directive. [1] The question arises on a reference from the House of Lords regarding the exclusion from the classified area of a small part of a large area of wetlands of international importance. The Court has been informed that the main proceedings constitute a test case for the future classification of a large number of other special protection areas throughout the United Kingdom, and presumably also in a number of other Member States. A related issue has been raised concerning the interpretation of certain provisions of the Habitats Directive. [2]

II — Facts and procedure

2. The proceedings before the national courts concern the exclusion from protection under the Birds Directive of some 22 hectares of the Lappel Bank, an area of intertidal mudflat which is geographically within the Medway Estuary and Marshes, on the North Coast of Kent. The following description of the factual background is taken from the judgment delivered by Lord Justice Hirst in the Court of Appeal on 18 August 1994:

'The Medway Estuary and Marshes are wetlands of international importance for a range and substantial number of wildfowl and water species, which use them both as a breeding ground and as a wintering area, and also as a staging post during spring and autumn migrations. They also support nationally important breeding populations of avocets and little terns, both of which species are considered vulnerable and are listed in Annex I to the [Birds] Directive. The area as a whole thus falls unquestionably within the ambit of both Article 4(1) and of Article 4(2).

The mudflats at Lappel Bank provide good quality feeding and sheltering grounds for a number of waders and waterfowl, including curlew, redshank, turnstone, dunlin, ringed plover, great plover [3] and shelduck, all of which are also present in significant numbers throughout the Medway Estuary and Marshes. None of these species is listed in Annex I to the Directive. However, Lappel Bank is also an important component of the overall eco-system of the designated SPA, and the loss

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

2 — Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora; OJ 1992 L 206, p. 7.

3 — It seems probable from the case-file that the 'grey plover' was intended.

of its inter-tidal area would probably result in a reduction in the overall wader and wildfowl populations of the Medway Estuary and Marshes. All the species present on Lappel Bank are present in larger numbers throughout the relevant area, and it is not suggested that Lappel Bank is necessary for the survival of any particular species: however ... some species are represented proportionately in significantly greater numbers than elsewhere in the relevant area ... .

[The Port of Sheerness] enjoys both maritime and geographical advantages. Its principal natural attraction is its berthing facilities with naturally occurring deep water of 11 metres at any tide, which enables the Port to accommodate both small sea and deep sea vessels including traditional break bulk cargo ships. As one of the few ports in the South East of England offering such facilities, it has developed into a thriving commercial enterprise, and is now the fifth largest port in the UK for cargo and freight handling.

Its seaward situation at the mouth of the Thames Estuary and close to the major North Sea and English Channel shipping routes, attracts considerable trade. Its landward situation, on the North Kent coast, which is an area scheduled for significant future development and within easy reach of the Channel Tunnel and the main markets of London and the South East, is also very favourable ... .

The port now plans to develop and expand, but physical expansion can only realistically be achieved by reclamation and development of Lappel Bank, seeing that to the north and west the port is bordered by the sea, and on the land side to the east expansion of the port is prevented by the proximity of the urban areas of the town of Sheerness, the railway and the A249 trunk road.'

3. The Medway Estuary and Marshes is also listed as a wetland of international importance in accordance with the international convention signed at Ramsar on 2 February 1971. [4] Though it was not disputed that the Lappel Bank was an integral part of the eco-system of the Medway Estuary and Marshes, the Court was not told expressly whether it was included in the area listed under the Ramsar Convention.

4. It appears that the Medway Estuary and Marshes, excluding Lappel Bank, was identified, pursuant to a practice followed in the United Kingdom, as a candidate SPA for the purposes of the Birds Directive in 1986; as such, the area was treated for some planning purposes as if it had already been designated an SPA. In August 1989, the Medway Ports Authority (the predecessor of the Port of Sheerness Limited) was granted permission by Swale Borough Council to reclaim

4 — United Nations Treaty Series Volume 996, p. 245; see also Commission Recommendation 75/66/EEC of 20 December 1974 to Member States concerning the protection of birds and their habitats (OJ 1975 L 21, p. 24), recommending that Member States accede to the Ramsar Convention.

that part of the Lappel Bank which had not previously been reclaimed; the permission was subject to the conditions, *inter alia*, that the work be commenced within five years, and that no further development take place without the express consent of the District Planning Authority.

5. The ornithological importance of Lappel Bank was described as follows in the inspector's report of a public inquiry held in late 1990 and early 1991 to consider *inter alia* the Medway Ports Authority's application for planning permission for dock reclamation and the extension of Sheerness docks at Lappel Bank:

'The bank can sometimes support a large percentage of the total Medway wintering population of some species ... on occasions Lappel Bank can hold more than 19% of the Medway totals of several species ... . Given the importance of the Medway Estuary to migratory birds, the feeding resource represented by the mudflats at Lappel Bank, and the bank's use by birds ... I conclude that Lappel Bank is itself a small but significant part of the network of sites which enables some migratory birds to survive. It has international significance.'

6. Following the recognition of its ornithological importance, the Lappel Bank was included in the proposed Medway Estuary and Marshes SPA in 1991. A further application by the Medway Ports Authority for planning permission to extend Sheerness Docks to Lappel Bank was 'called in' by the Secretary of State for the Environment, a procedure whereby the Secretary of State, rather than the local planning authority, decides on a planning application which may have significant effects on certain environmentally sensitive sites or for other reasons. On 30 July 1992, the Secretary of State accepted the planning inspector's recommendation to refuse the planning permission, on the grounds that the development would have 'significant adverse effects on the survival and reproduction of certain species of birds and would not accord with the requirements of the Birds Directive'.

7. Following this decision, the Secretary of State received representations both to revoke the 1989 planning permission, and to reconsider his decision on Lappel Bank in the light of the serious economic and social consequences its inclusion in the SPA would have for the future of Sheerness Docks. There followed a period of thorough consultation of those representing the rival interests, both ornithological and economic. It is argued that the Secretary of State gave due weight to both, before announcing his decision. On 15 December 1993, the Secretary of State announced the classification of the Medway Estuary and Marshes as an SPA, while excluding the Lappel Bank from the designated area. The exclusion was explained in the following terms:

'I am aware that Lappel Bank is an important component of the Medway estuarine system but it represents less than 1 per cent. of the total area of Medway S.P.A. I also recognise that further reclamation at Lappel Bank is essential to the

continued viability of the Port of Sheerness. The Port is a significant contributor to the economy of the Isle of Sheppey, the South East Region and the U.K., several hundred jobs are dependent on its operations ... .

I have concluded that the need not to inhibit the commercial viability of the port, and the contribution that expansion into this area will play outweighs its nature conservation value. I must stress that my decision is an exceptional one taken to ensure the economic future of Sheerness and the Isle of Sheppey.'

8. It is that aspect of the decision of 15 December 1993, namely, the exclusion of Lappel Bank from the designated area, comprising 4 681 hectares, which I will describe as the 'contested decision', which was challenged by the Royal Society for the Protection of Birds (hereinafter the 'RSPB') before the national courts. The central issue in the present case is whether the Secretary of State was entitled to take account, as he admittedly did, of economic requirements. An application for judicial review was refused by the Divisional Court, Queen's Bench Division, on 8 July 1994; the appeal against this judgment was rejected by the Court of Appeal on 18 August 1994. On appeal, the House of Lords referred the following questions to the Court by order of 9 February 1995:

'1. Is a Member State entitled to take account of the considerations mentioned in Article 2 of Directive 79/409/EEC of 2nd April 1979 on the conservation of wild birds in classification of an area as a Special Protection Area and/or in defining the boundaries of such an area pursuant to Article 4(1) and/or 4(2) of that Directive?;

2. If the answer to Question 1 is "no", may a Member State nevertheless take account of Article 2 considerations in the classification process in so far as:

(a) they amount to a general interest which is superior to the general interest which is represented by the ecological objective of the Directive (i.e. the test which the European Court has laid down in e.g. *Commission* v *Germany* ("*Leybucht Dykes*") Case 57/89 for derogation from the requirements of Article 4(4)); or

(b) they amount to imperative reasons of overriding public interest such as might be taken into account under Article 6(4) of Directive 92/43/EEC of 21st May 1992 on the conservation of natural habitats and of wild fauna and flora?'

9. In June 1994, Swale Borough Council granted planning permission to change the nature of the use of the land, from reclamation to development for port-related open storage. By 1 June 1995, the necessary engineering works had been carried out to bund the entire Lappel Bank, in preparation for land filling; approximately one third of the disputed area had by then been resurfaced, and was in use by the

Port of Sheerness. According to the observations of the Port authorities submitted in June 1995, the remainder of the work was due to be completed 'within months'.

