

OPINION OF ADVOCATE GENERAL FENNELLY  
delivered on 7 November 1996 <sup>\*</sup>

1. The present request for a preliminary ruling concerns the conditions under which a Member State may benefit from a derogation from the prohibition on the capture of birds in the wild, and in particular whether such a derogation would be justified either where the immediate implementation of the prohibition would inconvenience some bird fanciers, or where there is a risk of consanguinity in captive bird populations.

1979,<sup>3</sup> the Kingdom of Belgium entered a reservation in accordance with Article 9(1) thereof (which is largely identical in wording to Article 9(1) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds; hereinafter 'the Directive'),<sup>4</sup> to the effect that 'the capture of birds for recreational purposes ... will continue in the Walloon region', albeit ostensibly 'without prejudice to the Community provisions'.

I — Facts and national legislative background

2. The practice of 'tenderic', which consists essentially in the capture of certain small birds, especially finches, by means of a snare or net,<sup>1</sup> was long a pastime in the Walloon Region of Belgium. According to one of the parties to the national proceedings, the capture and keeping of wild birds are 'deeply rooted ancestral practices in Wallonia ... which international regulations have in no way condemned'. Thus, when depositing its instrument of ratification<sup>2</sup> of the Bern Convention on the conservation of European wildlife and natural habitats of 19 September

3. Article 3 of the Royal Decree of 20 July 1972 on the protection of birds prohibited, *inter alia*, the capture of all species of birds living in the wild state in the Benelux countries.<sup>5</sup> Article 9 empowered the Minister for Agriculture to allow temporary derogations to the decree in the interests of science and nature conservation, to prevent damage or to promote a local interest. A Ministerial Order regulating the keeping and exchange of birds and allowing a temporary stocking of birds was duly adopted on 17 September 1973.<sup>6</sup> The single recital in the preamble notes that 'in order that bird breeding and the holding

3 — OJ 1982 L 38, p. 3.

4 — OJ 1979 L 103, p. 1.

5 — *Monteur Belge* of 1 August 1972, p. 8530; powers in hunting matters were transferred to the regions in 1980, which were thereafter enabled to repeal, supplement, amend or replace existing statutory provisions or regulations (Case 247/85 *Commission v Belgium* [1987] ECR 3029, paragraph 4 of the judgment).

6 — *Monteur Belge* of 21 September 1973, p. 10669.

<sup>\*</sup> Original language: English.

1 — Order of the Walloon Regional Executive of 8 October 1992 on the restocking by breeders of indigenous birds, *Monteur Belge* of 10 October 1992, p. 21818, fifth recital in the preamble.

2 — *Monteur Belge* of 29 December 1990, p. 24530.

of singing contests for finches may continue, it is desirable to allow a temporary supply ... of birds taken from the wild for the use of bird breeders and finch collectors, pending the availability of a sufficient number of birds from breeding'. The capture season was fixed at 10 October to 15 November each year, while the list of species and the number of specimens which could be captured were to be determined on an annual basis by the Minister.

4. Following the entry into force of the Directive, the Regional Executive of the Walloon region adopted an Order of 28 July 1982 'on the capture and exchange of birds, and allowing the temporary restocking of birds', which replaced the 1973 Order in that region.<sup>7</sup> This allowed the Minister responsible for 'tenderie' in the Walloon region to determine annually the species which could be captured, the dates and duration of the capture season, and the number of rings which could be allocated to each capturer; the requirement that birds captured for supply be immediately ringed served to ensure compliance with the fixed maximum number of specimens which could be captured in a given season. The pursuit of such activities was subjected to the grant of a permit; a maximum of 4 300 such permits could be delivered in the territory of the Walloon region.<sup>8</sup> These arrangements regarding the capture of wild birds were held to constitute

a breach of the Directive by the Court in its judgment of 8 July 1987.<sup>9</sup>

5. On 13 September 1990, the Walloon Regional Executive adopted an Order on restocking by bird breeders permitting the capturing of fixed numbers of wild birds of each of 13 species, totalling 40 580 specimens.<sup>10</sup> This was annulled by the Belgian Conseil d'État (Council of State) by a judgment of 11 June 1991, several months after the capturing season was over. A similar fate awaited the restocking Orders of 26 September 1991 and 8 October 1992,<sup>11</sup> both annulled by judgments of 4 November 1994; in each case, the Conseil d'État held that the capture of the birds in question was prohibited under the Directive, that the Walloon region was obliged to prove that there was no other satisfactory solution, and that it had failed to do so. In particular, the Conseil d'État did not consider that capture in the wild was justified pending the outcome of studies on the feasibility of breeding which the Walloon Regional Executive had ordered.

