

Protecting Bird Habitat of European Importance — the View from Basses Corbières

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Abstract This paper describes the operation of the habitat protection provisions of the EEC Birds Directive of 1979 in the light of changes made by the Habitats Directive of 1992, by reference to the case law of the European Court of Justice and especially the decisions of *Commission v Spain* ('Santoña Marshes') in 1993 and *Commission v France* ('Basses Corbières') in 2000. The effect of the *Basses Corbières* decision was first considered by a United Kingdom court in *R (Bown) v Secretary of State for Transport*, decided by Collins J at first instance on 26 March 2003 and by the Court of Appeal on 31 July 2003. The author reviews the relevant aspects of these two decisions, and concludes that, although the actual result in the case may well be correct, the Court of Appeal did not accurately identify and address the issues which it raised. The judgment of the Court of Appeal is inconsistent in important respects with the European cases, and therefore a potentially misleading authority for those, whether courts, ministers or inspectors, who have to make decisions about the status and protection of areas which, it is contended, should have been, but have not been, included by government in a classified special protection area under the Birds Directive.

INTRODUCTION

The Basses Corbières site is located in the south-east corner of France, close to the Pyrenees. It is important for the conservation of certain species of birds listed in Annex I to the 1979 EEC Council Directive on the conservation of wild birds¹ ('the Birds Directive'), including the Bonelli's eagle, and other migratory species.

In *Basses Corbières*² the European Commission charged France with

- first, not having classified the Basses Corbières site as a special protection area ('SPA') under the Birds Directive;
- secondly, not having taken sufficient special conservation measures concerning the habitat of the species referred to in Annex I of the Birds Directive and of migratory species which frequent that site; and
- thirdly, not having taken appropriate steps to avoid disturbances in that site affecting those species and a deterioration of their habitat.

The judgment of the European Court of Justice ('the ECJ') was delivered on 7 December 2000, and informed by the Opinion of Advocate General Alber dated 15 February 2000. The Court found the first charge to be established, but dismissed the other two. That dismissal was unrelated to the facts of the case; it turned on a point of principle, and was revolutionary in a quite unexpected respect. To understand why, we must go back 20 years, and visit (metaphorically speaking) various corners of Europe.

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¹ Council Directive 79/409/EEC of 2 April 1979.

² Case C-374/98 *Commission v France*.

As to the first charge in *Basses Corbières*, classification is a formal, dateable act by a Member State executed under and by virtue of the following words of Article 4(1) or (2) of the Birds Directive:

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.

* * *

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 ...

The responsibility to classify sites is that of the Member States acting individually. When the United Kingdom Government classifies a site as an SPA, it is acting pursuant to its duty under Article 4(1) and/or 4(2) of the Birds Directive, and not by virtue of any domestic legislation.

The second and third charges in *Basses Corbières* were laid, for reasons explained below, by reference to the provisions protective of European nature conservation sites contained in Article 6 of the 1992 EEC Council Directive on the conservation of natural habitats of wild flora and fauna³ ('the Habitats Directive'). But our starting point must be the original provision protective of SPAs, tersely stated in the first sentence of Article 4(4) of the Birds Directive:

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 disturbance affecting the birds, in so far as these would be significant having regard to the objectives of this article.

The text of the Birds Directive left open, or at least imperfectly addressed, such questions as: (1) In what circumstances if at all can a classification be reversed or overridden? (2) How strict is the regime of control following classification? (3) How wide are the criteria for classification, and how are 'the most suitable territories' to be selected from suitable territories in general? (4) Is classification obligatory? (5) How can the duty to classify and protect be enforced in practice?

Member States were required to bring into force the laws, regulations and administrative provisions necessary to comply with the Birds Directive within two years of its notification; and it became binding on states joining the Union after 1979 as they acceded. None complied promptly and entirely, and it is plain by any standards that even now numerous qualifying sites remain wholly or partly unclassified, and effective protection has been widely withheld. An authoritative overview as of 28 March 2003 is provided by the 'Natura Barometer' on page 8 of Issue 16 of the European Commission DG ENV Nature Newsletter.

Moreover, in the 20 years following the Birds Directive, the Commission brought before the Court only a handful of cases alleging breach of its provisions.

Nevertheless, the Court has at least answered in principle most of the questions posed

3 Council Directive 92/43/EEC adopted on 21 May 1992.

above, and has done so in a way calculated to further the protective objectives set out in the recitals to the Directive.

QUESTION (1): CAN A CLASSIFICATION BE REVERSED OR OVERRIDDEN?

SPAs, once classified, are almost inviolate as regards their extent. In *Commission v Germany*⁴ (*Leybucht Dykes*) decided on 28 February 1991, the Court held that the power of a Member State to reduce the extent of an SPA could be justified only on exceptional grounds, which ‘must correspond to a general interest which is superior to the general interest represented by the ecological objective of the directive’. It was held that in that context, economic and recreational requirements do not enter into consideration.

QUESTION (2): HOW STRICT IS THE REGIME OF CONTROL?

Consequently, the protective regime under Article 4(4) of the Birds Directive is very rigorous, as demonstrated by *Leybucht Dykes* itself. The case involved sea protection works which encroached on the SPA in a seaward direction as compared with the pre-existing defences. In the event, the new works survived scrutiny, for two separate reasons. In part, the need to alleviate flooding and protect the coast were held, in respect of part of the works, to ‘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’. The encroachment of another part of the new dyke was influenced by the concern to ensure that fishing vessels had access to an adjacent harbour. To take account of such an interest was held in principle incompatible with Article 4(4), but the works were allowed because, and only because, they incidentally achieved specific improvements in the bird habitat within the SPA.