10. In its appeal to the House of Lords, the RSPB had requested interim relief, in the form of a declaration that:

'The Secretary of State acts unlawfully if, pending final consideration of this matter by the court, he fails to act so as to avoid deterioration of habitats of species as well as the disturbance of species in the whole of areas which have been officially identified as suitable for designation as S.P.A.s ... .'

This request was refused, principally on the ground that the RSPB was not in a position to give an undertaking in damages to cover the losses which could be sustained by the Port of Sheerness, as required under English law. [5]

III — The relevant provisions of Community law

11. The Birds Directive takes as its starting point the decline in the population of a large number of species of wild birds naturally occurring in the European territory to which the Treaty applies (hereinafter, for convenience, 'Europe'); this decline is described as 'represent[ing] a serious threat to the conservation of the natural environment, particularly because of the biological balances threatened thereby' (preamble, second recital). Effective bird protection is seen as 'typically a trans-frontier environment problem entailing common responsibilities', particularly as regards migratory species which 'constitute a common heritage' (preamble, third recital).

12. The sixth recital, which was relied upon in particular by the United Kingdom, [6] notes that 'the conservation ... of wild birds ... is necessary to attain, within the operation of the common market, [one] of the Community's objectives regarding the improvement of living conditions, a harmonious development of economic activities throughout the Community and a continuous and balanced expansion, but the necessary specific powers to act have not been provided for in the Treaty'.

13. The Directive requires the Member States to apply measures to 'the various factors which may affect the numbers of birds, namely the repercussions of man's

5 — The RSPB has said it would welcome guidance from the Court on this issue. While such a requirement might indeed have an impact on the enforcement of national provisions designed to implement Community environmental law, the referring court has not requested any such guidance, and I do not recommend that the Court address the issue in these proceedings.

6 — See paragraphs 41 and 42 of the present Opinion.

activities and in particular the destruction and pollution of their habitats, capture and killing by man and the trade resulting from such practices ... [and recognizes that] the stringency of such measures should be adapted to the particular situation of the various species within the framework of a conservation policy' (seventh recital). The objective of such conservation is identified as being 'the long-term protection and management of natural resources as an integral part of the heritage of the peoples of Europe' and 'the maintenance and adjustment of the natural balances between species as far as is reasonably possible' (preamble, eighth recital). The preamble also notes that 'the preservation, maintenance or restoration of a sufficient diversity and area of habitats is essential to the conservation of all species of birds ... [that] certain species of birds should be the subject of special conservation measures concerning their habitats in order to ensure their survival and reproduction in their area of distribution ... [and that] such measures must also take account of migratory species and be coordinated with a view to setting up a coherent whole' (ninth recital).

14. The scope of the Directive is defined in Article 1(1):

'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.'

Article 1(2) specifies that the Directive applies to 'birds, their eggs, nests and habitats'.

15. Article 1 is complemented by Article 2, one of the central provisions in the present proceedings, which reads as follows:

'Member States shall take the requisite measures to maintain the population of the species referred to in Article 1 at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of *economic* and recreational *requirements*, or to adapt the population of these species to that level.' [7]

16. The principal substantive provisions concern, firstly, the protection of wild bird habitats (Articles 3 and 4), and, secondly, the protection of species of wild birds (Articles 5 to 9). Clearly, it is the first class of measures which is relevant here. Member States are required, by Article 3(1), to 'take the requisite measures to preserve, maintain or re-establish a sufficient diversity and area of habitats for all the species of birds referred to in Article 1'; this obligation must be carried out '[in] the light of the requirements referred to in Article 2'. Article 3(2) specifies the primary means to attain the objectives of the preceding paragraph, including

7 — Emphasis added.

the 'creation of protected areas' and the 'upkeep and management in accordance with ecological needs of habitats inside and outside the protected zones'.

17. Article 4 of the Directive, which is the pivotal provision in this case, merits citation in full:

'1. The species mentioned in Annex I shall be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution.

In this connection, account shall be taken of:

(a) species in danger of extinction;
(b) species vulnerable to specific changes in their habitat;
(c) species considered rare because of small populations or restricted local distribution;
(d) other species requiring particular attention for reasons of the specific nature of their habitat.

Trends and variations in population levels shall be taken into account as a background for evaluations.

Member States shall classify in particular the most suitable territories in number and size as special protection areas for the conservation of these species, taking into account their protection requirements in the geographical sea and land area where this Directive applies.

2. Member States shall take similar measures for regularly occurring migratory species not listed in Annex I, bearing in mind their need for protection in the geographical sea and land area where this Directive applies, as regards their breeding, moulting and wintering areas and staging posts along their migration routes. To this end, Member States shall pay particular attention to the protection of wetlands and particularly to wetlands of international importance.

3. Member States shall send the Commission all relevant information so that it may take appropriate initiatives with a view to the coordination necessary to ensure that the areas provided for in paragraphs 1 and 2 above form a coherent whole which meets the protection requirements of these species in the geographical sea and land area where this Directive applies.

4. In respect of the protection areas referred to in paragraphs 1 and 2 above, Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this Article.

Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats.'

18. Articles 5 to 8 of the Directive impose on the Member States a series of obligations on the protection of wild birds, and their eggs and nests, other than the protection of their habitats. These include the obligation 'to establish a general system of protection for all species of birds referred to in Article 1', and prohibitions on the marketing and hunting of wild birds, subject in each case to limited exceptions. Derogations are allowed from these obligations under the strict conditions specified in Article 9. Article 14 allows the Member States to introduce stricter protective measures than those provided for in the Directive itself. The remaining provisions of the Directive are not relevant for the purposes of the Court's preliminary ruling in the present case.

19. Certain provisions of the Habitats Directive are also relevant, since part of the second question of the House of Lords relates to it. As will be seen below, it amends in an important respect Article 4 of the Birds Directive. In accordance with Article 3(1) of the Habitats Directive, the Member States are to set up a 'coherent European ecological network of special areas of conservation' (hereinafter 'SACs') known as 'Natura 2000', in order to 'enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range'. [8] The term SAC had previously been defined at Article 1(l) as meaning 'a site of Community importance designated by the Member States through a statutory, administrative and/or contractual act where the necessary conservation measures are applied for the maintenance or restoration, at a favourable conservation status, of the natural habitats and/or the populations of the species for which the site is designated'.

20. In accordance with Article 6(1), the Member States are to establish the necessary conservation measures for SACs. Article 6(2) obliges them to take appropriate steps to avoid 'the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive' in such designated sites. Any plan or project likely to have a 'significant effect' on the management of a SAC is subject to an assessment procedure, and may only proceed where the national authorities have 'ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public' (Article 6(3)).

21. Article 6(4) in effect allows a derogation from the general obligation to maintain the integrity of a SAC. It reads:

8 — The terms 'natural habitats', 'favourable conservation status' and 'habitat of a species' are defined at Article 1(b), (e) and (f) of the Directive, respectively.

'If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for *imperative reasons of overriding public interest*, including those of a social or economic nature, the Member States shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. [9] It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

22. Article 7 of the Habitats Directive amends certain of the provisions of Article 4 of the Birds Directive. It reads as follows:

'Obligations arising under Article 6(2), (3) and (4) of this Directive shall replace any obligations arising under the first sentence of Article 4(4) of Directive 79/409/EEC in respect of areas classified pursuant to Article 4(1) or similarly recognized under Article 4(2) thereof, as from the date of implementation of this Directive or the date of classification or recognition by a Member State under Directive 79/409/EEC, where the latter date is later.'

23. In accordance with Article 23, Member States were obliged to bring into force the necessary measures to comply with the Habitats Directive within two years of notification, i.e. by June 1994. It is common ground that the United Kingdom did not seek to implement the Directive until October 1994, several months after the contested decision was adopted.

IV — Observations of the parties

24. Observations were submitted by the RSPB, the United Kingdom and French Governments, the Port of Sheerness Limited (an intervener in the main proceedings; hereinafter 'the Port of Sheerness') and the Commission, each of which was also represented at the oral hearing on 7 February 1996.

9 — Emphasis added; this expression is the subject of part (b) of the second question referred by the House of Lords (see paragraphs 95 to 99 of the present Opinion).

(i) On the first question — the relationship between Articles 2 and 4(1) of the Birds Directive

25. The RSPB takes the view that Article 2 factors — for the present purposes, economic requirements — cannot justify derogations from the obligations imposed by the Birds Directive, and that these essentially form part of the background to the scheme of protection of the Directive. It cites in support of this view the judgment of the Court and the Opinion of the Advocate General in *Commission* v *Belgium* and the judgment in *Commission* v *Italy.* [10] From *Commission* v *Germany,* [11] it concludes that Article 2 factors do not enter into requirement in the application of Article 4(4). The Member States have a discretion as to the choice of the most suitable areas for the conservation of the species concerned, but the considerations relevant to the exercise of that discretion are exclusively ornithological.

