Animal welfare group victory in EC access to information case[1]

Alan Bates, Barrister, Monckton Chambers
Carolyn Jew, student, Stanford Law School

In a major victory for the International Fund for Animal Welfare (IFAW), the Grand Chamber of the European Court of Justice (ECJ) has set aside the 2004 judgment of the Court of First Instance (CFI) in Case T-168/02 *IFAW Internationaler Tierschutz-Fonds gGmbH* v *Commission of the European Communities*.[2] The case arose out of the refusal by the Commission to allow IFAW to have access to documents that the Commission had received from the German Government. In giving reasons for that refusal, the Commission cited the fact that it had been requested by the German Government not to disclose the documents, and that it considered that it was bound to comply with that request. The ECJ, setting aside the CFI's earlier judgment, held that the reasons given for the Commission's refusal were invalid, since a Community institution is not bound to comply with a request by a Member State not to disclose documents which it has provided to that institution. Rather, the Commission's duty towards the Member State is limited to consulting with that State to determine whether one of the limited exceptions to disclosure set out in Regulation (EC) No 1049/2001 on access to documents[3] ("the Regulation") applies. Where the Community institution is not satisfied that one of those exceptions applies, the document must be disclosed.

Facts

On 19 April 2000, the Commission issued an opinion authorising Germany to declassify the Mühlenberger Loch site as an area protected under Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora.[4] That declassification made possible the enlargement of the Daimler Chrysler airbus factory and the extension of an airport runway.

IFAW, which is an NGO active in the field of the protection of animal welfare and nature conservation, requested access to various documents the Commission had received in connection with the industrial project, including correspondence from the German Government.

The Commission informed IFAW that, having regard to Article 4(5) of the Regulation, it took the view that it was obliged to obtain Germany's agreement before disclosing the documents in question. Article 4(5) provides that "[a] Member State may request the institution not to disclose a document originating from that Member State without its prior agreement." The Commission subsequently received a non-disclosure request from Germany, and since it considered that in those circumstances Article 4(5) of the Regulation prohibited it from disclosing the documents, it adopted a decision on 26 March 2002 refusing IFAW's request. In other words, the Commission took the view that a "request" from a Member State not to disclose a document amounted to an instruction to which it was bound to give effect.

The CFI's judgment

IFAW brought an action in the CFI for the annulment of the contested decision. In support of its application, it relied on two pleas in law – infringement of Article 4 of the Regulation and breach of the duty to provide reasons pursuant to Article 253 EC. The CFI dismissed the action as unfounded.

On the first plea in law, the CFI held that the Commission was correct in concluding that where a Member State relies on Article 4(5) of the Regulation and asks an institution not to disclose a document originating from that State, such a request constitutes an instruction not to disclose, which the institution must comply with, without it being necessary for the Member State concerned to give reasons for its request or for the institution to examine whether non-disclosure is justified.

On the second plea in law, the CFI held that insofar as the Commission explained the reasons for its refusal to disclose the specified documents by referring to the non-disclosure request made by Germany and by stating that such a request is binding on the institution to which it is addressed pursuant to Article 4(5) of the Regulation, such a

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[1] Case C-64/05 P *Kingdom of Sweden* v *Commission of the European Communities* [2007], not yet published in the ECR.
[2] [2004] ECR II-4135.
[3] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001, p. 43.
[4] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, L 206, 22.7.1992, p. 7.

statement of reasons was sufficiently clear to enable IFAW to understand why the Commission did not disclose the documents and to enable the Court to review the lawfulness of the contested decision.

The ECJ's judgment

Sweden, an intervener at first instance in support of IFAW, appealed the CFI's judgment. It put forward a single plea in law alleging infringement of Article 4 of the Regulation. The Grand Chamber of the ECJ set aside the CFI's judgment and annulled the Commission's decision refusing IFAW access to the documents at issue.

The ECJ noted that recitals 2 and 3 in the preamble to the Regulation demonstrate that its aim is to improve the transparency of the Community decision-making process, since such openness inter alia guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizens in a democratic system.

Moreover, Article 2(3) of the Regulation provides that the right of access to documents held by the Parliament, the Council and the Commission extends not only to documents drawn up by those institutions but also to documents received from third parties, including Member States, as expressly stated by Article 3(b). By so providing, the Community legislature had abolished the authorship rule that had been applied previously. Such a rule required that, where the author of a document held by an institution was a natural or legal person, a Member State, another Community institution or body, or any other national or international organisation, a request for access to the document had to be made directly to the author of the document.