THE HABITATS DIRECTIVE — A NECESSARY DIGRESSION

The United Kingdom Government intervened in *Leybucht Dykes* to support Germany in arguing for a less stringent application of Article 4(4); so that deterioration of an SPA could be allowed unless it would threaten the survival or reproduction of a protected species within their area of distribution. That argument was roundly rejected by the Court, and Member States in general thereafter regarded the article, as interpreted and applied by the Court, as involving an unacceptable constraint on their freedom of action.

Accordingly, when the Council of the European Communities adopted the Habitats Directive the following year, the regime of protection accorded to the ‘special areas of conservation’ (‘SACs’) to be designated under the Directive was relaxed, as compared with that under the Birds Directive, by the introduction of a conditional derogatory regime, to be found in Article 6; and that relaxation was extended to apply also to SPAs classified under the Birds Directive.

Within Article 6 of the Habitats Directive, Article 6(2) is generally similar to Article 4(4) of the Birds Directive, and the opportunity for derogation is provided in Article 6(3) and (4); as follows:

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

4 Case C-57/89 *Commission v Germany*.

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 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 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.

Whereas 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 of the Commission, to other imperative reasons of overriding public interest.

SPAs remain distinct from SACs (or candidate SACs, since no list of SACs has yet been adopted by the Commission) albeit that the two designations frequently coincide or overlap. The Habitats Directive assimilated the control regimes for the two types of site by means of Article 7, 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 under Article 4(1) or similarly recognised 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.

Meanwhile, in 1990 the Commission had commenced proceedings (*Commission v Spain*⁵ ('*Santoña Marshes*')) in relation to an important and extensive bird habitat at Santoña Marshes on the coast of Cantabria, where various developments damaging to the habitat and disturbing to the birds had been allowed to occur. Spain was charged with failing to fulfil its obligations under the EEC Treaty by, amongst other things, not classifying the Santoña Marshes as an SPA under Article 4(1) and (2) of the Birds Directive, and by not taking appropriate steps to avoid pollution or deterioration of habitats under Article 4(4). These charges were held substantiated.

Although judgment was not given until 2 August 1993, the case was decided under the law as it stood before the adoption of the Habitats Directive. Nevertheless, it was and remains a seminal decision of continuing authority, providing answers to questions (3), (4) and (5) posed above.

QUESTION (3): HOW ARE 'THE MOST SUITABLE TERRITORIES' TO BE SELECTED?

In deciding what sites, within what boundaries, to classify, Member States are bound to have regard only to ornithological criteria: see *Santoña Marshes* at paragraphs 26 and 27.

5 Case C-355/90 *Commission v Spain*.

This was confirmed by *R v The Secretary of State for the Environment ex p. RSPB*⁶ ('Lappel Bank').

QUESTION (4): IS CLASSIFICATION OBLIGATORY?

Notification under Article 4(1) and (2) of the Birds Directive is an obligation for Member States. This was established in *Santoña Marshes*, paragraphs 24 to 32, and is very clearly expressed in *Commission v Netherlands*⁷ decided on 19 May 1998, at paragraphs 61 and 62, as follows:

61 It follows that the Member States' margin of discretion in choosing the most suitable territories for classification as SPAs does not concern the appropriateness of classifying as SPAs the territories which appear the most suitable according to ornithological criteria, but only the application of those criteria for identifying the most suitable territories for conservation of the species listed in Annex I to the Directive.

62 Consequently, Member States are obliged to classify as SPAs all the sites which, applying ornithological criteria, appear to be the *most suitable* for conservation of the species in question.

Although this reasoning is expressed by reference to Annex I species and thus Article 4(1) of the Birds Directive, exactly the same reasoning applies to migratory species under Article 4(2). The emphasis by underlining appears in the original judgment.

Thus the obligation on a Member State is to classify all the most suitable sites for Annex I species and all the most suitable sites for regularly occurring migratory species not listed in Annex I, by reference solely to ornithological criteria. Nevertheless, the distinction between all suitable sites and all most suitable sites is 'a fine difference', as observed by Professor Dr Ludwig Kramer at page 285 of his *Casebook on EU Environmental Law* (2002).

QUESTION (5): HOW CAN THE DUTY TO CLASSIFY AND PROTECT BE ENFORCED IN PRACTICE?

It is of central importance to the present discussion that *Santoña Marshes* also established that the protective regime under Article 4(4) of the Birds Directive applies to areas that have not been classified as SPAs, but should have been so classified. This conclusion was concisely expressed in paragraphs 20 to 22 of the judgment, as follows:

20 In the fourth place, the Commission claims that it is possible for a Member State to infringe both Article 4(1) and (2), relating to the classification of a territory as a special protection area, and Article 4(4) of the directive, which concerns the protection measures relating to such an area.

21 According to the Spanish Government, a Member State cannot be accused of having infringed both those provisions at the same time, because the protection measures cannot be implemented until the decision has been taken to classify a territory as a special protection area.

22 That line of reasoning must be rejected. The objectives of protection set out in the directive, as expressed in the ninth recital in its preamble, could not be achieved if Member States had to comply with the obligations arising under Article 4(4) only in cases where a special protection area had previously been established.