26. The RSPB contends that in *Commission* v *Spain* [12] the Court rejected the argument that the ecological requirements of Article 4 of the Directive could either be subordinated to, or balanced against, economic requirements. In finding in this judgment that Article 2 requirements did not apply in the framework of Article 4, the Court did not distinguish between Article 4(4), on the one hand, and Article 4(1) and (2), on the other. The view expressed by the Commission in its observations in that case, which was much relied upon by the Secretary of State in the national courts, that the Member States may take into account economic interests in designating SPAs, is isolated and of no consequence, and no longer even represents the Commission's position. Furthermore, the Habitats Directive clearly requires the Member States to designate SACs on the basis of scientific, conservation-related criteria, which is wholly consistent with RSPB's view that the Member States must classify as SPAs the most suitable areas from an ornithological point of view, and that economic factors cannot be taken into account.

27. In the Commission's view, the questions referred to the Court cover two situations, the classification of a site and the definition of its boundaries. It contends that the Lappel Bank should be considered as if it had already been classified and sees the expansion of Sheerness Docks as a partial declassification, which should therefore be assessed under Article 4(4) of the Birds Directive, as modified by Article 7 of the Habitats Directive. It also cites the 'Santoña Marshes' case, in support of its view that the Court did not intend to make the obligation of classification subject to any criteria other than ornithological criteria. This is seen as being consistent with the scheme of the Birds Directive, Article 2 of which seeks to establish the principal obligations for the Member States under

10 — Respectively, Case 247/85 [1987] ECR 3029 and Case 262/85 [1987] ECR 3073.

11 — Case C-57/89 [1991] ECR I-883, hereinafter the 'Leybucht Dykes' case.

12 — Case C-355/90 [1993] ECR I-4221, hereinafter the 'Santoña Marshes' case.

the Directive, 'to take the requisite measures to maintain the population of the species referred to in Article 1'; the economic and recreational requirements to which it refers can only be ancillary in the balance the Member States must strike under Article 3, between these and the obligation to protect wild bird species generally.

28. Article 4, on the other hand, in the view of the Commission creates a special protection regime for Annex I and migratory birds, to which Article 2 is not relevant. This was confirmed by the 'Leybucht Dykes' case; by classifying an area as an SPA, the Member State has acknowledged that the area contains the most suitable environments for the species concerned, and it cannot rely upon Article 2 to escape its obligations under Article 4(4). *A fortiori*, if ornithological criteria show an area to be most suitable for classification, to allow a derogation from the classification obligation for reasons other than ornithological ones would allow Member States to escape *ab initio* their habitat obligations under Article 4(1) and (2) of the Birds Directive.

29. The United Kingdom Government takes the view that the Birds Directive must be viewed within an economic and not a solely ornithological context, citing the reference to the operation of the common market in the sixth recital in the preamble. It states that in implementing a provision of the Directive, a Member State is entitled to take account of the economic requirements referred to in Article 2, unless these have been expressly taken into account in the provision at issue. As Article 4(1) and (2) do not take account of such requirements, the Member States may do so in taking decisions under these provisions.

30. Article 4 cannot, in its opinion, be viewed in isolation from Article 3, which plainly permits account to be taken of economic requirements; it would be surprising if no account could be taken of such requirements in implementing the more specific obligation with regard to SPAs in Article 4. The criterion of 'suitability' in Article 4(1) is therefore to be determined by reference to the requirements of Article 2, and not just ornithological criteria. Different considerations apply once a site has been classified; as the Court held in 'Leybucht Dykes', the Member States' discretion to take account of economic factors in derogating from the obligation to protect the classified area is much more limited. As a Member State may take account of superior or overriding (economic) considerations under Article 4(4), where its discretion is narrow, it would be anomalous if it could not take account of economic requirements where its discretion is broader, under Article 4(1) and (2). This reasoning applies *a fortiori* in relation to the definition of the boundaries of an SPA; it has not been suggested in the present case that the exclusion of 22 hectares of the Lappel Bank will prevent the achievement of the conservation objective. The Government submits that its analysis is confirmed by the 'Leybucht Dykes' and 'Santoña Marshes' cases.

31. The Port of Sheerness supports the position of the United Kingdom Government. The seventh recital in the preamble, which provides that the stringency of the conservation measures to be taken must be 'adapted to the particular situation of the various species within the framework of a conservation policy', and Article 2 together show that the Birds Directive recognizes the need to have regard for economic interests. The specific obligations of Article 4 are manifestations in respect of particular species of the general obligation under Article 3; Article 3 allows Member States to take Article 2 requirements into account, and there is nothing in Article 4(1) or (2) to prevent the Member States taking these into account, albeit to a lesser extent, in the framework of these latter provisions. Both the 'Leybucht Dykes' and 'Santoña Marshes' judgments show that Member States have a discretion with regard to the choice of SPAs and the delimitation of their boundaries. The Commission's submission in the former case that Member States were entitled to take account of economic interests in designating such areas was implicitly accepted by the Advocate General and the Court; the Port interprets the Court's judgment as meaning that it is only in the context of Article 4(4) that the economic requirements of Article 2 do not enter into requirement. It is clear from the 'Santoña Marshes' judgment, taken as a whole, that paragraph 19, where the Court said the interests referred to in Article 2 do not enter into requirement in the context of Article 4, only refers to Article 4(4).

32. The French Government considers that Member States are obliged to determine the extent of SPAs so as to include the most suitable territories, but not necessarily all listed or potentially classifiable territories. In accordance with Article 2, Member States must be guided by considerations of an economic nature in carrying out their obligation to create SPAs under Article 4. The reasoning of the 'Leybucht Dykes' case, where the Court found that the reduction of an SPA could not be justified by economic considerations, does not apply to the present case, which concerns the creation of an SPA. A listed area of very small dimensions may, in accordance with Article 2, be excluded from 'the most suitable territory' if the area in question is intended for development compatible with the future SPA, and if its inclusion would result in a serious imbalance between the conservation of birds and the economic interests at stake. It would be illogical, and could undermine the integrity of the system of classifying protected areas under the Birds and Habitats Directives, if a Member State were obliged to designate an area knowing it would be immediately able to authorize the development of that very area in accordance with the procedure laid down in Article 6(4) of the Habitats Directive.

(ii) On the second question – the possibility of taking economic requirements into account in accordance with the 'Leybucht Dykes' judgment or the Habitats Directive

33. The RSPB submits that while superior interests can be taken into account at the classification stage, economic and social interests cannot amount to such a superior interest. The correct approach under the Birds Directive as amended by the Habitats Directive is to treat an area which fulfils the ornithological criteria for classification as if it had been so classified, and to follow the procedures and rules laid down by Article 6(3) and (4) of the Habitats Directive.

34. The United Kingdom takes the view that a superior general interest can be taken into account at the classification stage, and that economic requirements can constitute such a superior general interest. The contrary view would impose an inflexible rule which could produce disproportionate results in extreme cases, which would be neither necessary or appropriate for achieving the objectives of the Birds Directive. While noting that the Habitats Directive had not come into effect at the time of the decision contested in the main proceedings, the United Kingdom submits that the 'imperative reasons of overriding public interest, including those of a social or economic nature', to which Article 6(4) of the Habitats Directive refers, may also be taken into account in classifying SPAs; to exclude such matters would introduce unnecessary and undesirable elaboration into the overall decision-making process and give rise to unnecessary administrative action, in that an area whose economic development was justified under this provision would have to be first classified and then subjected to a derogation procedure. This view is not inconsistent with the compensation provisions of Article 6(4) of the Habitats Directive, as a duty to adopt compensatory measures was inherent in Article 4(1) and (2) of the Birds Directive even before this was amended.

35. The Port of Sheerness submits that the exclusion of economic interests amounting to a superior general interest would be contrary to the overall scheme of the Birds Directive which recognizes the need to have regard to economic interests. The exclusion of such economic interests under the classification regime for SPAs after the amendments of the Habitats Directive would in its view lead to undue formalism; as a minimum, economic interests which are overriding and imperative must be relevant to the performance of the duties relating to the classification of SPAs.

36. Given their respective positions on the main question, neither the French Government nor the Commission deal with this point separately.

