Beaver culling licences quashed

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Trees for Life v NatureScot

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Licences issued by NatureScot to permit the killing of beavers in order to prevent damage to agricultural land were quashed by the Court of Session. However, the legal challenge succeeded only on the basis that inadequate reasoning was provided to justify the decisions to issue licences. The court determined that the underlying policy, allowing lethal measures in some circumstances, was not itself unlawful.

Background and Issues

Eurasian Beavers have been reintroduced to the wild to Scotland through an official controlled trial in Knapdale, Argyll, and through escapes or unauthorised releases in Tayside. The latter population has grown substantially and is causing damage to agricultural land through damage to the banks of watercourses and through dams or other works disrupting drainage.

In legal terms, beavers have been declared a European Protected Species under the Conservation (Natural Habitats, etc) Regulations 1994 (SI 1994/2716), which implements the EU Habitats and Species Directive (Dir.92/43), and as such they enjoy strong legal protection. The legislation allows derogations from this protection to be granted, but only on certain grounds, including serious damage to crops or property, and only where there is no satisfactory alternative and the action will not harm the population's maintenance of favourable conservation status across its natural range.

NatureScot issued a number of licences authorising the killing of beavers to protect prime agricultural land. This was opposed on the grounds that where any intervention was required, non-lethal measures should have been adopted instead, capturing and transferring the beavers to other parts of the UK. A legal challenge to the licences was raised, arguing that NatureScot's action was in breach of the Regulations, when interpreted and applied in the light of the caselaw from the Court of Justice of the European Union (CJEU). Although made under the European Communities Act 1972 (now repealed), the 1994 Regulations continue in force after Brexit and relevant European caselaw remains binding below Inner House level (European Union (Withdrawal) Act 2018, s 6 and European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 (SI 2020/1525)).

Decision

The opinion of Lady Carmichael is heavily based on caselaw from the CJEU. It was confirmed that derogations are possible where serious harm caused by a protected species is likely to occur, not only after it has occurred. In identifying the "natural range" of the species for the purposes of a species' conservation status, it was held that the range was to be defined on scientific grounds rather than on the basis of the boundaries of any state. Further, in determining whether a derogation was justified the relevant authority did not also have to decide at that stage the shape that the derogation was to take.

Three lines of argument are perhaps of wider interest. The first was that it was unlawful for NatureScot to decide that lethal control measures were justified in terms of the strict rules on derogations. The court held that on the basis of the information available, NatureScot might reasonably conclude that the activities of beavers on or near vulnerable agricultural land were likely

to give rise to serious damage to crops and other forms of property and also that there was no satisfactory alternative other than allowing exceptions from the rules protecting beavers. NatureScot was therefore entitled to conclude that granting licences fell within the scope of the statutory derogation.

A second argument, which also failed, was an allegation that NatureScot had failed to exercise its discretion properly by automatically granting licences in accordance with a policy of doing so whenever prime agricultural land was possibly being affected. This would be contrary to the general rule of administrative law that although general policies to guide decisions are acceptable, they must not be applied automatically without consideration of the individual circumstances of specific cases. It was held that it was for the for the party asserting the existence of a general unlawful practice to substantiate that claim and the court concluded that the petitioner had not done so here.

The argument which did succeed was that NatureScot had acted unlawfully since it did not provide adequate reasoning for the grant of the licences. Although not spelled out in the legislation, the case-law from the CJEU, notably *Luonnonsuojeluyhdistys Tapiola Pohjois-Savo- Kainuu Ry v Risto Mustonen* (Case C-674/17), made it clear that the relevant authority must "provide a clear and sufficient statement of reasons as to the absence of a satisfactory alternative" before authorising a derogation. By failing to provide proper reasoning for why it had granted each licence, NatureScot had acted unlawfully and the licences which had not yet expired were quashed.

Comment

Both sides have been able to claim some success from this case which involved a mixture of detailed analysis of EU conservation laws and the application of general principles of judicial review. Looking forward, the management of wildlife is ever more becoming a battleground between groups with strongly opposing views, some of whom now seem more willing to resort to litigation. It is likely that the courts will be faced with further cases in this area. Unpicking the detailed, complex and fragmented wildlife laws and applying them against a background of often contested scientific evidence will not be easy.

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