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OPINIONS OF THE LORDS OF APPEAL FOR
JUDGMENT IN THE CAUSE

2.30pm 9.2.98

REGINA

v.

SECRETARY OF STATE FOR THE ENVIRONMENT
(RESPONDENT)
EX PARTE
ROYAL SOCIETY FOR THE PROTECTION OF BIRDS
(APPELLANTS)

ON 9TH FEBRUARY 1995

LORD JAUNCEY OF TULLICHETTLE

My Lords,

Lord Jauncey
of Tullichettle
Lord Bridge
of Harwich
Lord Ackner
Lord Browne-
Wilkinson
Lord Woolf

This is an appeal against a decision of the Court of Appeal (Steyn, Hirst and Hoffmann L.JJ.) on 18 August 1994) dismissing an appeal by the Royal Society for the Protection of Birds ("R.S.P.B.") against a refusal by a Divisional Court of the Queen's Bench Division (Rose L.J. and Smith J.) on 8 July 1994 to quash a decision of the Secretary of State for the Environment to exclude an area known as Lappel Bank from the designated Medway Estuary and Marshes Special Protection Area for Birds. The case turns upon the construction of Council Directive (79/409/E.E.C.) on the Conservation of Wild Birds ("the Birds Directive") of which the articles relevant to this appeal are of 2 April 1979.

"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 2

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.

"Article 3

1. In the light of the requirements referred to in Article 2, Member States shall 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.

2. The preservation, maintenance and re-establishment of biotopes and habitats shall include primarily the following measures:

(a) creation of protected areas;

...

"Article 4

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:

...

(c) species considered rare because of small populations or restricted local distribution;

...

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.

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."

The relationship of Lappel Bank to the designated S.P.A. is set out in the agreed Statement of Facts and Issues and I cannot do better than repeat it:

"6. The designated Medway Estuary and Marshes S.P.A. is an area of 4,681 hectares on the north coast of Kent. It is a wetland of international importance also listed under the Ramsar Convention for a range of wildfowl and wader species which use it as a breeding and wintering area, and as a staging post during spring and autumn migration. Further, the site supports breeding populations of avocet and little tern, which are species listed in Annex 1 for the purpose of Article 4(1) of the Birds Directive.

"7. Lappel Bank is an area of intertidal mudflat which, at its northern end, immediately adjoins the port of Sheerness and falls geographically within the bounds of the Medway Estuary and Marshes. The original area has been reclaimed over several years, and presently approximately 22 hectares remains. Lappel Bank shares several of the important ornithological qualities of the area as a whole. Although it does not support any species designated for the purpose of Article 4(1) of the Birds Directive, some species are represented in significantly greater numbers than elsewhere in the Medway S.P.A.. Lappel Bank is an important component of the overall estuarine ecosystem and the loss of this intertidal area would probably result in a reduction in the wader and wildfowl populations of the Medway Estuary and Marshes.

"8. Lappel Bank was, however, required by the Port of Sheerness for potential expansion. It is the only area into which the Port can realistically expand. The Port can accommodate a variety

of small sea and deep sea vessels, is one of the few ports in the South East offering such facilities, and as a result has developed into a thriving commercial enterprise, being now the fifth largest port in the U.K. for cargo and freight handling. It is well situated for its maritime trade and for its main domestic markets, as well as the Channel Tunnel. The main items traded through the Port are vehicles, fruit produce, and forestry and paper products. The current expansion proposals are for expanded facilities for car storage and value added activities on vehicles and in the fruit and paper products market, which the Port sees as of particular importance, as a competitor of continental ports offering similar facilities. The Port is a significant employer in the area, where there is a serious unemployment problem. Generally there were strong social and economic factors favouring exclusion of Lappel Bank from the S.P.A., if it were possible to take such factors into account when finally classifying the Medway Estuary and Marshes S.P.A."

In August 1989 Swale Borough Council granted planning permission to the Medway Ports Authority for reclamation of 26 hectares of Lappel Bank. A further application by that authority in association with Lionhope (Kent) Ltd. for dock reclamation and extension of Sheerness Docks was called in by the Secretary of State for the Environment. By a decision letter of 30 July 1992 he accepted an inspector's recommendation to refuse a detailed planning application for development at Lappel Bank on the ground that it 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. Thereafter the Secretary of State received requests to revoke the August 1989 planning permission, as well as representations from Swale Borough Council as to the social and economic consequences of such revocation. By letter of 16 March 1993 he informed English Nature that he was minded to exclude the 26 hectares of Lappel Bank from the Medway Estuary S.P.A. and on 15 December 1993 he announced his final decision in the following terms:

"Both the Medway Estuary and the Swale Estuary - where I have today decided to extend the existing S.P.A./Ramsar site - include mudflats, salt marshes and extensive grazing marshes. These habitats are internationally important for many species of waterfowl which use them in large numbers, both for wintering and breeding, and as a staging post during migration.