V – Examination of the questions submitted by the national court

37. The Birds Directive is amongst the first measures of Community legislation motivated primarily by environmental protection concerns. It anticipates, in effect,

the introduction as a result of the Single European Act, of separately identifiable Community environmental objectives. Though most of its substantive provisions, particularly those concerning species protection, have by now been examined by the Court, the Directive is still capable of throwing up novel questions of interpretation. [13]

38. In the proceedings before the national courts, and in particular the Court of Appeal, both main parties argued that the principal question, namely whether economic requirements were relevant in the framework of decisions by Member State authorities on the designation of SPAs, was 'acte clair' in their favour. Lord Jauncey of Tullichettle, speaking in the House of Lords, records the surprising fact that two Lords Justices of Appeal considered the matter to be 'acte clair' that the Secretary of State was entitled to have regard to economic requirements, whereas the third considered it to be 'acte clair' the other way. While the Court has had to interpret Article 4 on a number of previous occasions, and though I consider that it is possible to reach a clear and unequivocal answer to the questions submitted by the referring court, I rather doubt that 'the correct application of Community law [was] so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised [should] be resolved', to adopt the test laid down by the Court in *C.I.L.F.I.T.* v *Ministry of Health*. [14] Faced with opposing claims that a particular matter is 'acte clair', national courts might well bear in mind the observations, in the same case, of Advocate General Capotorti. [15]

(i) The first question: the application of Article 2 in classification decisions

39. In its first question, the national court poses an important question of principle, namely whether a Member State can take economic requirements pursuant to Article 2 of the Birds Directive [16] into account when classifying SPAs in accordance with Article 4(1) and/or (2) thereof, or in determining their boundaries. It is not contested that, assuming his right to have regard to such requirements, the Secretary of State consulted properly with the interested persons and bodies, or that he also gave weight to the relevant ornithological requirements. The fact that he ultimately chose to give precedence to the economic interests of the Port of Sheerness was a matter for him to decide and is not capable of being reviewed by the courts except in the extreme circumstances of an entirely irrational decision. The contested decision is on its face described as 'exceptional' but it explains briefly why the economic reasons for permitting the development of the

13 — Case C-149/94 *Vergy* [1996] ECR I-0000, and C-202/94 *Van der Feesten* [1996] ECR I-0000.

14 — Case 283/81 [1982] ECR 3415, paragraph 16 of the judgment.

15 — Ibid., paragraph 4 of the Opinion, pp. 3435 to 3437.

16 — Article 2 also refers to recreational requirements, though these do not appear to have any relevance in the present proceedings.

site 'outweigh its nature conservation value'. There is, in the circumstances, no evidence that the development of the Port of Sheerness will have 'specific positive consequences' for the conservation of wild birds, in the sense in which the Court used this term in 'Leybucht Dykes'. [17]

40. In order to answer this first question, it will be necessary to interpret Article 2 of the Directive, and examine its application to the habitats provisions of the Directive, Articles 3 and 4. I would like to begin this analysis by addressing an observation of the United Kingdom Government concerning the context of the Directive, which appears to have conditioned, to some extent, its interpretation of the relevant provisions.

(a) The context of the Directive

41. The United Kingdom relies upon the sixth recital in the preamble to support the view that 'the Birds Directive must be viewed within an economic, and not solely ornithological, context'; from this recital, and from Article 2 as interpreted by the Court, it reaches the conclusion that 'a Member State is entitled to take account of ... economic and other requirements ... unless those requirements have *already* been taken into account by the Council in the formulation of the provision at issue.'

42. It is clear from its terms that the purpose of the sixth recital is to justify the recourse by the Council to Article 235 of the Treaty as the legal basis of the Directive. Measures are only permitted under the terms of this provision '[if] action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers'. The sixth recital seeks to establish the necessity for Community action and the absence of other, more specific, Treaty powers, and identifies the Community objectives the Directive seeks to attain. The term 'common market' employed in Article 235 and in the sixth recital should be interpreted in the light of Article 2 of the Treaty; in its original version, this provided that the promotion, *inter alia*, of improved living conditions, a harmonious development of economic activities and a continuous and balanced expansion, should be pursued 'by establishing a common market and progressively approximating the economic policies of Member States'. The words 'harmonious' and 'balanced' demonstrate, in my view, that the concept of the 'common market' employed in Article 235 of the Treaty embraces values other than the narrowly economic; the fact that a particular measure is based on this provision, and is deemed 'necessary ... in the course of the operation of the common market', does not preclude its promoting these values, including, as need be, according them priority over economic requirements.

17 — See paragraphs 80 to 82 of the present Opinion.

43. The protection of the environment is one such value which can be profoundly and drastically affected by uncontrolled economic activity. Harmony and balance are necessary if economic growth is to be prevented from destroying Community assets and values which are, in the long term, essential to the improved standard of living which is one of the objectives of the Community. This was implicit, in my view, in a number of provisions of the Treaty, in its original version, which constitute the legal basis for Community action in various policy areas. Thus in the 'hormones case', the Court held that '[efforts] to achieve objectives of the common agricultural policy ... cannot disregard requirements relating to the public interest such as the protection of consumers or the protection of the health and life of humans and animals, requirements which the Community institutions must take into account in exercising their powers'. [18]

44. As national environmental protection measures could impinge on the free movement of goods and the conditions of competition, the Community was inevitably led to pursue environmental objectives more directly in regulating economic activity. [19] In *ADBHU*, where the compatibility of Council Directive 75/439/EEC of 16 June 1975 on the disposal of waste oils with the fundamental right of free trade was challenged, the Court held that 'the principle of freedom of trade is not to be viewed in absolute terms but is subject to certain limits justified by the objectives of general interest pursued by the Community provided that the rights in question are not substantively impaired ... environmental protection ... is one of the Community's essential objectives.' [20] It is important to note this emphatic statement by the Court in advance of the introduction into the Treaty of a specific title on the environment by the Single European Act, as amended and strengthened by the Treaty on European Union, as well as the express recognition of the importance of environmental protection concerns in internal market legislation. [21]

45. It follows from these indications, in my view, that the Community's powers and responsibility to ensure respect for the environment are in principle an inescapable adjunct of its powers and responsibility in relation to the regulation of economic activity, which were merely made more explicit, as regards both substance and procedure, by the amendments to the Treaty concerning environmental protection. For most purposes, they are two sides of the one coin; economic

18 — Case 68/86 *United Kingdom* v *Council* [1988] ECR 855, paragraph 12 of the judgment.

19 — Case 91/79 *Commission* v *Italy* [1980] ECR 1099, paragraph 8 of the judgment; Case 92/79 *Commission* v *Italy* [1980] ECR 1115, paragraph 8 of the judgment.

20 — Case 240/83 *Procureur de la République* v *ADBHU* [1985] ECR 531, paragraphs 12 and 13 of the judgment; see also Case 302/86 *Commission* v *Denmark* [1988] ECR 4607, paragraph 8.

21 — See now Articles 130r to 130t, and 100a(3) and (4) of the Treaty, respectively.

activity can damage the environment, while the requirements of environmental protection may in some circumstances impede economic activity.

46. More specific indications concerning the context in which the Directive sought to protect bird habitats can be found in the Declaration of the Council and of the Representatives of the Governments of the Member States meeting in the Council of 22 November 1973 on the programme of action of the European Communities on the Environment, [22] to the effect that 'a harmonious development of economic activities and a continuous and balanced expansion ... cannot now be imagined in the absence of ... an improvement in .. the protection of the natural environment [which is] among the fundamental tasks of the Community' (fourth and fifth recitals in the preamble). The Community's environmental policy should therefore 'ensure the sound management of and avoid any exploitation of resources or of nature which cause significant damage to the ecological balance' (objectives, third indent).

47. The rationale of protecting flora and fauna was identified in the following terms in the Resolution of the Council and of the Representatives of the Governments of the Member States meeting within the Council of 17 May 1977 on the continuation and implementation of a European Community policy and action on the environment:

'Wild flora and fauna are part of mankind's common heritage. Their importance derives from the fact that they constitute reservoirs of non-renewable genetic material and that they are elements in an overall ecological balance, the stability of which is linked to the complex nature of the numerous functions performed and to the diversity of the organisms involved. The steady decline in the number of wild species is not only in itself an impoverishment of our natural heritage, but it lessens the diversity of non-renewable genetic resources whilst at the same time affecting the ecological balance with various degrees of severity.' [23]

48. The first recital in the preamble to the Birds Directive refers to both the 1973 declaration and the 1977 resolution, while other recitals, cited above, [24] indicate the Council's concern regarding the threat to the wildlife environment. It follows from the foregoing, in my view, that the context of the Directive is predominantly ecological, even if it takes account of economic considerations in certain circumstances.

49. In so far as it implies that the context in which the Directive was adopted, even apart from its text, would point to the existence of a discretion for the

22 — OJ 1973 C 112, p. 1.