6. In October 1992, the competent minister of the Walloon region commissioned a study from the Faculty of Veterinary Medicine of the University of Liège on the feasibility of breeding indigenous birds in the region in

7 — *Moniteur Belge* of 18 September 1982, p. 10800.

8 — It was suggested at the oral hearing that the number of capture licences granted was of the order of 50 000 in 1981 and 20 000 or 30 000 in 1994; these figures are not consistent with that set out in Article 7(2) of the Order of 28 July 1982.

9 — Case 247/85 *Commission v Belgium*, cited in footnote 5 above, paragraphs 36 to 43 of the judgment.

10 — *Moniteur Belge* of 29 September 1990, p. 18598.

11 — *Moniteur Belge* of 1 October 1991, p. 21595 and 10 October 1992, p. 21818 respectively.

1993 and 1994. The report was also to evaluate the degree of difficulty of breeding certain species of indigenous birds, to define the factors which would facilitate their reproduction in captivity and to assess the extent and distribution of facilities for breeding such birds in the Walloon region. To this end, the report was to study 283 couples in 30 breeding facilities of variable quality, though including the most reputable facilities in the Walloon region, in 1993; in 1994, the study was to examine 71 couples in six good-quality breeding facilities and 74 couples in a pilot breeding facility subsidized by the Ministry of the Walloon region.

7. In what has been described as 'a significant progress compared to the previous case-law',<sup>12</sup> the Conseil d'État suspended the application of the restocking Order of 16 September 1993, provisionally on 8 October 1993, and definitively on 14 October 1993. The 1993 Order was annulled on 27 May 1994.

8. The report commissioned by the Walloon region on the feasibility of breeding indigenous birds was presented in October 1993 by Dr Brochier of the Faculty of Veterinary Medicine of the University of Liège (herein-

after the 'Brochier Report'). This concluded, *inter alia*, that:

— the breeding in captivity of the seven species studied, as well as a number of other species whose capture was permitted annually, was possible;

— the average rate of reproduction depends particularly on the conditions in which the birds are kept, the worst results being obtained where the mating couple is kept in a common aviary, as distinct from a box;

— the implementation of the technical recommendations of the report<sup>13</sup> would require a certain amount of time, as many bird fanciers would be obliged to change their installations and their habits, but these improvements would rapidly lead to an increase in the reproduction rate;

— some years would be required to start up large-scale breeding, during which time

12 — Neuray, 'La Suspension de la Tenderic en 1993: un Hommage à Aristophane?', (1993) *JLMB* 1364, 1366.

13 — Concerning, in particular, the physical and social environment of the species, preventive sanitary and medical measures, control of feeding, and the selection of the mating couple.

the supply of a limited number of birds (through capture in the wild) would be indispensable.

is prohibited. Chapter IV of Title IV of the Order is headed 'Capture for breeding purposes'. The relevant provisions read as follows:

9. The conclusions of the Brochier Report were not shared by the Conseil Supérieur Wallon de Conservation de la Nature (hereinafter 'CSWCN'), which was consulted on the draft proposal which subsequently became the Order of 14 July 1994. In its interim opinion of 12 July 1994, it took the view that the techniques of breeding the species of birds whose capture was to be permitted had long been mastered, and that breeding in captivity, under proper conditions, was therefore a satisfactory solution for ensuring the replenishment of stocks. It also concluded that the imposition of a total ban on capture would have the effect of prompting bird fanciers to carry out the necessary modifications to their installations in order to ensure reproduction in appropriate conditions; the ensuing improved rate of reproduction using current stocks alone would more than cover their requirements.<sup>14</sup>

Article 26:

'The capture of wild birds with a view to making it possible for breeding alone to provide a satisfactory solution shall be subject to authorization in accordance with the provisions of this chapter.'