⁶ Case C-44/95 *R v Secretary of State for the Environment ex p. RSPB* [1997] Env L Rev 442.

⁷ Case C-3/96 *Commission v Netherlands*.

This last principle applies both in the case of a failure to classify altogether (as for example in *Santoña Marshes*), and a failure to classify a sufficient area (as for example in *Commission v France*⁸ (*the Marais Poitevin*) decided on 25 November 1999.

THE ROAD TO *BASSES CORBIÈRES*

After implementation of the Habitats Directive it appears to have been generally assumed that the 'new regime' of protection under Article 6(3) and (4) of the Habitats Directive would apply to an area which should have been classified as within an SPA (which I will call a 'should be' SPA), as well as to an area which had actually been classified, in place of the 'old regime' of protection under the first sentence of Article 4(4) of the Birds Directive. In short, it was assumed that a 'should be' SPA should be treated for all purposes as if it were a classified SPA. However, until *Basses Corbières* the European Court of Justice did not have occasion to determine whether that was indeed the case.

The point arose for decision in *Basses Corbières* because the Commission, assuming, correctly, that an SPA should have been classified, charged France with failing to comply with obligations that would arise under Article 6(2) to (4) of the Habitats Directive (the new regime) rather than with infringement of Article 4(4) of the Birds Directive (the old regime). Ironically, France questioned whether the new regime applied, and the Court, following the opinion of the Advocate General, held that it did not. The reasoning of the Court on this issue is at paragraphs 42 to 58 of the judgment, the conclusion being expressed at paragraph 47:

It is clear, therefore, that areas which have not been classified as SPAs but should have been so classified continue to fall under the regime governed by the first sentence of Article 4(4) of the birds directive.

This conclusion was reached on a literal interpretation of Article 7 of the Habitats Directive, but supported by reference to policy considerations. One consequence of this ruling, and indeed part of the reasoning behind it, is precisely that the original regime is stricter, and does not provide the possibility of permitting a plan or project for imperative reasons of overriding public interest, notwithstanding that it would or might adversely affect an SPA.

The Court stated that a Member State cannot derive an advantage from its failure to comply with its Community obligations (paragraph 51); that, if it were lawful for a Member State which, in breach of the Birds Directive, has failed to classify as an SPA a site which should have been so classified, to rely on Article 6(3) and (4) of the Habitats Directive, that State might enjoy such an advantage (paragraph 52); that it would be difficult for the Commission effectively to monitor such unclassified sites, increasing the risk that projects affecting the integrity of a site might be accepted by national authorities in breach of the Article 6(3) and (4) procedure (paragraph 53); that persons entitled to assert nature conservation interests before the national courts, such as environmental protection organisations, would face comparable difficulties (paragraph 54); that such a situation would be likely to endanger the attainment of the objective of special protection for wild bird life set forth in the Birds Directive (paragraph 55); and that (paragraph 56):

... the duality of the regimes applicable, respectively, to areas classified as SPAs and those which should have been so classified gives Member States an incentive to carry out classifications, in so far as they thereby acquire the possibility of using a procedure which allows them, for imperative reasons of overriding public interest, including those of a social or economic nature, and subject to certain conditions, to adopt a plan or project adversely affecting an SPA.

8 Case C-96/98 *Commission v France*.

THE IMPLICATIONS OF *BASSES CORBIÈRES*

As regards the site actually in question, *Basses Corbières* was a highly unsatisfactory decision. The Court found, as was admitted by France, that an SPA should have been designated, but it does not go on to identify the area that should have been classified. Nor does the Court condemn France for failing to protect the ‘should be’ SPA because, the charges for infringement of Article 6(2) to (4) of the Habitats Directive having been held inapplicable, no charges under the ‘old regime’ of Article 4(4) of the Birds Directive were regarded as being before the Court.

However, the implications of the case for the protection of important bird sites in general are profound. The decision is, of course, binding throughout the European Community, and those bound to respect it include the governments, and the courts, of England and Wales, and Scotland. Put shortly, although the ‘old regime’ no longer applies to classified SPAs, it has been raised from the grave to apply wherever and to the extent that an area should have been classified as or within an SPA, but has not been so classified. Since the ‘new regime’ only applies to classified SPAs, the only way to bring a ‘should be’ SPA within the new regime is actually to classify it.

The Habitats Directive, including the ‘new regime’ of control for classified SPAs, was transposed into UK domestic law in the Conservation (Natural Habitats etc) Regulations 1994.⁹ There is nothing in the 1994 Habitats Regulations which contradicts, or conflicts with, the operation of the *Basses Corbières* decision. The definition of ‘European Site’ in regulation 10(1) includes an area classified pursuant to Article 4(1) or (2) of the Birds Directive, but does not purport to include any unclassified area; not even sites listed in PPG9 — Planning Policy Guidance: Nature Conservation — as Potential Special Protection Areas (‘pSPAs’) but not yet classified. In any case, whilst domestic legislation can impose a stricter regime than that required by the relevant directive, it cannot adopt one which is more lax. In this connection it is relevant to bear in mind that ‘... according to the settled case-law of the’ (European) ‘Court, a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with the obligations and time-limits laid down in a directive’: *Commission v France*¹⁰ (*Seine Estuary*).