23 — OJ 1977 C 139, p. 25.

24 — See particularly the second and eighth recitals, paragraphs 11 and 13 of the present Opinion.

Member States to take economic requirements into account, the United Kingdom's affirmation is to my mind incorrect. If, on the other hand, it was intended to mean that the Directive enshrines the correct balance between economic and ecological factors which, in the Council's view, was at the time necessary to ensure the conservation of wild birds as provided in Articles 1 and 2, the affirmation is unexceptionable, but it does not support the conclusion reached by the United Kingdom with regard to the interpretation of Article 4(1) and (2).

(b) The general scheme of the Directive

50. The argument against taking economic requirements into account is not essentially a textual one, as has been alleged; in my opinion, the general scheme of the Directive supports the view that economic requirements may not enter into account at the classification stage. While a balance between ornithological and economic requirements is certainly necessary in deciding on habitats protection, it is the Directive itself which strikes the balance as regards classification of SPAs, rather than leaving discretion to individual Member States to find their own balance.

51. This is illustrated by the seventh recital in the preamble, cited above. [25] The finding in this recital that 'the stringency of such measures should be adapted to the particular situation of the various species within the framework of a conservation policy', which was relied upon by the Port of Sheerness to show that the Directive explicitly recognizes the need to have proper regard for economic interests, can equally justify restrictions on the pursuit of such interests; the situation of endangered and migratory species of wild birds clearly requires more stringent protective measures than those which apply to wild birds generally. The general scheme of the Directive is based on a series of carefully graduated obligations and prohibitions which are phrased in sweeping terms, but which are accompanied, where appropriate, by express exceptions and derogations to which the Member States may resort only under the conditions specified in each case.

52. This analysis is confirmed by the provisions of the Directive concerning species protection. Article 6(1), for example, requires the Member States to prohibit 'the sale, transport for sale, keeping for sale and the offering for sale of live and dead birds and of any readily recognizable parts or derivatives of such birds'; Article 6(2) and (3), on the other hand, allow trade in certain species of wild birds where their 'biological status so permits'. A similar derogation from the prohibition on hunting wild birds, this time largely motivated by recreational requirements, is allowed by Article 7 in respect of certain species where, 'because of their high population level, geographical distribution and reproductive rate in the Community as a whole' (eleventh recital), hunting would not jeopardize their

25 — Paragraph 13 of the present Opinion.

conservation status. The United Kingdom has itself, correctly in my view, referred to the very strictly drawn possibilities of derogation allowed by Article 9 of the Directive as 'reflect[ing] an antecedent judgment (*sic*) by the Council as to the circumstances in which economic and other requirements may prevail over the system of protection established by Articles 5 to 8'.

53. Under each of these provisions, the conservation objective is paramount, but the Member States may benefit from exceptions to the prohibitions, or a derogation in accordance with Article 9, for specified reasons (which include economic and recreational requirements) and under specified conditions. The general scheme of the Directive indicates that bird conservation is the rule, and that the Member States may only rely on other considerations to mitigate that rule where expressly so authorized. The priority of ecological, or more specifically ornithological, factors in this general scheme is evident.

(c) The interpretation of Article 2 of the Directive

54. While not disputing, therefore, that, as regards species protection, the Directive has itself established the requisite balance between economics and ecology, the United Kingdom takes the view that the fixing of the balance as regards habitats protection for all species of wild birds is left to the Member States. In support of this view, it relies primarily on the text of Article 2 as interpreted by the Court, and on the extent of the discretion enjoyed by Member States, respectively, under Article 3 on the one hand and, on the other hand, under Article 4(1) and (2).

55. Article 2 can, in my opinion, only be interpreted along with Article 1 of the Directive; both are general provisions, which, read together, determine the obligations of the Member States. Article 1 fixes the material scope of the Directive ('all species of naturally occurring birds in the wild state', 'their eggs, nests and habitats'), its territorial scope ('the European territory of the Member States to which the Treaty applies'), [26] and its regulatory scope ('the protection, management and control of these species and ... rules for their exploitation'). Article 2 imposes the general obligation on the Member States to adopt the requisite measures to achieve the objectives of the Directive, and fixes the population level which Member States must maintain or achieve, namely 'a level which corresponds in particular to ecological, scientific and cultural requirements'; in taking the requisite measures to maintain or achieve that level, the Member States must take account of 'economic and recreational requirements'.

26 — This includes a measure of extra-territorial protection, in relation to birds of subspecies which do not occur in the territory to which the Directive applies, where the species is protected: Case C-202/94 *Van der Feesten*, cited in footnote 13, above.

56. This interpretation coincides with the explanation provided by the Commission of Article 2 of the proposal which became the Birds Directive:

'The aim of the measures proposed in the Directive is to maintain the numbers of the various species at a level compatible with certain requirements ... . The principle behind the measures is to find a satisfactory level, bearing in mind not just one criteria (*sic*) such as protection, but a number of different criteria'. [27]

57. Significantly, though the Commission had proposed that the Member States be obliged to maintain population levels which were 'compatible with ecological, economic, recreational and scientific requirements', the Council confined economic and recreational requirements to matters of which the Member States should 'take account' in taking the requisite measures to maintain, or adapt, population levels corresponding to ecological, scientific and cultural requirements. In so doing, the Council did not require that the population levels to be attained be necessarily *compatible* with economic requirements, which would have given these equal treatment with ecological requirements; instead, Article 2 should, in my view, be read as requiring the population level of protected species to be maintained at a level which *corresponds* with ecological, scientific and cultural requirements, while obliging Member States to take account of economic and recreational requirements in the *measures* they adopt in accordance with the Directive to attain these levels.

58. On a literal construction of this provision, which has not been suggested by any of the parties to the present proceedings, it would be possible to interpret the obligation to take account of economic and recreational requirements as applying to the determination of the population level to be attained ('Member States shall ... maintain the population of the species ... while taking account of economic and recreational requirements'), rather than to the taking of the measures ('Member States shall take the requisite measures ... while taking account of economic and recreational requirements'). This interpretation would in my opinion, however, be inconsistent with Article 3(1), which allows Member States to take account of these requirements while *'tak[ing] the requisite measures* to preserve, maintain and re-establish' habitats for wild birds generally; it would also in effect restore the text to that which the Commission had proposed, but which the Council did not adopt.

59. The interpretation of Article 2 adopted by the Court in its previous case-law supports the view that the Directive itself has struck the necessary balance between economic and ecological factors. Thus, while noting in *Commission* v *Belgium* that as a general proposition 'the protection of birds must be balanced against other requirements, such as those of an economic nature', the Court held that:

27 — COM (76) 676 final of 20 December 1976, paragraph III(2).

'... although Article 2 does not constitute an autonomous derogation from the general system of protection, it none the less shows that *the directive takes into consideration*, on the one hand, the necessity for effective protection of birds and, on the other hand, the requirements of public health and safety, the economy, ecology, science, farming and recreation'. [28]

60. The passage quoted in the preceding paragraph has been cited by the United Kingdom as demonstrating that, where the Directive does not expressly take account of economic requirements, the Member States are free to do so. It seems to me, however, that if Member States were allowed to take account of such requirements on the basis of Article 2, this provision would inevitably function as an 'autonomous derogation', which interpretation the Court has consistently rejected. Indeed, far from justifying a derogation of any kind, the principal purpose of Article 2 is to establish obligations. [29]

(d) The relationship between Articles 3 and 4 of the Directive

61. In the present proceedings, it is clear that the national court is seeking a ruling on whether the economic requirements to which Article 2 refers may be taken into account in deciding on the classification of SPAs. Before examining the pivotal issue of the relationship between Articles 3 and 4 of the Directive, it may be useful to deal with two preliminary points raised by the Commission.

62. The Commission has invited the Court to treat the exclusion of the Lappel Bank from the Medway Estuary and Marshes as a partial declassification of a designated area. This does not seem to me to be a very useful approach, nor to correspond to the terms or to the intention of the questions referred. The decision of the Secretary of State was, in clear terms, a decision to classify an area as an SPA, but to exclude Lappel Bank. The issue before the national court is whether Lappel Bank should have been included; if the response is negative, no question of partial declassification arises, while if the response is affirmative, there is no reason to doubt that the United Kingdom will take the relevant action to comply with its obligations under the Directive.

63. The Commission also sought to distinguish between the classification of a site as an SPA and the definition of its boundaries. In the circumstances of the present proceedings, this is a distinction without a difference, and the Commission did not base any of its observations on this distinction; in deciding to classify any area as an SPA, the Member State authorities must also fix its boundaries. It is

28 — Case 247/85, cited in footnote 10 above, paragraph 8 of the judgment (emphasis added).