Article 27(1):

'The species of wild bird of which the capture is authorized and the capture quotas for each species shall be determined on an annually reducing basis and for a period of five-years by Government Order from among the species and sub-species listed in Annex III. b to the present order.'

10. On 14 July 1994, the Walloon Government adopted an Order on the protection of birds in the Walloon Region (hereinafter 'the Order [of 14 July 1994]'), which repealed the Order of 28 July 1982.<sup>15</sup> In accordance with Articles 2(1) and 3(1) of the Order, the capture and sale of birds of any species living in the wild state within the territory of Europe

Annex III. b sets out a list of ten species of wild bird which can be captured, and the maximum number of specimens of each species which can be taken annually, comprising a total of 31 090 birds. For each of the years 1994 to 1998, Annex XIII sets annual maxi-

<sup>14</sup> — Doc.94/CSWCN 111, Annex B.

<sup>15</sup> — *Moniteur Belge* of 21 September 1994, p. 23922.

mum numbers of capturable specimens per species which are lower than or equal to the figures in Annex III. b, and which decrease from year to year.

precise questions regarding the interpretation of the Directive:

11. Article 32 of the Order sets the conditions for obtaining a licence to capture; in particular, the applicant must engage in the breeding of birds, personally or through an associate, and must have achieved an average renewal rate of one<sup>16</sup> in the 36 months preceding the submission of the application. In accordance with Article 73, these requirements are suspended for a transitional period from 1994 to 1997 inclusive; instead, the applicant must have, or have access to, the necessary breeding facilities as defined in Annex XIV to the Order, and must respect the guidelines established in that Annex.

1. Do Articles 5, 9 and 18 of Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds allow a Member State to take account, on a decreasing basis and over a specified period, of the fact that the prohibition of capturing birds for recreational purposes would compel numerous fanciers to alter their installations and to abandon certain habits where that State recognizes that breeding is possible but is not yet feasible on a large scale for that reason?

12. The application of the Order of 14 July 1994 was suspended by the Conseil d'État on 7 October 1994. The operation of a further Order to similar effect of 13 October 1994 was suspended by the Conseil d'État on 14 October 1994.

2. Do Articles 5, 9 and 18 of Directive 79/409/EEC allow Member States, and if so to what extent, to authorize the capture of birds living naturally in the wild state within European territory with a view to obviating, in bird breeding for recreational purposes, the problems of consanguinity which would result from too many endogenous<sup>17</sup> crossings?

13. Considering the correct application of Community law not to be so clear as to preclude room for reasonable doubt, the Conseil d'État has referred to the Court two very

16 — A renewal rate of one means that the number of birds born and living in captivity exactly balances the mortality rate of the particular bird population.

17 — The word "endogenous", which is defined in the *Collins English Dictionary* as meaning "developing or originating within an organism or part of an organism", appears to be somewhat out of place; it seems probable from the context that "endogamous" is intended.

## II — The relevant Community provisions

14. It may be useful to recall the principal relevant provisions of the Directive, which has already given rise to an abundant case-law of this Court.<sup>18</sup>

15. 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.’

16. Article 1 is complemented by Article 2, 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 ecologi-

cal, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of these species to that level.’

17. The Directive imposes a number of general obligations regarding the maintenance of population levels of protected species, and the preservation, maintenance and re-establishment of their habitats (Articles 2 and 3). Later provisions contain more specific obligations on the protection of endangered and migratory species (Article 4), and the protection of wild birds and their eggs in general, including a prohibition on the marketing of wild birds and restrictions on hunting birds of protected species (Articles 5 to 8).

18. In particular, Article 5 requires the Member States to ‘take the requisite measures to establish a general system of protection for all species of birds referred to in Article 1, prohibiting in particular ... [their] capture by any method’ (Article 5(a)).