In considering the practical operation of *Basses Corbières* to domestic decisions on the authorisation of plans or projects likely to have a significant effect on a ‘should be’ SPA, these three questions immediately arise:

- (A) when might it make a difference?
- (B) who decides whether an area is a ‘should be’ SPA, when the issue is raised?
- (C) how is such a decision informed?

Question (A) is relevant to the decision by those who oppose a project whether to take the *Basses Corbières* point. The subsequent questions focus on how the point, once taken, should be developed and addressed.

QUESTION (A): WHEN MIGHT ‘SHOULD BE’ SPA STATUS MAKE A DIFFERENCE?

In one sense the answer to this question is obvious — when a project will or may adversely affect a ‘should be’ SPA and the decision whether to authorise a project depends on the

⁹ SI 1994, No. 2716.

¹⁰ Case C-166/97 *Commission v France*.

difference between the ‘old’ and ‘new’ regimes of control. Here the ‘old’ regime is the first sentence of Article 4(4) of the Birds Directive, and the ‘new’ regime is Article 6(2) to (4) of the Habitats Directive as transposed into UK domestic law by regulations 48, 49 and 53 of the Habitats Regulations.

But the answer still merits a moment’s reflection. It is an observable truth that new laws promoting nature conservation, both European and domestic, are only slowly recognised, respected and applied. Designations are delayed, decisions are taken in ignorance or defiance of the law, and challengeable decisions go unchallenged. The *Basses Corbières* principle is only meaningful because *Santoña Marshes* had already established that ‘should be’ SPAs are subject to the control of the Birds Directive. Yet, even following the Habitats Directive, that point alone would in principle suffice to defeat any project that would, or might, injure the integrity of the site, except one of those exceptional projects which could survive scrutiny under regulations 49 and 53 of the Habitats Regulations; that is, projects for which there are no alternative solutions, which must be carried out for imperative reasons of overriding public interest, and where any necessary compensation measures can be secured. But I am unaware of any instance, before the *Basses Corbières* decision, where an attempt was made to defeat a proposal in reliance on the ‘should be’ SPA point.

In contrast, since December 2000 a number of objections to the approval of proposals have been asserted, by reference to *Basses Corbières*, not only in cases potentially depending on the availability of the ‘new regime’ of control, but also in cases where an adverse decision under regulation 48 would alone prevent approval. The impact of *Basses Corbières* therefore consists not only in what it actually decided, but in its having alerted the world to the availability and potency of the principle first established in *Santoña Marshes*.

Questions (B) and (C) are both vital to the practical application of what I will call the ‘SM/BC’ principles. I adopt this shorthand because *Santoña Marshes* established that Article 4(4) of the Birds Directive applies to a ‘should be’ SPA, and *Basses Corbières* added the rider that this continues to be the case notwithstanding Article 7 of the Habitats Directive, which only operates to relax the regime of control in respect of formally classified SPAs.

QUESTION (B): WHO DETERMINES WHETHER AN AREA IS A ‘SHOULD BE’ SPA?

The mere assertion that an area should be an SPA, or should have been included in an existing SPA, however well founded on the evidence, cannot itself make the area ‘should be’ SPA so as to compel all concerned, from then on, to treat that as being the case. That requires an actual decision from an authority having power to take it.

That authority can only be the competent authority, for example a planning authority, the Secretary of State, or an inspector, seised with jurisdiction to make the substantive decision in relation to which the SM/BC submission is made. Any such decision will of course be open to challenge on public law principles in the usual way, by statutory appeal or judicial review, and could be pre-empted if meanwhile there is a separate ministerial decision which either classifies the site, or determines that it does not merit classification.

Should the competent authority in any particular case decide that the Birds Directive does not require classification of the site in question, that will determine the issue, subject to successful challenge in the domestic or European Court.

If, conversely, the competent authority decides that an area is ‘should be’ SPA, that will *ipso facto* involve the recognition of a legal obligation for the relevant government to classify the

area accordingly. In the event that classification is then effected, the new regime of protection, incorporated in the Habitats Regulations, would become applicable, and, given sufficiently prompt classification, could be applied in the case which prompted it.

QUESTION (C): HOW IS THE DECISION TO BE INFORMED?

The European importance of named sites has often been admitted in proceedings before the ECJ, and whilst the Court has variously pronounced that there should have been an SPA designated at X, or the designated site should be larger at Y, or even that State Z has not classified sufficient sites generally, it has never pronounced that an SPA should have been classified within specific boundaries identified by the Court itself.

Recognition of the importance of the SM/BC principles has given impetus to the need to establish some kind of objective and generally accepted context within which a competent authority can decide, in the light of the evidence adduced in a particular case, whether or not a disputed area should have been classified as 'one of the most suitable territories'. Such a context is beginning to emerge.

Even before *Basses Corbières*, the European Court had shown itself willing to have regard to scientific evidence to assist it in deciding whether any, and if so what, area should have been classified. The decisive step was taken in *Commission v Netherlands* (cited above), in which, in the absence of any scientific evidence being produced by the Netherlands itself, the Court gave considerable weight to Important Bird Areas 89 ('IBA 89'), an 'inventory ... prepared for the competent directorate-general of the Commission by the Eurogroup for the Conservation of Birds and Habitats in conjunction with the International Council of Bird Preservation and in cooperation with the Commission experts' (paragraphs 68–70 of the judgment). In effect the Court followed the view of the Advocate General as expressed in paragraph 50 of his opinion:

It follows in my view that IBA89 not only constitutes scientific evidence ... but was expressly designed for use in the application of the Directive. It is not in itself conclusive or constitutive of a legal obligation, but can be relied upon in demonstrating the extent of a Member State's compliance therewith, both as regards the general obligation and specific sites. As regards an individual site, it is open to a Member State to produce better scientific evidence to show that it is not amongst the 'most suitable' for the conservation of Annex I species. Similarly, it is open to a Member State to produce contrary evidence to prove that the total figures for SPAs, in number and area, which arise from IBA89, or from any other such list upon which the Commission relies, are erroneous.