29 — It can also act, for example, as a guideline for future modifications of the annexes to the Directive; see in this regard the Opinion of Advocate General Da Cruz Vilaça in Case 247/85 *Commission* v *Belgium*, cited in footnote 10 above, pp. 3051 and 3052.

obvious, and indeed it was not contested, that the exclusion of a particular piece of territory from the area of the SPA which could not be justified on ornithological grounds under the Directive would constitute a breach of the obligation imposed by Article 4(1) to classify the most suitable territories. The case for the United Kingdom Government is not that it has a discretion in respect of the fixing of the boundaries of SPAs which is not limited by the Directive, but rather that, having properly identified an area which should, prima facie, be classified, it may exclude a part of the area on economic grounds pursuant to the Directive.

64. The United Kingdom Government has argued with particular force that Article 2 should be interpreted as applying to the classification of SPAs in accordance with Article 4(1) and (2), in the same way as it applies to Article 3, notwithstanding the absence of an express indication to this effect in the text of Article 4. In its view, Article 4 should be treated as 'a more specific application of the general obligation of Article 3'.

65. Article 3 establishes the general obligations of the Member States as regards the habitats of all protected species; they must 'take the requisite measures to preserve, maintain or re-establish a sufficient diversity and area of habitats for all the species of birds referred to in Article 1'. Given the comprehensive character of this obligation, which covers all wild birds regardless of any threat to their conservation status, and the fact that the Directive sought to achieve a balance between ecological and other competing interests, [30] it would have been surprising if the Member States had been precluded from taking account of economic and recreational requirements in complying with Article 3; hence Article 3(1) expressly provides that the Member States should act '[in] the light of the requirements referred to in Article 2'.

66. Article 4 is, as it were, a bird of a very different feather. It only applies to endangered species, listed in Annex I to the Directive, and to regularly occurring migratory species. The special conservation measures which it requires the Member States to take, of which the designation of SPAs is merely the most prominent, are required in order to ensure the very survival of the species concerned, and to facilitate their reproduction in their area of distribution. It appears from the preamble to the Directive, in particular the seventh recital, and from the legislative context in which the Directive was adopted, that many of these species are under threat precisely as a result of 'the repercussions of man's activities', economic and recreational; [31] to allow Member States, in effect, to give these requirements priority in deciding on special conservation measures would, in my view, contradict the purpose for which a special regime for endangered and

30 — See paragraphs 50 to 53 of the present Opinion.

31 — See also the explanatory statement accompanying the Commission's proposal for a directive on bird conservation, cited in footnote 27 above, paragraph I(5).

migratory species was instituted in the first place, and could have the effect of applying to endangered and migratory species essentially the same regime as for other wild birds.

67. The specific character of the protective regime for endangered and migratory species was underlined by the Court in its judgment in *Van den Burg*. There the Court noted that Article 14 of the Directive expressly authorized the Member States to introduce stricter measures and that hence it had 'regulated exhaustively the Member States' powers with regard to the conservation of wild birds'. [32] Having regard to the general objectives of the Directive, the Court interpreted this provision as allowing the Member States 'to introduce stricter measures to ensure that [endangered and migratory] species are protected even more effectively', even as regards specimens of species which did not occur in the territory of the Member State in question; on the other hand, this provision did not justify such measures in relation to other protected species, except as regards species occurring within the territory of the Member State. [33]

68. Article 3 is the only provision of the Directive which expressly allows the Member States to take account of the non-ornithological requirements mentioned in Article 2. I do not consider such an exception to the general obligation should be extended without an express indication to this effect. Such a wide interpretation of the habitats provisions, by extending the area of Member States' discretion, would also in my view undermine the uniform application of the Directive; the Court noted in *Van der Feesten* that '[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'. [34] The birds listed in Annex I are identified as being in need of special protection on a Community-wide basis. Their safety and possible survival should not be put at risk by the action of individual Member States.

69. This is not the first time that the Court has had to examine the argument that 'the duties laid down in Article 4 ... are merely fleshed-out versions of the measures referred to in Article 3(2)(a) and (b) of the directive'; the United Kingdom put forward the same interpretation of these provisions in 'Leybucht Dykes'. [35] The Court implicitly but, to my mind, incontrovertibly did not accept this view; had it done so, it would have been led to accept that Member States' obligations under Article 4(4) were subject to Article 2 requirements, which it did not. [36]

32 — Case C-169/89 [1990] ECR I-2143, paragraph 9 of the judgment.

33 — Ibid., paragraph 12 of the judgment.

34 — Case C-202/94, cited in footnote 13 above, paragraph 16 of the judgment.

35 — Case C-57/89 *Commission* v *Germany*, cited in footnote 11 above, p. I-901.

36 — Ibid., paragraph 22 of the judgment.

70. The interpretation of Article 4(1) and (2) of the Birds Directive proposed by the United Kingdom would also be doubly inconsistent with the Habitats Directive; though the national measures to implement this latter were not yet in force at the time the contested decision was taken, the close link between the two directives is clear from the preamble to the Habitats Directive, and in particular the seventh and fifteenth recitals, and Articles 3(1) and 7 thereof. As the RSPB has pointed out, while the Member States are to take account of 'economic, social and cultural requirements and regional and local characteristics' in taking measures pursuant to the Habitats Directive (Article 2(3)), the criteria for the selection of SACs set out in Annex III are entirely conservation-related. Thus, for example, the criteria for the assessment at the national level of the relative importance of natural habitat types are defined as follows:

'(a) Degree of representativity of the natural habitat type on the site.
(b) Area of the site covered by the natural habitat type in relation to the total area covered by that natural habitat type within national territory.
(c) Degree of conservation of the structure and functions of the natural habitat type concerned and restoration possibilities.
(d) Global assessment of the value of the site for conservation of the natural habitat type concerned.'

71. It is clear from Article 4(1) of the Habitats Directive that the Member States must identify the potential SACs on their territories on the basis of these criteria and 'relevant scientific information'. This provision establishes that '[for] animal species ranging over wide areas, these sites shall correspond to the places within the natural range of such species which present the physical or biological factors essential to their life and reproduction'. Unless Article 2(3) were to be considered to constitute an 'autonomous derogation' from the obligations of the Member States under Article 4 of the Habitats Directive, there is nothing in this Directive to indicate that the designation of SACs, as distinct from the subsequent obligation to conserve them, is subject to economic priorities.

72. The interpretation suggested by the United Kingdom would be inconsistent with the regime which applies to the conservation of SPAs as a result of the modifications to the Birds Directive effected by the Habitats Directive. According to the United Kingdom, a Member State is able to take account of economic requirements in designating the 'most suitable territories'; by this token, it would be able to do so without proceeding to the assessment required by Article 6(3) of the Habitats Directive, or taking compensatory measures to protect the overall coherence of Natura 2000, in accordance with Article 6(4), or respecting the other conditions imposed by those provisions. If sites have already been assessed for their potential for economic development prior to any decision on their classification as SPAs, the entire mechanism for derogating from the obligation to conserve such sites will have little or no purpose, other than in circumstances where

the imperative reasons of overriding public interest only arise after the designation of the site.

73. It would also follow from this interpretation that Member States which have failed to designate the most suitable territories within the deadline for the implementation of the Birds Directive – April 1981 in the case of the United Kingdom – would thereby enjoy a considerable advantage, particularly in terms of the economic cost of taking compensatory measures for declassified SPAs, over those which have complied with Article 4(1) and (2) more promptly. This state of affairs would equally offend against the requirement of the uniform application of the Directive, referred to above. [37]

74. There is a further dimension to this question to which the parties did not advert, which is in my view equally important for the interpretation of Article 4(1) of the Birds Directive. In carrying out their obligations under Article 3 of that Directive, Member States are entitled to take into consideration certain factors the evaluation of which could be described as subjective to that Member State. Nothing in the Directive would oblige the Member States to take account of the economic or recreational requirements of other Member States, when adopting measures to ensure a sufficient diversity and area of habitats for protected birds generally in accordance with Article 3(1). The criteria governing the application of Article 4(1) on the other hand are exclusively objective, that is, ornithological in character, the respect of which is to be evaluated at the level of the Community. Thus the extent of the special conservation measures required depends on the survival and reproduction needs of the species concerned 'in their area of distribution', rather than at the level of individual Member States, taking account of verifiable 'trends and variations in population levels'. In deciding on the classification of SPAs, Member States must take into account the 'protection requirements [of the species concerned] *in the geographical sea and land area where this Directive applies*' (Article 4(1), third paragraph; emphasis added). Similarly objective criteria govern the special conservation measures the Member States are obliged to adopt to protect migratory species in accordance with Article 4(2), and the coordination which the Commission must carry out pursuant to Article 4(3).

