2016-04-22

Case Summary posted by the Task Force on Access to Justice

SWEDEN: Appeals ban; Supreme Administrative Court 2015-12-18 in case No 312-15

1. Key issue	Appeals ban on hunting decisions and access to justice – A provision in national procedural law that allows for administrative appeal, but bars the public concerned from going to court to challenge decisions concerning species protection is in breach with the principle of legal protection in EU law and must therefore be put aside by the national courts.
2. Country/Region	Sweden
3. Court/body	Supreme Administrative Court
4. Date of judgment /decision	2015-12-18
5. Internal reference	HFD 2015 ref 79
6. Articles of the Aarhus Convention	art. 2 para. 5, art. 9, paras. 3 and 4
7. Key words	Appeals ban, administrative appeal and judicial review, principle of legal protection, principal of useful effect, access to court, Aarhus Convention and EU law, species protection, ENGOs

8. Case summary

The wolf is a species that is strictly protected according to the Habitats Directive (92/43) of EU law. The Swedish Environmental Protection Agency (SEPA) permitted hunting seasons for wolves in 2010 and 2011. The decisions were decried by environmental non-governmental organizations (ENGOs), but their legal challenges were dismissed for lack of standing. Following legal developments at the EU level (C-240/09 *The Slovak Brown Bear*, C-115/09 *Trianel*) and further legal challenges by Swedish ENGOs, injunctions were granted against the 2013 and 2014 hunting seasons, and they were eventually declared invalid by the Swedish administrative courts. Determined to permit licensed hunting, the Government changed the procedural provisions of the Hunting Ordinance in order to disallow appeals to a court. In 2014, the hunting decisions were taken by the regional County Administrative Boards (CABs) instead and appeals could be made to SEPA, but no further. Despite the appeals ban, the ENGO Nordulv appealed this decision to the administrative courts, and at the end of 2015, the Supreme Administrative Court (HFD) ruled that the band was incompatible with EU law.

In the HFD, the Government argued that a system which allows for administrative appeals that meets the criteria in Article 9.4 of the Aarhus Convention is also sufficient according to EU law, and that both the CABs and the SEPA are independent from the Government according to the Swedish constitution. Nordulv argued that the principle of legal protection in EU law requires a possibility to go to a court or a tribunal according to Article 267 of the Treaty of the Functioning of the European Union (TFEU) in order to be able to ask the CJEU for a preliminary ruling on the matter.

To begin with, the HFD stated that the relevant provision in Article 12 of the Habitats Directive is unconditional and clear, requiring strict protection of the wolf. The case-law of CJEU has created general principles of law, among them the principle of legal protection (C-97/91 *Borelli*, p13-14, C-562/12 *Lihaveis MTÜ*, p75). To a certain extent, these principles are today expressed in the Treaty of the

European Union (Articles 4(3) and 19(1) para 2) and the Charter of Fundamental Rights of EU (Article 47). Furthermore, according to established case-law of CJEU under Article 288 TFEU, clear provisions in directives create "rights" that shall enjoy legal protection (C-41/74 *van Duyn*, p12-13).

HFD thereafter pointed to the fact that CJEU several times has answered questions concerning what kinds of national procedural provisions are required to meet the obligations of the Habitats Directive, one such case being *The Slovak Brown Bear*. Here, the CJEU said that, in the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from the Habitats Directive. On that basis, the detailed procedural rules governing actions for safeguarding an individual's rights under EU law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (principle of effectiveness). According to the CJEU, it would therefore, if the effective protection of EU environmental law is not to be undermined, be impermissible that Article 9(3) of the Aarhus Convention be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law. The CJEU concluded by stating that, in so far as concerns a species protected by EU law and in particular the Habitats Directive, it is for the national court, in order to ensure effective judicial protection in the fields covered by EU environmental law, to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention, so as to enable ENGOs to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law.

Thereafter, HFD pointed to the fact that *The Slovak Brown Bear* concerned the interpretation of national procedural law, not a situation where there was an express appeals ban. However, the demands expressed in that case on how to interpret national law derive from the principle of useful effect (effet utile) of Union law. This principle not only requires the Member States' courts to interpret national law in a manner loyal to EU law, but also may imply that they shall disregard those procedural rules that are in conflict with clear provisions of EU law (C-106/77 *Simmenthal*, p22, C-213/89 *Factortame*, p20 and C-263/08 *DLV*, p45). Moreover, the HFD referred to the *Waddenzee* case, in which the CJEU has stated that "it would be incompatible with the binding effect attributed to a directive (…) to exclude, in principle, the possibility that the obligation which it imposes may be relied on by those concerned". The CJEU furthermore stated in this case, that, particularly where a directive provision imposed on Member States the obligation to pursue a particular course of conduct, the effectiveness of such an act would be weakened if individuals were prevented from relying on it before their national courts, and if the latter were prevented from taking it into consideration as an element of EU law in order to rule whether the national legislature has kept within the limits of its discretion set by the directive (C-127/02 *Waddenzee*, p 66).

According to the HFD, the statement of the CJEU in *Waddenzeee*, shall be understood as meaning that ENGOs have rights according to the Habitats Directive that shall enjoy effective protection in court. It also found that the useful effect of the directive requires that individuals can invoke the provisions therein and the national court is free to evaluate if the law of the Member State is in line with the directive. In sum, this means that according to HFD, Union law requires that the question whether clear and unconditional provisions in the Habitats Directive have been implemented correctly in national law can be tried in a national court. The fact that the appeals ban also excluded the possibility to refer such a question to CJEU by way of a request for preliminary ruling reinforces the impression that such a provision is in breach of EU law. Thus, the appeals ban in the Swedish Hunting ordinance was disregarded.

Note: In the end of 2015 – but before HFDs judgement – the CABs permitted a hunting season for wolves to begin in 2016, a decision that was confirmed by SEPA. On appeal, most of the hunt was

stopped by the administrative courts.	
9. Link to judgement/ decision	http://www.hogstaforvaltningsdomstolen.se/Domstolar/regeringsratten/R%c3%a4ttsfall/HFD%202015%20ref.%2079.pdf