"After careful consideration I have decided to exclude an area of intertidal mudflats at Lappel Bank from the Medway Estuary S.P.A. This area is subject to a planning permission for reclamation granted by Swale B.C. in August 1989. 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. Unemployment in the area has reached double the national average - and the island is now an Intermediate Assisted Area and forms part of the East Thames corridor, where economic growth and development is to be encouraged, as well as nature conservation assets conserved.

"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 help to secure the economic future of Sheerness and the Isle of Sheppey."

The question is whether in reaching that conclusion he was entitled in terms of the Birds Directive to have regard to economic considerations. The Divisional Court held that he was so entitled as did the majority of the Court of Appeal. In the latter court, Hirst and Steyn L.JJ. considered that the matter was *acte claire* and that a reference to the E.C.J. was unnecessary, whereas Hoffmann L.J. considered that the Secretary of State was not entitled to have regard to economic considerations and that the matter was *acte claire* the other way.

Before this House, Mr. Gordon, for the R.S.P.B., argued forcibly that in classifying the S.P.A. under article 4.1 and 4.2 of the Directive, the Secretary of State was not entitled to have regard to the economic and recreational requirements referred to in article 2. The latter article applied generally to all species of naturally occurring birds whereas article 4 required more stringent measures to be taken for the protection of the more limited species of birds therein referred to. He sought to derive support for this proposition from four decisions of the E.C.J., namely, *The Commission v. Belgium*, Case 247/85 [1987] E.C.R. 3029, *The Commission v. Italy*, Case 262/85 [1987] E.C.R. 3073, *The Commission v. Germany* ("*Leybucht Dikes*") Case 57/89 [1991] E.C.R. 1-883, and *The Commission v. Spain* ("*Santona Marshes*") Case 355/90 [1993] E.C.R. 1-4221. In relation to the *Leybucht Dikes* case, he referred to the fact that the E.C.J. had, in paragraphs 21-22 of the judgment, ruled that article 4.4 required that the extent of a S.P.A. could only be reduced by a Member State on exceptional grounds, which grounds did not include economic and recreational requirements as referred to in article 2. He argued that the considerations applicable to article 4.4 were equally applicable to article 4.1 and 4.2. In the *Santona Marshes* case he relied on the rejection by the Court of the Spanish Government's argument that in considering article 4, the ecological requirements thereof should be subordinate to or balanced against social or economic interests and in particular on the conclusion in paragraph 19 of the judgment that the economic and recreational interests referred to in article 2 did not enter into

consideration when implementing article 4, and in paragraph 26 that the classification of S.P.A.s followed certain ornithological criteria defined in the Directive. These conclusions of the court demonstrated that classification of S.P.As depended entirely on ornithological considerations and the matter was, accordingly, acte claire. It followed that the Secretary of State had acted unlawfully. Mr. Gordon further pointed out that the rigour of the E.C.J. decisions had been mitigated by the terms of article 6 of the Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora ("the Habitats Directive") which has applied in the United Kingdom since 30 October 1994 and which provides that if a project must, nevertheless, be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure certain specified objectives. The proper course here was for the Secretary of State to include Lappel Bank in the area classified as a S.P.A. and thereafter to reconsider the classification for the purposes of article 6.4 of the Habitats Directive.

Mr. Richards, for the Secretary of State, argued equally forcibly that article 2, while not amounting to an autonomous derogation, nevertheless conditioned the exercise of powers under article 3, which article could equally well have embraced article 4 as an extension from the general to the specific. It therefore followed that the word "suitable" in the final paragraph of article 4.1 included economic and recreational considerations. Mr. Richards relied on the views of the Commission in the *Leybucht Dikes* case to the effect that when classifying S.P.A.s there was no bar to taking into account the interests laid down in article 2, in contradistinction to the position of management under article 4.4. He further argued that the *Santoña Marshes* case was concerned with article 4.4 and that there was nothing in the decision which required that economics be not considered in classifying a S.P.A. under article 4.1 or 4.2. Mr. Richards submitted that it would be odd indeed if the Secretary of State had to classify Lappel Bank as part of a S.P.A. and then immediately derogate therefrom under the Habitats Directive on economic grounds.

My Lords, faced with competing arguments of substance and with support for each of those arguments in conflicting judgments of two members of the Court of Appeal, I do not consider that your Lordships have any alternative but to refer the matter to the E.C.J. under 177 of the Treaty, for the ruling. The two questions to be referred, which have been agreed between the parties, are as follows:

1. Is a Member State entitled to take account of the considerations mentioned in Article 2 of Directive 79/409/EEC of 2 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 insofar 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 21 May 1992 on the conservation of natural habitats and of wild fauna and flora?