75. The exclusion from the process of SPA classification of what might be termed considerations of national concern is perfectly consonant with the remainder of the Directive. Thus, for example, the third recital in the preamble declares that migratory species 'constitute a common heritage' and that 'effective bird protection is typically a trans-frontier environment problem entailing common responsibilities'. The Community character of the habitats protection for endangered and migratory species is underlined by Article 4(3), which gives the Commission responsibility for 'the coordination necessary to ensure that the areas provided for in paragraphs 1 and 2 form a coherent whole which meets the

37 — Paragraph 68 of the present Opinion.

protection requirements of these species in the geographical sea and land area where this Directive applies'. In this regard, the Court has consistently stressed that 'a faithful transposition [of the Directive] becomes particularly important in a case such as this in which the management of the common heritage is entrusted to the Member States in their respective territories.' [38]

76. The inclusion of economic requirements in the framework of Article 4(1) and (2) was also rejected by the Court in 'Santoña Marshes', at paragraphs 16 to 19 of the judgment. Replying to an argument of the Spanish Government that the ecological requirements imposed by Article 4 were 'subordinate ... to social and economic interests, or must at the very least be balanced against them', the Court held:

'[That] argument cannot be accepted. It is clear from the Court's judgment in ["Leybucht Dykes"] that in implementing the Directive, Member States are not authorized, at their option, to invoke grounds of derogation based on taking other interests into account'. [39]

The view put forward by a number of parties to the present proceedings that the Court's finding in 'Santoña Marshes' was restricted to Article 4(4) of the Directive is inconsistent both with the terms of the Commission's complaint, which referred to Article 4(1) and (2) as well as Article 4(4), and with the general character of the Spanish Government's argument, reflected in paragraph 17 of the judgment and in the report for the hearing. [40]

77. It follows, in my view, that the absence of any express reference in Article 4(1) to a Member State discretion under Article 3 to take economic and recreational requirements into consideration must be interpreted as precluding the existence of any such discretion.

(e) The extent and character of the discretion of the Member States in selecting SPAs

78. Article 4(1) of the Directive imposes an obligation on the Member States to 'classify in particular the most suitable territories in number and size as special protection areas for the conservation of [endangered] species'. The United Kingdom has argued that the 'natural reading' of this provision is that

38 — Case 247/85 *Commission* v *Belgium*, cited in footnote 10 above, paragraph 9 of the judgment.

39 — Case C-355/90 *Commission* v *Spain*, cited in footnote 12 above, paragraph 18 of the judgment.

40 — Ibid., pp. I-4228 and I-4229.

'"suitability" is to be determined by reference to the various requirements referred to in Article 2', [41] and that the Directive should not be interpreted as 'requiring classification to proceed *solely* of the basis of ornithological criteria'. Furthermore, it argues that, as the Court has recognized that Member States enjoy a certain, limited, discretion in respect of Article 4(4), the Directive did not intend to deny them a margin of discretion under Article 4(1) and (2).

79. It follows from the analysis of the wording and general scheme of Articles 3 and 4 I have presented above that the classification of SPAs must indeed proceed on the basis of the ornithological criteria expressly provided in the text of Article 4(1). This is not inconsistent with the existence of a certain discretion for the Member States. In the first place, the use of the term 'in particular' implies that the classification of the most suitable sites as SPAs is a minimum requirement. Furthermore, as the Court noted in its judgment in *Commission* v *Italy*, it follows from the 'allocation of responsibilities [under Article 4(1) of the Directive] that it is for the Member States to identify the species which must be the subject of the special protective and conservation measures required ... . Moreover, the Member States are better placed than the Commission to ascertain which of the species listed in Annex I to the directive occur in their territory.' [42] This discretion is biological rather than political in character; as the German Government pointed out in 'Leybucht Dykes', the choice of an SPA entails an extremely complex assessment of the most varied facts, and requires considerable scientific work; [43] it does not, in my opinion, permit the introduction of criteria other than those provided for in the relevant provisions of the Directive.

80. The United Kingdom has argued, on the basis of 'Leybucht Dykes', that Member States enjoy a limited discretion to take economic requirements into account in circumstances where a derogation from the obligation under Article 4(4) 'to avoid pollution or deterioration of habitats or any disturbance affecting the birds' is justified, and that it would be anomalous if Member States were unable to take such requirements into account in classifying SPAs.

81. This view appears to me to be based on a misreading of the Court's judgment in 'Leybucht Dykes'. The Court clearly stated that a decision to reduce the area of an SPA could not be justified by economic factors; the only grounds which could be relied upon were those which 'correspond to a general interest which is superior to the general interest represented by the ecological objective of the directive. In that context the interests referred to in Article 2 of the directive, namely economic and recreational requirements, do not enter into

41 — This is clearly contradicted by the Court's judgment in 'Leybucht Dykes'; see paragraph 83 of the present Opinion.

42 — Case C-334/89 [1991] ECR I-93, paragraph 9 of the judgment.

43 — Case C-57/89 *Commission* v *Germany*, cited in footnote 11 above, pp. I-896 and I-897.

consideration'. [44] Furthermore, the taking into account of such factors in deciding on the action which was justified by the superior general interest was also 'in principle incompatible with the requirements of' Article 4(4). [45] In the particular circumstances of the case, the Court found that the decision on the new line of the dyke could be justified by 'specific positive consequences for the habitat of birds', and that the taking account of economic requirements did not constitute a violation of Article 4(4) 'because there were ... offsetting ecological benefits, and solely for that reason'. [46]

82. It is clear from the Court's judgment that the Member States may not rely on economic requirements either to justify reducing the size of an area previously classified as an SPA, or in deciding on action which is justified by a superior general interest. However, where such a superior interest does exist, a Member State is not precluded from taking a particular action which has 'specific positive consequences for the habitat of birds' merely because this action corresponds to a particular economic interest, as long as the positive ecological benefits are not outweighed by the negative effects of the action. In my view, this judgment does not support the view that Member States enjoy a discretion not to classify an SPA, or to reduce the area so classified, based on economic grounds.

83. There is also a contradiction inherent in the United Kingdom's argument that, where a provision of the Directive does not expressly take account of economic and other non-ornithological requirements, a residual discretion for the Member States should be implied. Article 4(4) of the Directive, as it was at the time of the contested decision, did not expressly take account of such requirements; according to the United Kingdom's reasoning, an 'Article 2 discretion' should therefore be implied. This was indeed the position adopted by the United Kingdom in 'Leybucht Dykes', which was emphatically rejected by the Court, stating that in the context of Article 4(4) such interests do not enter into consideration. [47]

84. In effect, the United Kingdom interprets Article 4(1) and (2) in the light of Article 3, while treating Article 4(4) as a discrete provision subject to different rules. It seems to me to be much more logical to interpret the four paragraphs of Article 4 as a coherent whole. The Court noted in 'Leybucht Dykes' that the Directive did not envisage the possibility of Member States reducing the extent of an SPA 'since they have themselves acknowledged in their declarations that those areas contain the most suitable environments for the species listed in Annex I to

44 — Ibid., paragraph 22 of the judgment.

45 — Ibid., paragraph 24 of the judgment.

46 — Ibid., paragraph 25 of the judgment.

47 — Ibid., paragraph 22 of the judgment.

the directive. If that were not so, the Member States could unilaterally escape from the obligations imposed on them by Article 4(4) of the directive with regard to special protection areas'.[48] The Court thereby rejected the idea put forward by the United Kingdom that the criterion of 'suitability' should be interpreted as embracing non-ecological requirements.

85. It also seems to me to follow from this judgment that the areas designated as SPAs are only deserving of such special protection *because* they are the most ornithologically suitable areas, rather than areas which have been selected as exhibiting the least economic potential and that, conversely, the Member States *must* designate the most suitable areas because, once designated, they will be entitled to the extensive protection intended by Article 4(4). The discretion the Member States enjoy under Article 4(1) and (2) arises from the nature of these provisions, which impose positive rather than negative obligations, and is limited to a discretion to apply the criteria established by these provisions.

86. It follows from the foregoing, in my opinion, that, subject to the requirement to take account of superior general interests, the discretion of the Member States under Article 4(1) and (2) of the Directive does not authorize them, when deciding on the classification of SPAs, to take into account requirements other than those laid down by these provisions.

(f) 'Common sense' arguments

87. The United Kingdom also appeals to what are intended to be considerations of common sense, presenting the hypothesis of two similar sites, one adjacent to an industrial area, the other remote from any such activities, where only one site need be classified to satisfy the object of conservation. In such circumstances, the exclusion of economic requirements would, in its view, lead the Member State to make a 'near-random selection between the two sites'.