Reference to the same source was made in *Seine Estuary*. More recently, in a judgment given on 20 March 2003 in *Commission v Italy*,¹¹ the Court stated (at paragraph 18):

In addition, it is not disputed that a large number and area of the sites listed in the IBA Inventory 89 have not been classified as SPAs by the Italian authorities. In that regard, it is necessary to point out that the Italian Government, although it maintained, at the hearing, that that inventory required revision, admitted that it had not been in a position to challenge it with a more persuasive document. In those circumstances, in view of the scientific nature of the IBA Inventory 89, and of the absence of any scientific evidence adduced by the Italian Republic, tending particularly to show that the obligations flowing from Articles 4(1) and (2) of the Directive could be satisfied by classifying as SPAs sites other than those appearing in that inventory and covering a smaller total area, that inventory, although not legally binding on the Member State concerned, can be used by

11 Case C-378/01 *Commission v Italy*.

the Court as a basis for reference for assessing whether the Italian Republic has classified a sufficient number and area of territories as SPAs for the purposes of the abovementioned provisions of the Directive ...

In *Basses Corbières* itself the Court placed some reliance on the views of the Groupe Ornithologique du Roussillon as being an organisation ‘which the French Government recognises as a naturalist association independent of the administration that has shown scientific seriousness and objectivity for many years’ (paragraph 24).

R (BOWN) v SECRETARY OF STATE FOR TRANSPORT

The *Basses Corbières* principle was first considered by a United Kingdom Court in *R (Bown) v Secretary of State for Transport*, decided by Collins J at first instance on 26 March 2003¹² and by the Court of Appeal on 31 July 2003.¹³

In the case of *Bown* (initially and erroneously reported as ‘Brown’) the claimant challenged decisions by the Secretary of State to confirm compulsory purchase orders, and orders made under the Highways Act 1980, in relation to the proposed Western Bypass of Barnstaple, which will involve the construction of a bridge over the Taw Estuary. At the public inquiry the claimant, and others, argued to the effect that the estuary should have been classified as an SPA under the Birds Directive, and as it had not been, the ‘old regime’ of control under Article 4(4) applied in all its rigour and, since the bridge would inevitably harm the integrity of the ‘should be’ SPA, the decision to authorise its construction was unlawful.

The circumstances of the decision, both at first instance and on appeal, were unusual in that much of the documentary evidence bearing on the merits of classification were not before the inspector; but was gathered and communicated to the Secretary of State after the close of the inquiry; further documents, including one regarded by the judge as particularly significant though not ultimately decisive, was produced for the first time to the court at first instance; and in the Court of Appeal there was introduced for the first time substantial additional documentary material, and a witness statement from the relevant officer in the Department for the Environment, Food and Rural Affairs (Defra).

The fact that the two decisions, at first instance and on appeal, were decided on the basis of differing sets of facts makes it more important than usual to study both decisions with equal care, not least because, as will be seen, the additional evidence in the Court of Appeal brought to the fore an issue not the direct subject of any case law in the European Court, which was only latent at first instance.

BOWN AT FIRST INSTANCE

The Taw Estuary is important because it attracts a considerable number of wintering birds, including the Annex I species, golden plover. The documents relied on by the claimant included a Nature Conservancy Council Report dated 1990, entitled ‘Protecting internationally important bird sites’ and said to be a review of the EEC SPA network in Great Britain, and a report dated 1992 produced by the RSPB and English Nature entitled ‘Important Bird Areas in the United Kingdom’. Both publications included the Taw-Torridge Estuary as deserving of SPA status. There was also evidence before the inspector to the effect that the site had been included in the 1989 IBA list.

¹² [2002] EWHC 819 Admin.

¹³ [2003] EWCA Civ 1170.

For the claimant, it was submitted that the existence of the 1990 and 1992 reports led to a presumption that the Taw-Torridge Estuary should have been designated an SPA, and it was only if there was significant scientific evidence to the contrary that the lack of designation could be considered proper. This submission was supported by reference to *Santoña Marshes, Commission v Netherlands*, and *Basses Corbières*.

Counsel for the Secretary of State demurred at the use of the word ‘presumption’, but, as recorded in paragraph 24 of the judgment, ‘accepted, as indeed was correct from the decisions which I have cited, that if a site was in IBA89 and there was no other material produced to counteract that, it would prevail’. The judgment continues to record counsel’s submission, and the judge’s acceptance of it, as follows:

... But here he submits that there has been ample material presented which shows that the Taw-Torridge Estuary does not qualify under the relevant criteria, whatever may have been believed to be the position in 1989. It seems that the position in 1989 was to a high extent influenced by the suggestion that more than one per cent of the British population of golden plover, which were and are an Annex I species, were wintering at the estuary. That has dropped out of the picture since. It is not regarded on the counts that have been referred to in the evidence as a reliable figure. Thus, there are no reasons to suppose that the estuary would qualify under the relevant criteria that were used in IBA89. However, even if that is not right the fact is that they do not qualify under the criteria used by those advising the Secretary of State, criteria which were quite clearly referred to in the letter of 4 April produced by the claimants.