In the light of these observations, the ECJ rejected the Commission's interpretation of Article 4(5), i.e. that it confers on a Member State a general and unconditional right to veto the disclosure of any document held by a Community institution simply because it originates from that Member State. It reasoned that to interpret Article 4(5) in this manner is not compatible with the Regulation's objectives of improved transparency and enhanced legitimacy, and poses a risk of reintroducing the authorship rule in the case of the Member States. Member States constitute an important source of information and documentation in the Community decision-making process, and the creation of a discretionary right of veto for Member States would substantially reduce the effectiveness of the right of public access.

Rather, the ECJ held that the correct interpretation of Article 4(5) confers on the Member States the power to take part in the Community decision, but only to the extent delimited by the substantive exceptions set out in Article 4(1) to (3) of the Regulation. In other words, the right of the Member State referred to in Article 4(5) resembles not a discretionary right of veto as suggested by the Commission, but a right to be consulted as to whether any of the grounds of exception under Article 4(1) to (3) exist in relation to an access request covering documents provided by that Member State to a Community institution.

In reaching such a conclusion, the ECJ relied on the fact that its interpretation is compatible with the objectives pursued by the Regulation, namely increased transparency and abolishment of the authorship rule. The ECJ also determined that the language of Article 4 supported its interpretation. While Article 4(1) to (3) clearly lists substantive exceptions that may justify a refusal to disclose a requested document, Article 4(4) and (5) lays down procedural rules for particular documents. Moreover Article 4(7), which lays down rules concerning the period during which the various exceptions to the right of public access to documents are to apply, refers expressly only to the exceptions laid down in Article 4(1) to (3) and make no reference to Article 4(5).

Accordingly, when an institution receives a request for access to a document originating from a Member State and notifies that State, the institution and the Member State should commence a genuine dialogue concerning the possible application of the exceptions laid down in Article 4(1) to (3). If, following such a dialogue, a Member State objects to disclosure of a document, it is obliged to state reasons for that objection with reference to those exceptions. The institution cannot accept a Member State's objection to disclosure if the objection gives no reasons at all or if the reasons are not put forward in terms of the exceptions. If the Member State fails to provide reasons or if the institution itself considers that none of the exceptions apply, it must give access to the document. Further, the institution itself is obliged to give reasons for a decision to refuse a request for

access to a document.

Commentary

Although the language of Article 4(5) may be ambiguous if viewed in isolation, its intended meaning and effect, as the ECJ determined, is quite clear when viewed in its legislative context. After careful analysis of both the objectives of the Regulation as set forth in the recitals and Article 1, and the structure and language of Article 4 itself, the ECJ concluded that Article 4(5) must be narrowly interpreted to provide the widest possible access to documents.

First, the ECJ recognised that the proper interpretation of Article 4(5) should give effect to the Regulation's stated purpose of increased transparency and accountability. Such goals could not be met if, as the CFI held, Member States could prevent disclosure of documents that originated from them, without providing any reason whatsoever for their objections. The ECJ decision draws a delicate balance between the right of access to documents provided for in Article 255 EC and the interests of the Member States in preventing disclosure of documents on the grounds of public interest. The legitimate interests of the Member States continue to be protected on the basis of the exceptions laid down in Article 4(1) to (3) of the Regulation and by virtue of the special rules for sensitive documents laid down in Article 9. Where such grounds for non-disclosure do not exist, however, access to the documents must be granted.

Second, the ECJ correctly scrutinised the language and structure of Article 4 itself to determine that Article 4(1) to (3) sets forth exceptions to the general right of access, while Article 4(5) and (6) provide procedural rules for specific types of documents. The ECJ's conclusion is supported not only by the use of specific language within Article 4 (and, in particular, the word "request"), but also by the language of Article 9(3) which provides that the originator's consent is required for the disclosure of sensitive documents. Had the Community legislature intended to lay down in Article 4(5) a right of veto with regard to the disclosure of documents originating from a Member State, it would have chosen wording similar to that of Article 9(3). This argument was initially made by IFAW, but the CFI dismissed it by stating that the specific character of sensitive documents made it clear that Article 9(3) had no relationship to Article 4(5). The CFI is correct in noting that Article 9(3) refers to sensitive documents while Article 4(5) does not, but it failed to address the argument made by IFAW – that the Community legislature had the linguistic ability, if it so wished, to confer on Member States a right to veto the disclosure of documents originating from them.

As a result of the well-reasoned ECJ decision, animal welfare and environmental conservation groups – and, indeed, all citizens of the Union – can expect broader access to Community documents originating from Member States. Furthermore, any refusal to disclose documents must now be accompanied by substantive reasons setting forth the exception on which such refusal is based. An objection by the Member State to disclosure of its documents is not, in itself, sufficient to justify a Community institution's refusal to allow access to those documents.