19. In accordance with Article 9(1), Member States may only derogate from the prohibi-

18 — See Wils, ‘The Birds Directive 15 years later: a survey of the case-law and a comparison with the habitats directive’, 6 *Journal of Environmental Law* 220 (1994), and, more recently, Case C-149/94 *Vergy* [1996] ECR I-299, Case C-202/94 *Van der Feesten* [1996] ECR I-355, Case C-118/94 *Associazione Italiana per il World Wildlife Fund and Others* [1996] ECR I-1223, and Case C-44/95 *Royal Society for the Protection of Birds* [1996] ECR I-3805.

tion on capturing birds laid down by Article 5: 20. Article 9(2) provides that:

‘The derogations must specify:

‘... where there is no other satisfactory solution [and] for the following reasons:

(a) — in the interests of public health and safety,

— the species which are subject to the derogations,

— the means, arrangements or methods authorized for capture or killing,

— in the interests of air safety,

— the conditions of risk and the circumstances of time and place under which such derogations may be granted,

— to prevent serious damage to crops, livestock, forests, fisheries and water,

— the authority empowered to declare that the required conditions obtain and to decide what means, arrangements or methods may be used, within what limits and by whom,

(b) for the purposes of research and teaching, of re-population, of re-introduction and for breeding necessary for these purposes;

— the controls which will be carried out.’

(c) to permit, under strictly supervised conditions and on a selective basis, the capture, keeping or other judicious use of certain birds in small numbers.’

In accordance with Article 9(3), the Member States must send a report on the implementation of this article to the Commission, which ‘shall at all times ensure that the consequences of these derogations are not

incompatible with this Directive' and take 'appropriate steps to this end' (Article 9(4)).

21. It follows from Article 5 that the activity of capturing birds in the wild is prohibited under the Directive, unless it is justified under Article 9.

### III — Observations of the parties

22. Written observations have been submitted by Belgium, jointly by the Ligue Royale Belge pour la Protection des Oiseaux and the Société d'Études Ornithologiques AVES (hereinafter 'the applicants'), by the Fédération Royale Ornithologique Belge<sup>19</sup> (hereinafter 'the intervener'), and by the Commission.

#### *On the first question*

23. The applicants deny that 'psycho-social considerations' arising from the persistent resistance to the modification of habits unfavourable to breeding can prevent the adoption of a satisfactory solution in the

sense of Article 9(1) of the Directive, in the form of breeding, and therefore argue that recourse to that Article 9 is excluded. According to the report of the Auditeur of the Conseil d'État, cited by the applicants, the five-year transitional period is designed, not to allow the accumulation of the necessary knowledge, but to permit capture in the wild to compensate for the defective state of the facilities of many bird fanciers. The Auditeur's report also notes that the five-year transitional period can be extended, and that the requirement that the breeder demonstrate the viability of his facilities in order to be authorized to capture birds from the wild only comes into effect in 1998; the applicants conclude that the transitional period is not justified in so far as it is already possible to breed the birds in question in captivity. They further allege that the Order constitutes a breach of Article 18 of the Directive fixing the deadline for implementation, and that the derogation claimed perpetuates a situation of infringement along exactly the same lines as that declared incompatible with Community law by the Court in 1987 in *Commission v Belgium*.<sup>20</sup> Moreover, the number of birds in the Walloon region already taken from the wild, which they estimate at over half a million specimens, does not respect the requirement of 'small numbers' in Article 9(1)(c) of the Directive.

24. On the second question, the applicants produce scientific evidence to disprove the

19 — This organization is variously described in its own observations as the 'Fédération Royale Ornithologique Wallonne', the 'Fédération Royale Ornithologique Belge' and the 'Fédération Ornithologique Wallonne'; the description used by the Conseil d'État is adopted here for convenience.

20 — Case 247/85, cited in footnote 5 above.



existence of any danger of problems of consanguinity. In particular, they note that bird breeding is widely practised in a number of Member States where capture is completely prohibited without such problems arising. They conclude that breeding is a perfectly feasible solution, and that recourse to capture is not justified in accordance with Article 9.

25. The Commission notes that the existence in principle of another satisfactory solution is sufficient to defeat recourse to a derogation under Article 9; the implementation in practice of an alternative solution is not required in order that recourse to such a derogation be precluded. Capture would be justified only if the 'quasi-impossibility' of breeding were to be demonstrated by objective scientific and technical factors, evaluated by reference to bird populations already in captivity rather than the amateur breeders considered individually. Neither the fact that numerous bird fanciers may not have the necessary facilities nor that the derogation is limited and degressive, are relevant. The Commission suggests, particularly in the light of the Court's judgment in *Vergy*,<sup>21</sup> that more extensive cooperation between breeders relying on existing stocks would constitute such a solution. Alternatively, should the Court not adopt this interpretation of Article 9(1) of the Directive, the national court would have to apply the criteria established by the Court to determine whether the capture in question could constitute the 'judicious use of small numbers' of birds.