88. The RSPB doubted at the oral hearing whether this is in any way a plausible scenario from the ornithological point of view. Without prejudice to that particular question, it should be recalled that the United Kingdom's observations on this point are informed by the idea, already rejected above,[49] that Article 4(1) should be interpreted in the light of Article 3. The submission concerning similar sites might be plausible in the context of Article 3, as regards the generality of wild-bird habitats, except of course that Article 3 allows non-ecological criteria to be taken into account. The argument appears to me not to take account of the fact that Article 4(1) and (2) apply only to wild bird species whose very existence is under threat, and to migratory species. Birds of such species whose habitat happens to

48 — Ibid., paragraph 20 of the judgment.

49 — Paragraphs 65 to 77 of the present Opinion.

be adjacent to an industrial development are no less deserving of protection under the Directive than those to be found in more remote areas. In the example given, should the two sites in question equally fulfil the criteria laid down in these provisions to qualify as 'the most suitable territories ... for the conservation of these species', there is nothing in the Directive which would absolve the Member State from the duty of classifying both as SPAs. The mere fact that a Member State has classified a number of areas as SPAs does not justify its failure to classify a site which, according to the objective ornithological criteria of Article 4, is amongst 'the most suitable territories'; the obligation imposed by Article 4(1) and (2) is not only that to achieve a general result, as the United Kingdom appears to believe, but 'to preserve, maintain and re-establish habitats as such, because of their ecological value'. [50]

89. For reasons set out above, I am of the opinion that the Member States may not take account of economic requirements such as those mentioned in Article 2 of the Birds Directive when designating SPAs, or in determining the boundaries of such SPAs, in accordance with Article 4(1) and/or (2) of the Directive.

(ii) Part (a) of the second question: the possibility of taking account of economic requirements amounting to superior general interests in classifying SPAs

90. As the answer I am proposing to the first question is 'no', the Court should in my view address the second question posed by the House of Lords. Part (a) of the second question seeks to establish in effect whether a Member State would be entitled to take account of Article 2 requirements in the classification process, where such requirements amount to a general interest which is superior to the general interest which is represented by the ecological objective of the Directive (hereinafter a 'superior general interest'), in application of the test laid down by the Court in 'Leybucht Dykes'. In effect, the issue is again, in a different form, whether economic interests may be taken into account. The United Kingdom, while relying primarily on an affirmative answer to Question 1, has also argued that to refuse the possibility that economic interests could ever constitute such a superior general interest would be unduly inflexible and could lead to disproportionate results.

91. It appears that this issue was first raised by Lord Justice Hoffman in his judgment in the Court of Appeal and was relied upon by the Secretary of State for the first time before the House of Lords. The relevance of the question to the contested decision is by no means clear, since the Secretary of State does not refer to a superior general interest, economic or otherwise. It is a matter for the

50 — Case C-355/90, 'Santoña Marshes', cited in footnote 12 above, paragraph 15 of the judgment.

national court, however, to apply to the facts of the case any answer given by the Court.

92. The considerations which justified the reduction in the area of the SPA in 'Leybucht Dykes' were principally founded on the necessity to protect human life; the Court found that 'the danger of flooding and the protection of the coast constitute sufficiently serious reasons to justify the dyke works and the strengthening of coastal structures as long as those measures are confined to a strict minimum and involve only the smallest possible reduction of the special protection area'. [51] Of course, 'Leybucht Dykes' was decided by reference to an already classified site and concerned the measures which a Member State was obliged to take in accordance with Article 4(4), which had not yet been amended and contained no provision for derogation such as was added by Article 7 of the Habitats Directive. It would seem to me to follow that the Member States may take account of similar superior general interests in classifying and defining the boundaries of SPAs, notwithstanding the silence of the Directive on this point. However, it equally follows that, should a particular site or part of a site which is otherwise suitable for classification not be so classified as an SPA, by reason of a superior general interest, the Member State would be obliged under these provisions to take compensatory measures. To this extent, I agree with the United Kingdom's observation that such a compensatory obligation is inherent in Article 4(1) and (2) in order to satisfy the primary obligation under those provisions. No such provision appears to be contained in the contested decision.

93. On the question of proportionality, it is inherent in the nature of such protective measures that in particular circumstances they may restrict economic development which might otherwise be unobjectionable. [52] In deciding what is proportional, it is important to remember that, as noted by counsel for the RSPB at the hearing, the huge losses in bird habitats in the decades which preceded the adoption of the Birds Directive did not occur all at once but were the result of an accumulation of quite small losses; the fact that a particular site is small in geographical terms is not therefore a decisive factor.

94. I conclude that, while a superior general interest as recognized by the Court in 'Leybucht Dykes' may be taken into account in the classification of SPAs and the definition of their boundaries, economic interests cannot be considered to constitute a superior general interest.

51 — Case C-57/89 *Commission* v *Germany*, cited in footnote 11 above, paragraph 23 of the judgment.

52 — In 'Leybucht Dykes', the German Government, though arguing that the Member States enjoy a wide discretion in the application of Article 4(4), admitted expressly that 'in special protection areas general economic interests such as those of tourism, industry and agriculture must give way to the requirements of bird conservation' (Case C-57/89 *Commission* v *Germany*, cited in footnote 11 above, pp. I-897 and I-898).

(iii) Part (b) of the second question: the possibility of taking account of economic requirements amounting to an overriding public interest within the meaning of Article 6(4) of the Habitats Directive in classifying SPAs

95. The United Kingdom submits that this question can be relevant only to classification decisions which have been taken after the Habitats Directive came into effect, but that in the present case, the classification decision preceded the implementation of the Habitats Directive. The concept of overriding public interest was, it is true, introduced into the Birds Directive only by the amendments of the Habitats Directive, and therefore this view might arguably be deemed to be correct. The Court has consistently held, however, that 'it is for the national courts alone ... to determine, having regard to the particular features of each case, both the need for a preliminary ruling to enable them to give judgment and the relevance of the questions which they refer to the Court.' [53] In any event, I do not agree with the proposed interpretation of Article 7 of the Habitats Directive. Nothing in this provision could prevent its applying *in the future* to a site already classified. The House of Lords appears to be of the opinion that the question is relevant to its decision in the proceedings before it. I therefore propose to deal with this question briefly.

96. The United Kingdom considers that Member States must be able to take account of 'imperative reasons of overriding public interest', which include requirements of an 'economic and social nature', in classification decisions, and that to hold otherwise would introduce unnecessary and undesirable elaboration into the overall decision-making process, and give rise to unnecessary administrative action if a site were to be first classified and then subject to an immediate derogation procedure.

97. The difference between, on the one hand, deciding not to classify a site as an SPA and, on the other hand, classifying the site and subjecting it, even immediately, to a derogation procedure, is not one of the comparative administrative burden. If a site which qualifies for classification as an SPA under Article 4(1) or (2) is not classified, then the site will not benefit from the protective restrictions laid down by Article 6(3) and (4) of the Habitats Directive and, in particular, the requirements of Article 6(4) that an ecologically destructive project may only be carried out 'in the absence of alternative solutions' and that 'the Member State ... take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected'.

98. My previously expressed view that economic requirements are excluded from any decision-making process under Article 4(1) or (2) is confirmed by the terms of the amendment to Article 4; not only did the Council not amend Article 4(1) or (2) so as to allow Member States to take account of such requirements, but the

53 — Case C-62/93 *BP Supergas* [1995] ECR I-1883, paragraph 10 of the judgment.

amendments to Article 4(4) itself allow the Member States a limited discretion to take account of such requirements where they happen to clash with their ecological obligations under the Directive.

99. In the light of the foregoing, I am of the opinion that a Member State may not take into account economic requirements at the classification stage, even where it considers that these amount to imperative reasons of overriding public interest.

VI — Conclusion

100. For the reasons set out above, I recommend that the questions referred to the Court by the House of Lords should be answered as follows:

(1) A Member State is not entitled to take account of economic requirements such as those mentioned in Article 2 of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds when classifying special protection areas, or in determining the boundaries of such special protection areas, in accordance with Article 4(1) and/or (2) of the Directive.

(2) In classifying a special protection area in accordance with Article 4(1) or (2) of Council Directive 79/409/EEC:

(a) a Member State may take account of a general interest which is superior to the general interest which is represented by the ecological objective of the Directive subject to the inherent obligation to take compensatory measures. Economic requirements do not constitute a superior general interest for these purposes;

(b) a Member State may not take into account economic requirements which it considers amount to imperative reasons of overriding public interest within the meaning of Article 6(4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.