25. In those circumstances it is clear that there is the necessary scientific material which indicates that this site is not one which falls to be designated as an SPA, and that the Secretary of State and the Inspector were correct in their approach in the report and in the decision respectively. ...

The letter of 4 April referred to by the judge was written by English Nature to the Chair of North Devon Friends of the Earth, and was before the Inspector. It explained that, whilst the site might have qualified for selection as an SPA in 1989, neither the 1990 and 1992 reports, nor any subsequent or current data, supported the case for consideration of the site as a potential SPA, in the light of ‘the published SPA selection guidelines’.

This last was a reference to the JNCC (Joint Nature Conservation Committee) publication *The UK SPA Network, its scope and contents*, which was placed before the Court at a late stage. The judgment includes quotations from Volume 1 – *Rationale for the selection of sites*. (This work was published in 2001, and the date 1990 attributed to it in the judgment was a mistake.)

Thus the decision turned on the fact that there was the necessary scientific material available to displace the inference of qualification as an SPA which might otherwise have been drawn from inclusion of the site in IBA89 and some later publications as deserving classification.

As can be seen, despite the fact that evidence relevant to the ‘should be’ SPA status claimed for the site was spread over more than a decade, the decision on this claim was made as at 2003 on all the information regarded as within the knowledge of the Minister in 2002; note the present tense in paragraph 25 of the judgment.

Bown at first instance supported the following propositions (all of which are established in, or can be derived from, the European case law):

First, the ECJ cases mean what they say, and must be respected and applied in the domestic arena.

Secondly, it is implicit in the judgment that, when a competent authority has to decide whether to authorise a plan or project, and it is claimed that relevant land is ‘should be’ SPA, the competent

authority must adjudicate on that claim before proceeding to make the decision on authorisation. (This is the case, notwithstanding that, from the indications in the judgment (at paragraphs 17 and 18), the Inspector and the Secretary of State did not see their role in that light. The Inspector in his report said ‘... but there is no evidence that these campaigns are likely to result in relevant designation. It is not the function of this inquiry to resolve such matters, ...’. The Secretary of State accepted the Inspector’s reasoning, and is said to have stated that he considered that there was nothing in the post-inquiry correspondence that persuaded him that there was a likelihood that the Taw-Torridge Estuary was to be designated as an SPA. However, the question which needed to be answered, was not, whether the site was likely to be designated as an SPA, but whether it should already have been so designated. The judge clearly understood this, and we have the unusual spectacle of the Court upholding a decision whose true nature the decision-taker may not have understood.)

Thirdly, authoritative scientific reviews and reports, whether European or domestic, provide a starting point for consideration of the claims of an area to be ‘should be’ SPA, and the inclusion of an area in such a publication of current application is likely to prevail in the absence of scientific evidence to contradict it.

Fourthly, land found to be ‘should be SPA’ is indeed subject to the ‘old regime’ of protection provided by Article 4(4) of the Birds Directive, with the result that it will be unlawful to authorise any proposal which might, in respect of that site, cause ‘pollution or deterioration of habitats or any disturbance affecting the birds, in so far as these would be significant having regard to the objectives’ of Article 4 of the Birds Directive.

The issue which I have described as latent in *Bown* at first instance, which was not then distinctly addressed, is encapsulated in the question: What is the position of a site which should have been classified as an SPA at some date in the past, but which does not deserve classification on the facts as they stand at a later date when its status is called into question?

BOWN IN THE COURT OF APPEAL

The Court of Appeal gave a single judgment, dismissing the appeal. After an introduction (paragraphs 1 to 8) they review the Birds and Habitats Directives (paragraphs 9 to 12), the ECJ judgments (paragraphs 13 to 24) and the implementation of the Directives in England (paragraphs 25 to 27), all in terms consistent with the content of this article thus far. They then consider the evidence, including the new evidence, relating to the Taw and Torridge Estuary (paragraphs 28 to 33), summarising the history of consideration of the Estuary for possible SPA classification in paragraph 33.

The effect of the additional information was to strengthen the body of evidence that would have been available to support a case for classification in, say, the early 1990s, but, in contrast, to confirm that, notwithstanding the inclusion of the Estuary in the 2000 edition of *Important Bird Areas in Europe* (IBA: 2000), by 2001 responsible agencies in England, including the JNCC and English Nature, were excluding the Estuary from sites which they would recommend for classification by reference to site selection guidelines published by the JNCC in 1999.

The current view was sufficiently clear that in the Court of Appeal counsel for the appellant (Robert McCracken QC) did not challenge the conclusion of Collins J in paragraph 25 of his judgment (quoted above) ‘in so far as it relates to the position at and since the time of the inquiry’.

The appellant’s case in the Court of Appeal is summarised in paragraphs 36 to 38 of the judgment. The case was developed on the basis of what Mr McCracken called a ‘constructive’

SPA, 'his term for an area which (under the ECJ judgments referred to above) is entitled to protection under Article 4, as one which qualifies as an SPA, but which, in breach of the Directive, has not been so classified'. This term is thus equivalent to my 'should be' SPA.