26. The Commission considers, however, that Article 9(1)(c) may be relied on to justify the capture of specimens in order to ensure the input of new genes where the danger of consanguinity is scientifically established, and where genetic diversity cannot be guaranteed by the introduction of specimens born and bred in captivity.

27. Belgium argues that the objective pursued by the Order of 14 July 1994 is to permit bird fanciers to modify the fittings of their aviaries and to acquire the requisite dietary, hygiene, sanitary, biological and veterinary knowledge to enable the breeding of sufficient numbers of birds to maintain the present captive population, an objective which is in conformity with Articles 2 and 9 of the Directive. A transitional period is in its view necessary in view of the limited lifespan of the birds concerned and the effort required by those who engage in the activities in question; during this period, the capture of decreasing numbers of birds must be admitted in order to allow breeding to continue. It submits that the capture arrangements in question are justified under Article 9 as constituting the judicious use of birds and to avoid the problems of consanguinity which would arise if the present prohibition on the capture of birds were to be maintained.

28. The intervener supports Belgium's position closely. In its view, the practice of breeding certain species in captivity would be doomed in the near future if their capture

<sup>21</sup> Case C. 149/94, cited in footnote 18 above, paragraphs 12 to 15 of the judgment.

in the wild were not to be permitted; in particular, it quotes the Brochier Report in support of its affirmation that Walloon breeders are unable to produce a sufficient number in captivity of specimens of five species: the serin, goldfinch, bullfinch, chaffinch and siskin. It adds that the Order of 14 July 1994 considerably reduces the number of species and specimens which can be captured compared to previous Orders, as well as reducing the period of time so that capture may only be effected after all the migratory and nesting species of the Walloon region have already migrated.

specimens of birds in the wild with a view to allowing the replenishment of stocks of captive wild birds. Though it recognized in its judgment in *Commission v Belgium* that the Order of the Walloon Regional Executive of 28 July 1982<sup>22</sup> 'subject[ed] the people authorized to capture and keep birds and the capture and keeping itself to strict rules and controls', the Court held that in order to benefit from a derogation under Article 9(1)(c) of the Directive, the national provisions must 'guarantee ... that capture and keeping are restricted to cases in which there is no other satisfactory solution, *in particular the possibility that the bird species concerned may reproduce in captivity*'.<sup>23</sup>

#### IV — Examination of the questions submitted by the national court

##### A — *The first question*

29. By its first question, the Conseil d'État is essentially seeking guidance as to whether the fact that the breeding of captive wild birds is not yet feasible on a large scale, because of the state of the installations of bird fanciers and of their engrained habits, is sufficient to justify a derogation from the prohibition on capture in the wild.

30. As noted above, this is not the first occasion the Court has had to examine Belgian legislative provisions allowing the capture of

31. In the first place, there seems to be little doubt that the capture of wild birds in certain circumstances can, in principle, qualify for a derogation under the Directive. In *Commission v Italy*, the Court held that 'the capture and sale of birds, even outside the hunting season, with a view to keeping them for use as live decoys or for recreational purposes in fairs and markets may constitute judicious use authorized by Article 9(1)(c)'.<sup>24</sup> It is clear that any such derogation must respect the criterion of 'small numbers' imposed by that provision, which the Court has held 'is not an absolute criterion but rather refers to the maintenance of the level of the total population and to the

22 — Cited in footnote 7 above.

23 — Case 247/85, cited in footnote 5 above, paragraphs 40 and 41 of the judgment, emphasis added.