The second question arises out of the following concluding passage in the judgment of Hoffman L.J.:

"I should say that I might nevertheless as a matter of discretion have dismissed the appeal on the grounds that economic argument for excluding Lappel Bank is so strong and the relative size of the bank so small that, if the Secretary of State had applied the correct test, namely 'a general interest superior to the general interest represented by the ecological objective of the directive' he would still have arrived at the same answer. But since my Lords think that the effect of the Directive is clear in the opposite sense from mine, we have heard no argument on this point."

I understand that there are a number of sites in the United Kingdom and in Europe which are under consideration for classification as S.P.A.s and whose boundaries may be affected by the decision of the E.C.J. on this reference. I therefore venture to express the hope that the E.C.J. will, so far as their procedures permit, treat the reference made by this House as one of some urgency to which priority may be given.

Having decided that there must be a referral to the E.C.J. I must now consider the R.S.P.B.'s application for interim declaratory relief. In doing so I make the assumption that such remedy is available in law to an applicant and consider only whether an appropriate case for granting it has been made out, this being a matter for the decision of the national court (*Reg. v. Secretary of State for Transport ex parte Factortame Ltd. and Others* (No. 2) [1991] 1 A.C. 603).

Mr. Gordon submitted that there was, in any event, going to have to be a review of the situation at Lappel Bank because of its proximity to the remainder of the S.P.A. and of the effect thereupon of the proposed development. This review was occasioned by articles 6 and 7 of the Habitats

Directive which had become part of the U.K. law. The provisions of these articles, so far as relevant to this appeal, are:

"Article 6

2. Member States shall take appropriate steps to avoid, in the special areas of conservation, 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.

"3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having 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.

"4. 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 State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

"Article 7

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."

The Secretary of State should accordingly treat Lappel Bank as though it had been designated a S.P.A. and act now under Article 6.3 and 6.4 by making the appropriate assessment. The proposed interim declaration is in the following terms:

"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 and which meet the necessary ornithological criteria, without having taken the steps set out in Article 6 of the Habitats Directive (92/43/EEC) and without having implemented that Directive."

My Lords, I see formidable difficulties in the way of granting the relief proposed. In the first place, until the E.C.J. has ruled upon the construction to be placed on Article 4, the Secretary of State will not know the proper basis upon which to make the assessment. In the second place, Mr. Gordon conceded that his objective in seeking the declaration was to hold up further development of Lappel Bank pending a ruling by the E.C.J. Any such hold up could result in a very large commercial loss to the Port of Sheerness and possibly to Swale Borough Council as planning authority. However, the R.S.P.B. were not prepared to give any cross undertaking in damages. Had they sought an interim injunction against the Port Authority or other developer proceeding further they would undoubtedly have been required to give such an undertaking as a condition of being granted relief. Instead, they are seeking to achieve the same result without the risk of incurring very substantial expenditure and thereby asking this House to adopt a most unusual course. In the third place, the proposed Order does not seek to declare what are the interim rights of any person or body arising under the Directive or otherwise, which would be the expected form of any interim declaration, but rather does it, albeit in a negative way, seek to compel the Secretary of State to take certain action. A declaration that "the Secretary of State acts unlawfully if . . . he fails to act" in a certain way is tantamount to an instruction to the Secretary of State to act in a particular way. It is not declaratory of anyone's rights but a mandatory order which if it were to be granted by way of relief would usually be granted in the form of an interim injunction. In addition it would be unsuitable in this case because, as I have already remarked, the Secretary of State will be unaware how properly to proceed in the absence of the E.C.J.'s ruling. Furthermore, the declaration sought would not, per se, achieve the objective of the R.S.P.B. since so long as the planning permission stands the Port Authority and any developer could properly continue with the reclamation. To prevent this, further machinery would require to be set in motion to revoke the planning permission, a course which would be likely to have very considerable financial implications.

My Lords, for all the foregoing reasons I would refuse the application of the R.S.P.B. for interim declaratory relief.

LORD BRIDGE OF HARWICH

My Lords,

I have had the advantage of reading in draft the speech of my noble and learned friend Lord Jauncey of Tullichettle. For the reasons which he gives, I too would refer the two agreed questions to the European Court of Justice and refuse the application for interim relief.

LORD ACKNER

My Lords,

For the reasons given by my noble and learned friend Lord Jauncey of Tullichettle I too would refer the two agreed questions to the European Court of Justice under Article 177 of the Treaty and would refuse the application for interim declaratory relief.

LORD BROWNE-WILKINSON

My Lords,

I have had the advantage of reading in draft the speech of my noble and learned friend Lord Jauncey of Tullichettle. For the reasons which he gives, I too would refer the two agreed questions to the European Court of Justice and refuse the application for interim relief.

LORD WOOLF

My Lords,

I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Jauncey of Tullichettle. For the reasons he gives I too would refer the two agreed questions to the European Court of Justice under Article 177 of the Treaty and would refuse the application for interim declaratory relief.