The nub of the appellant's case on appeal is then summarised in the following passages from paragraphs 36 and 38 of the judgment:

Applying that concept to this case, ... at the latest from the date of the NCC's advice in 1990, the Estuary was a constructive SPA; the Government was under a duty under EC law to classify it as an SPA, and to treat it as if so classified. Thereafter, he argues, it was not possible in law for the Government to cease treating it as an SPA ...

* * *

He accepts that none of the previous cases on which he relies touches directly on what he calls the 'time-lag' point: that is, what happens where a site has been identified as a potential SPA, but circumstances subsequently change so that it ceases to qualify before formal classification takes place. However, he relies on the principle that a State cannot benefit from its own failure to classify. This would be infringed unless the issue is looked at by reference to the time when classification should have taken place; in effect, once a 'constructive SPA', always a constructive SPA. Any reduction in the area so established can only be allowed under the strict criteria laid down by the *Germany* case [*Leybucht Dykes*].

The case thus stated raised two questions. First, had the appellant established that, in or about 1990, the Estuary should have been classified as an SPA? Secondly, if the site should have been so classified, should it have been treated as a 'constructive' SPA (with the consequences stated in *Basses Corbières*) at the date of the Minister's decision whether to confirm the Barnstaple CPO, given the finding that it would not have qualified for classification at that time? Either question could conceivably be taken first, and the answer might render the other question academic; but logic required that the Court should address and answer at least one of them.

In the event, the Court shaped as if to address the first question; in fact answered a different question (which so far as it can be identified was, can the Secretary of State's 1994 decision not to list the Estuary as a potential SPA now be challenged?); treated the negative answer to this different question as if it were a negative answer to the first question; and accordingly did not consider the second question at all. This is scarcely a satisfactory situation, and in view of my adverse criticism of the Court's approach it is right that I should quote their reasoning fairly fully. It is contained in paragraphs 39 to 45 of the judgment:

39 In our view, it is convenient to consider the argument in two stages: first, the legal effect of the events between 1990 and 1994 (so far as they are known); secondly, the position at the time of the decision under challenge in 2002.

40 There is no doubt that, on the evidence of the 1990 and 1992 studies, there appeared to be a strong case for classification of the site. However, the decision rested with the Secretary of State, who had to make a judgment based on the ornithological advice before him. It is surprising and unfortunate that we know so little about how or why the decision was made to exclude the Estuary from the 1994 list. ...

41 However, it is equally clear that in 1994 it became public knowledge that a decision had been made by the Secretary of State that the Estuary had, for whatever reason, been excluded from the list of SPAs or potential SPAs. It would have been open to anyone with a sufficient interest to challenge that decision, either by an application for judicial review, or possibly by reference to the Commission. ...

- 42 The 1994 PPG9 list was published for the guidance of local planning authorities, developers and others. It has no doubt been acted on by them over the nine years since then. In particular, the present bypass scheme has been prepared and presented at inquiry on the basis that the area, although an SSSI, does not have the added protection of an SPA. It is our view that it is far too late now to challenge the 1994 decision or to base an argument on alleged shortcomings in that decision. That of course does not preclude further consideration of the site, as the RSPB has requested. But that must be on the basis of current information.
- 43 This conclusion is not affected by Mr McCracken's interesting argument based on 'constructive SPAs'. That may be a convenient term to explain the effect of the protection given to potential SPAs. However, it does not alter the fact that a 'potential' SPA, until classification, remains a proposal. Classification as an SPA is a legal step with important consequences, both for conservation and for those whose land is affected; hence, the need for notification of owners, and registration as a local land charge. As with any proposal, the decision-maker must take account of all relevant information available to him at the date of the decision.
- 44 This conclusion also makes it unnecessary to address the issue which underlies Mr McCracken's suggested reference. Since the site never became an SPA, the issue of declassification does not arise.
- 45 Once the arguments based on the pre-1994 events have been disposed of, there is in our view no basis for challenging the actual decision in 2002. On the material before him, the inspector was correct to proceed on the basis that the site was not an SPA, and was not likely to become one. ... This approach is not inconsistent with the ECJ cases relied on by Mr McCracken. The judgments lend no support to the proposition that an area which, on the available evidence, does not qualify as an SPA must be so treated merely because of conclusions reached in the past. ...

The central error in the Court's reasoning is to treat the status of a 'constructive' or 'should be' SPA under EU law as being the same as the status of a site listed by the Secretary of State as a potential SPA ('pSPA'). This confusion invalidates the reasoning throughout paragraphs 40 to 41 of the judgment, and is actually made explicit in paragraph 43, where 'constructive SPAs' is characterised as 'a convenient term to explain the effect of the protection given to potential SPAs'.

In fact, the terms 'constructive' or 'should be' SPA are convenient labels to describe a site which, when identified in accordance with the principles laid down by the ECJ as one which should have been classified as an SPA, must be treated as if it had been classified, with the qualification that, until actual classification, it is protected by Article 4.4 of the Birds Directive. Such identification depends on the application of EU, not domestic law, and has *legal* effect.

The listing of a site as a pSPA in PPG9 had no direct legal effect; it merely conferred on such a site, as a matter of domestic *policy* rather than law, the same protection as that enjoyed as a matter of law by a classified SPA. Further, as a consequence of *Basses Corbières*, such policy protection would be less stringent than the legal protection enjoyed by a 'should be' SPA.