24 — Case 262/85 [1987] ECR 3073, paragraph 38 of the judgment.

reproductive situation of the species concerned'.<sup>25</sup>

32. No derogation from the prohibition on capture is, however, permissible in the presence of any other satisfactory solution. Article 9(1)(a) identifies a small number of public interests which can override that of protecting wild birds, while the activities permitted by Article 9(1)(b) contribute in the long run to that protection and therefore justify recourse to a derogation. Article 9(1)(c) is slightly different in character, in that it does not, unlike the other two subparagraphs, identify the concrete problem or conservation activity for which a derogation may be necessary, but allows a derogation to the prohibition on the capture of birds, where their 'capture, keeping or other judicious use' is necessary in order to allow the pursuit of certain activities not in themselves incompatible with the Directive; the more restrictive conditions of this subparagraph ('under strictly supervised conditions and on a selective basis', 'judicious use', 'in small numbers') may be said to compensate for the absence of the necessity to found the derogation on one of the listed public interest considerations.

33. The essential unifying characteristic of paragraphs (a), (b) and (c) of Article 9(1) is that a prohibition laid down in the Directive

in the interests of bird protection may have to yield to other requirements; a derogation under this provision can therefore only be a last resort. In this context the term 'satisfactory' may be interpreted as meaning a solution which resolves the particular problem facing the national authorities, and which at the same time respects as far as possible the prohibitions laid down in the Directive; a derogation may only be allowed where no other solution which does not involve setting aside these prohibitions can be adopted.

34. In the present case, the problem facing the authorities in the Walloon region is the necessity to maintain stocks of wild birds held in captivity. It appears from the terms of the first question that the Order is founded on the idea that 'breeding is possible', but is not 'satisfactory' because it would require bird fanciers to change their installations and habits. Thus the legislator explicitly recognizes that breeding in captivity is a satisfactory solution,<sup>26</sup> but, like St Augustine, seeks to postpone embracing virtue to a later date.

35. The Court has consistently emphasized that, as an exception to a series of general rules, Article 9 of the Directive must be

25 — Case 252/85 *Commission v France* [1988] I.C.R. 2243, paragraph 28 of the judgment.

26 — Indeed, the validity in principle of this solution has been recognized in Belgium at least since 1973; see paragraph 3 above.

strictly interpreted. Thus in *Commission v Belgium*, it held that ‘the precise formal conditions set out in Article 9(2) ... are intended to limit derogations to what is strictly necessary and to enable the Commission to supervise them ... [the derogation facility] must be applied appropriately in order to deal with precise requirements and specific situations’.<sup>27</sup> Like the formal requirements of Article 9(2), the provisions of Article 9(1) seek to limit derogations to ‘what is strictly necessary’. The Commission is therefore right, in my view, to argue that the necessity to replenish bird stocks should not be evaluated at the level of the breeders considered individually, but having regard to the total captive wild bird population in the Member State concerned; allowing individual breeders to take birds from the wild where other sources are available would not be strictly necessary and would therefore not respect the exceptional character of the derogation allowed under Article 9.

36. On its face, Article 9 only admits a derogation ‘where *there is* no other satisfactory solution’, and not where the application of a prohibition would merely cause some inconvenience to those affected or require them to change their habits, or, as Belgium has suggested, to acquire proper breeding skills. It is in the nature of environmental protection that certain categories of persons may be

required to amend their behaviour in pursuit of a general good; in this case, the abolition, as a consequence of the Directive, of ‘tendrie’ or ‘the capture of birds for recreational purposes’, which Belgium sought so stoutly to defend in ratifying the Bern Convention, is one example. That such activities may be ‘ancestral’ or partake of an ‘historical and cultural tradition’ does not suffice to justify a derogation from the Directive.<sup>28</sup>

37. The practical difficulties which certain breeders may experience would not justify postponing the full implementation of the prohibition on capturing birds in the wild for a further period of five years from 1994, such as appears to have been the intention of the national provisions; *a fortiori*, the compatibility in principle with the Directive of the possibility that capture licences be issued after this transitional period, which is not precluded by the terms of the national provisions,<sup>29</sup> must be open to doubt. It was precisely in order to take account of any such practical difficulties, and to allow sufficient time for those concerned to modify their habits, that Article 18 of the Directive allowed the Member States a period of two years ‘to bring into force the laws, regulations and administrative provisions necessary

27 — Case 247/85 *Commission v Belgium*, cited in footnote 5 above, paragraph 7 of the judgment, emphasis added; Case C-118/94 *Associazione Italiana per il World Wildlife Fund and Others*, cited in footnote 18 above, paragraph 21.