It is hoped that this increased transparency of Community decision-making processes will result in greater accountability and confidence in the democratic institutions of the Community. Information provided by a Member State is often a crucial part of the evidence which informs the decision-making processes of the Commission, and access to such documents will therefore enable environmental and animal welfare groups to gain a fuller picture of the evidence that the Commission has before it, thus enabling those groups to lobby the Commission more effectively.[5]

The ECJ's judgment also raises some interesting possibilities of conflicts arising between UK public authorities' application of the public interest tests to refuse requests for access to information under the Freedom of Information Act 2000 or the Environmental Information Regulations 2004, and the approach of Community institutions in considering whether they are obliged to allow access to the same documents. If a UK public authority refuses to disclose documents under the Act or the Regulations, doing so in purported reliance on a public interest ground under that legislation, but copies of those documents are also in the possession of a Community institution, will the

[5] The Commission has recently adopted a proposal to amend the Regulation following a public consultation (to which IFAW responded), recent case law and its experience of applying the Regulation.

person seeking access to the requested documents be more likely to be successful by making an access request to that institution? This will in part depend on the willingness of the Community institutions to take a robustly independent stance in response to attempts by Member States to advance flimsy reasons why one of the exceptions in Article 4 of the Regulation applies.

The campaign to ban snaring in Scotland

Patricia Gail Saluja
School of Law, University of Aberdeen

Introduction

Over the last few decades there have been marked changes in the way humankind regards animals. Advances in our understanding of evolution and of animal sentience have given rise to a greater sense of affinity with other members of the animal kingdom. This perception is increasingly characterised by compassionate sensibilities with regard to animals, including enhanced concerns over the way animals are treated when they are sick or injured or during transport or slaughter or when they are subjected to snaring for purposes of "pest" and predator control on sporting estates and farms. The present article focuses on the last issue, namely, the practice of snaring.

Snares are thin wire loop devices which are positioned in such a way that one end is attached to a post or a heavy object while the other end forms the loop which traps the animal and tightens as the animal struggles. Target animals are generally foxes and rabbits. At present it is a matter of concern to a variety of organisations and to many individuals that this practice remains legal in the UK. Indeed, the UK is one of only five countries within the EU which permits the use of snares, the others being Belgium, France, Ireland and Spain.

In Scotland, the abolition of snaring has been the subject of recent high-profile campaigning led by Advocates for Animals ("Advocates"). Whilst recognising that other groups and individuals have also been involved in this movement, this article focuses on the role of Advocates in the campaign for legal change.

In its anti-snaring activities, Advocates has collaborated with a number of other animal welfare organisations[6] in setting up a website totally dedicated to this cause (www.bansnares.com) with the purpose of working towards a ban on the use of snares. Theoretically, this is by no means a groundless hope given that a legal basis for the possibility of introducing such a ban in Scotland has been in existence since 2004. In order to place the Advocates' campaign in perspective, it is necessary first to outline the relevant legal background as follows.

The legal basis for a ban on snaring in Scotland

The starting point is section 11 of the Wildlife and Countryside Act 1981 ("the 1981 Act"). This provision banned "self-locking" snares in the UK,[7] but left "free-running" snares still permitted, albeit with certain conditions imposed on their use, for example a requirement to inspect all snares "at least once every day".[8] [9]

The next key development was the advent of devolution in Scotland, established by the Scotland Act 1998. Under the terms of this Act, animal welfare became a devolved matter.[10] Using its devolved powers, the Scottish Parliament enacted the Nature Conservation (Scotland) Act 2004 (asp[11] 6) ("the 2004 Act"). The provisions relevant to snaring are located in paragraph 10 of Schedule 6 which amends section 11 of the 1981 Act. During the passage of the Bill through the Scottish Parliament and on invitation from the Committee concerned, Advocates provided a written submission supporting an outright ban. This was not accepted, although the 2004 Act did introduce some

[6] Hare Preservation Trust, Hessilhead Trust, International Otter Survival Fund, League Against Cruel Sports, The Marchig Animal Welfare Trust and Scottish Badgers.
[7] See section 11(1)(a).
[8] See section 11(3)(b).
[9] A self-locking snare is a wire loop which continues unremittingly to tighten by a ratchet action as the animal struggles, causing severe distress, pain and injury before death. A free-running snare is intended to be simply a restraining device which is supposed to release when the animal stops pulling – although this is not consistently the case, as explained below. Furthermore, according to Advocates, self-locking snares are still found in use from time to time despite having been prohibited in 1981.
[10] Scientific procedures on live animals and the regulation of the veterinary profession are, however, reserved to Westminster and are governed by the Animals (Scientific Procedures) Act 1986 and the Veterinary Surgeons Act 1966 respectively (Scotland Act 1998, Schedule 5, Heads B7 and G2).
[11] "asp" denotes an Act of the Scottish Parliament.