Further, the listing of a site as a pSPA in 1994 did not mean that the site was one which the Minister judged deserving of classification. Such a conclusion would have placed the Minister under a duty to classify; but there remain pSPAs which are unclassified nine years later. Whilst listing as a pSPA would clearly be a substantial factor in favour of 'should be' SPA recognition, it could never be conclusive, since, in 1994 or at any subsequent date, a decision on that point would require that all relevant evidence then available should be taken into account; and as is undisputed, documentary recognition can be outweighed by 'better scientific evidence'.

Conversely, and for similar reasons, the omission of a site from Annex B to PPG9 cannot be conclusive against 'should be' SPA status under EU law. Such sites can be, and have been, classified or enlarged as SPAs on the basis of data gathered since 1994; and the existence of similar sites deserving of classification, but still unclassified, cannot be ruled out *a priori*.

In these circumstances, the reasoning of the Court of Appeal, as to the consequences of no one having challenged the omission of the Estuary from Annex B of PPG9, is beside any relevant point. Classification under the Birds Directive, where justified, is a duty of Member States, and the consequence of failure to fulfil that duty, under European law, cannot be evaded by reference to the omission of any private citizen to mount a legal challenge to that failure; still less to the omission of a site from a Government policy document.

The potential effects of the Court's confused reasoning are not limited to the particular, and probably rare, situation where a site once arguably merited classification as an SPA, but does not currently do so. This can be seen in paragraph 43 of the judgment, which appears to go far towards denying the possible operation of SM/BC principles in respect of any unclassified site in England, save possibly one listed as a pSPA in 1994. Yet that position is plainly inconsistent with the binding case law of the ECJ which the Court of Appeal itself accurately cites.

My conclusion from this analysis is that the Court of Appeal did not effectively address the issues genuinely raised by the case, and their reasoning does not support their ultimate conclusion. That is not to say that the conclusion was wrong. For instance, had the Court, in response to the first question raised by the appellant's submissions, asked itself whether the evidence before it warranted a present conclusion that, at any point in time before 2002, there was available a body of information justifying classification at that point, it might on the evidence have decided Yes or No without any confusion of principle.

The second question, not in the event addressed by the Court, would have had to be addressed if the Court had decided that classification was once justified, but would not be currently justified. This is Mr McCracken's 'time-lag' point, and on this premise, one can see its logical justification.

This can be illustrated by an example. Suppose facts as in *Santoña Marshes*, with the single adjustment that, by the date at which the legality of Spain's action or inaction had to be determined, the site had declined from SPA standard solely as a result of being deprived of the protection which timeous classification would have afforded. Would the decision of the ECJ have been different? I would submit not. The rationale of *Santoña Marshes* is entirely undermined unless protection as a 'should be' SPA operates from the time when the site should have been classified.

On the other hand, suppose a situation in which it is ascertained that, at a particular past point in time, a site merited classification, but, without any harmful intervention or culpable neglect, it no longer does so. Should the result then be the same as in the last example? I suspect that in such a case the ECJ might not treat the site as a 'should be' SPA, for pragmatic rather than purely logical reasons.

Putting aside these speculations, where does the Court of Appeal judgment in *Bown* leave us? A possible answer might be — 'confused'; and there is certainly the danger that the respect naturally accorded to a decision of that Court may hinder the correct application of the law in domestic tribunals, which would have the natural inclination to take their guidance on this area of law from the domestic courts, rather than the seemingly more remote case

law of the ECJ. There are, however, several considerations which may be called on to alleviate this danger.

First, the confusion in the Court of Appeal's reasoning is readily visible, once explained.

Secondly, the judgments of the ECJ are binding on national courts, by virtue of the European Communities Act 1972, s. 3(1). The Court of Appeal of England and Wales cannot modify, within the national jurisdictions, the law as stated by the European Court; so that the correct principles of approach must be taken from these judgments, in preference to judgments of domestic courts, where they conflict.

Thirdly, the area of potential confusion, though important, is circumscribed. This can be seen by recalling the four propositions, which I identified earlier as being supported by the judgment of Collins J at first instance, and considering whether they are equally supported by the Court of Appeal.

As to the *first* proposition, the Court correctly cited the relevant ECJ cases, and clearly accepted that they must indeed be respected and applied domestically. The doubt now arising is whether the Court fully and correctly understood the effect of the European authorities.

As to the *second* proposition, I think that the Court did at least accept that the competent authority must adjudicate on a claim that relevant land is 'should be' or 'constructive' SPA; even though they erroneously equated that status with that of a pSPA and approached adjudication on that footing.

The Court of Appeal clearly accepted the *third* and *fourth* propositions.

AU REVOIR

This completes my description of the view from the heights of Basses Corbières. As the reader may have noticed, visibility is now quite clear over the Continent, but more obscure across the Channel. The view will not remain unmodified, because there are now exposed issues, not all of them identified in this article, which are likely to generate further litigation. Projects in the United Kingdom, which may affect areas frequented by significant bird populations, are likely to continue to generate *Santoña Marshes/Basses Corbières* issues at least until a full and defensible suite of classified SPAs has been completed.

The *Bown* litigation itself, however, appears to be at an end, since on 6 February 2004 the House of Lords refused permission to appeal further.¹⁴

¹⁴ The analysis advanced in this article has been developed with the assistance of David Tyldesley MIEEM, FRTPI, FRSA and Jonathan Mitchell, Barrister, both of whom I thank for corrective comments at draft stage. Assistance does not necessarily imply total agreement with the finished product.