28 — Case 236/85 *Commission v Netherlands* [1987] ECR 3989, paragraphs 21 and 23 of the judgment.

29 — Counsel for the Belgian Government sought to assure the Court at the oral hearing that the system of capture for supply would be phased out after the transitional period.

to comply with' their substantive obligations under the Directive, notwithstanding the fact that many species of wild birds were already under threat in 1979 as noted in the second recital in the preamble. That transitional period expired on 6 April 1981, and cannot, in effect, be reopened in order to take account of difficulties which Belgium should, in accordance with the Directive, have confronted more than 15 years ago.

38. In my view, the practical difficulties identified by the national court in its first question are in principle not such as to justify resorting to a solution other than that of breeding birds, any more than 'provisions, practices or circumstances existing in [a Member State's] internal legal system ... [could] justify a failure to comply with the obligations and time-limits laid down in a directive'.<sup>30</sup> I agree with the Commission that the *existence* of a solution which complies with the prohibitions laid down by the Directive is sufficient to preclude recourse to a derogation under Article 9; thus, in *Commission v Belgium*, the mere '*possibility* that the bird species concerned may reproduce in captivity'<sup>31</sup> was sufficient for the Court to reject Belgium's defence based on this provision. A Member State cannot rely on its own failure over many years to implement a satisfactory solution in order to claim that such a solution would not, at present, solve the particular problem it is facing as a result of that failure.

39. The determination of whether another satisfactory solution exists in a given factual situation is, of course, a matter for the national court. Such a determination must, in my view, be founded on objectively verifiable factors, such as the scientific and technical considerations suggested by the Commission. The resolution without recourse to a derogation of a particular problem to which the application of the Directive has given rise in other Member States, or indeed in other parts of the same Member State, strongly suggests that a similar solution could be applied in the Member State or part of a Member State which seeks to benefit from the derogation. Given the exceptional nature of the derogation regime and Member States' duty under Article 5 of the EC Treaty to facilitate the achievement of the tasks of the Community, a derogation would only be justified in such circumstances on the basis of an objective demonstration of the grounds on which other *prima facie* satisfactory solutions cannot be adopted.

40. As has been pointed out at various stages in the national proceedings, there is something of a contradiction in the Order of 14 July 1994. On the one hand, the Order recognizes explicitly that the breeding of wild birds in captivity is possible, and includes a number of provisions to encourage this activity; in particular, only those who respect the guidelines for breeding set out in Annex XIV to the Order (for the years 1994 to 1997), or who have a proven record of successful breeding (after the transitional period), will be entitled to a licence to capture. On the other hand, it follows from the Brochier Report that successful breeders will not need to capture birds from

30 - Case C 236/95 *Commission v Greece* [1996] ECR I 4459, paragraph 18 of the judgment.

31 - Case 247/85, cited in footnote 5 above, paragraph 41 of the judgment, emphasis added.

the wild in order to maintain their stocks, and the implementation of the Report's recommendations should lead to a rapid increase in the renewal rate of the bird populations concerned. Thus capture licences may only be given to those who do not, in principle, need to capture birds in the wild to renew their birds stocks.

41. Nor is it clear why a transitional period of a minimum of five years (and no maximum) has already been determined in advance; the CSWCN has noted in its opinion that the fixing of a capture quota five years in advance was in any case not scientifically justified, and did not ensure that the criterion of 'small numbers' was respected from one year to the next.<sup>32</sup> If the adoption of proper breeding practices can provide a satisfactory solution within a lesser period to the problem of the maintenance of the stocks of wild birds in captivity, the practice of capture will have lost its *raison d'être*, and in particular any justification under Article 9 to which it might otherwise pretend. Furthermore, as a derogation must be restricted 'to what is strictly necessary', the criterion of 'small numbers' imposed by Article 9(1)(c) must be considered an upper limit rather than a generally applicable norm; this provision does not, therefore, permit the fixing of capture quotas in advance for a five-year period, without regard to what is 'strictly necessary' in a given year.

42. The contested provisions in the present case in effect beg the question as to whether the imposition of breeding requirements would provide an immediate solution to the problem of maintaining stocks of captive wild birds. In my view, the proper approach would be to adopt first a solution which is in conformity with the Directive, particularly one which has been shown to be satisfactory in other parts of the Community, and only to resort to a derogation if and when it can be shown that the original problem persists. I might add that subjecting the grant of capture licences to respect for breeding requirements is far from being the only solution which can be envisaged. The Commission has suggested that breeders could be encouraged to cooperate with each other, and indeed the interveners, in their submissions to the Conseil d'État of 15 December 1994, noted that Walloon bird fanciers had acquired their stocks of serin in free exchanges of specimens with their Flemish counterparts. These avenues remain to be explored before it can conclusively be determined that capture in the wild is justified.

43. The first question should therefore be answered to the effect that, in circumstances such as those described in the order for reference, the fact that the application of the prohibition on capturing birds would compel numerous fanciers to alter their installations and to abandon certain habits may not be taken as establishing the absence of another satisfactory solution, so as to justify recourse to a derogation.

<sup>32</sup> — Opinion of 12 July 1994, cited in footnote 14 above, section 2.

B — *The second question*

44. In its second question, the referring court is enquiring as to whether the risk of consanguinity in species of wild birds bred in captivity for recreational purposes would justify capture in the wild, and, if so, to what extent.

45. The Directive does not seek to protect specimens of birds born and reared in captivity, as the Court held in *Vergy*.<sup>33</sup> It follows that any derogation from the prohibition on capture in the wild motivated by the risk of consanguinity in captive bird stocks could only be justified in accordance with Article 9(1)(c) of the Directive, as a 'judicious use' and only in 'small numbers'; as the Directive does not prohibit the breeding of wild birds in captivity, ancillary activities, such as capture to avoid consanguinity, which are strictly necessary for such breeding may in principle qualify as a 'judicious use'.

46. As with capture for replenishment of stocks, recourse to a derogation in order to avoid problems of consanguinity is conditional on the absence of any other satisfac-

tory solution; the Member State would therefore be obliged to demonstrate by objective, scientific evidence that there is in fact a risk of consanguinity,<sup>34</sup> and that the derogation upon which it wishes to rely would obviate any risk which has been shown to exist. If these conditions are fulfilled, then capture in the wild would, in my view, be justified, to the extent that it can be shown to be strictly necessary; the numbers which could be captured should, as the Commission has suggested, therefore exactly reflect the need to avoid problems of consanguinity, with the criterion of 'small numbers', as interpreted by the Court,<sup>35</sup> serving as an absolute upper limit.

47. It should also be recalled in this regard that 'the criteria which the Member State must meet in order to derogate from the prohibitions laid down in the directive must be reproduced in specific national provisions', as the Court has consistently held, most recently in *Associazione Italiana per il World Wildlife Fund and Others*.<sup>36</sup> It follows that capture for the avoidance of consanguinity would only be justified if it were expressly provided for, and strictly limited in accordance with Article 9, in the relevant legislative provisions in force in the Member State. The task of ascertaining whether the national provisions in question satisfy this requirement is clearly one within the purview of the referring court.

34 The CSWCN took the view in its opinion that the number of birds born in captivity of the most popular species in question was already more than sufficient to avoid any risk of consanguinity (Annex B to its opinion of 12 July 1994, cited in footnote 14 above); the Brochier Report did not consider this question.

35 — See paragraph 31 above.

36 — Case C 118/94, cited in footnote 18 above, paragraph 22 of the judgment.

33 — Case C 149/94, loc. cit., footnote 18 above.

## V — Conclusion

48. In view of the foregoing, I propose that the questions referred by the Belgian Conseil d'État be answered as follows:

- (1) Article 9 of Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds should be interpreted as precluding a Member State from taking into account the fact that the application of the prohibition on capturing birds for recreational purposes would compel numerous bird fanciers to alter their installations and to abandon certain habits, in circumstances such as those which gave rise to the principal proceedings, in order to benefit from a derogation under that provision.
  
- (2) The avoidance of consanguinity in populations of wild bird species born and bred in captivity for recreational purposes, where such a risk is shown by objective, scientific evidence to exist, and where there is no other satisfactory solution, may justify a derogation in accordance with Article 9(1)(c) of the Directive, where the legislative provisions in force in the Member State ensure that this provision is strictly respected.