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Published in:
Scottish Planning and Environmental Law

Publication date:
2022

Document Version
Peer reviewed version

[Link to publication in Discovery Research Portal](#)

Citation for published version (APA):
Reid, C. (2022). Conservation duties under EU law remain enforceable. *Scottish Planning and Environmental Law*, (213), 111-112.

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Conservation duties under EU law remain enforceable

Harris v Environment Agency
[2022] EWHC 2264 (Admin)

The English High Court has held that the duty under the EU Habitats Directive to prevent the deterioration of habitats within Special Areas of Conservation is one that remains directly enforceable under domestic law. The legislation giving effect to the UK's withdrawal from the EU has the effect of preserving this obligation as one that can be directly relied on in the courts.

Background

This case arose from disagreement over the extent of a review of abstraction licences in the Norfolk Broads. The claimants argued that the amount of groundwater being abstracted was causing irreparable damage to the ecosystem in areas that had been designated as a Special Area of Conservation and Special Protection Area under the Habitats Directive. The Environment Agency was reviewing some licences with a view to reducing the amount of water being taken, but it was argued that the measures being considered were not enough to fulfil its duties under the Conservation of Habitats and Species Regulations 2017, SI 2017/1012 (the equivalent provision in Scotland is the (much amended) Conservation (Natural Habitats, etc.) Regulations 1994, SI 1994/2716). These regulations implement the Habitats Directive which in art 6(2) obliges Member States to take appropriate steps to avoid the deterioration of habitat in Special Areas of Conservation.

Decision

The parties agreed that there were four points on which the case depended. Firstly it was noted that although the Minister and some other authorities are under a duty to secure compliance with the Directive, the obligation on other authorities such as the Environment Agency is just to "have regard" to its requirements (reg 9), potentially allowing some leeway. Normally, having regard to something means that it must be taken seriously into account but does not have to be followed or "slavishly obeyed". Nevertheless, it was important to note that here the authorities had to have regard not just to policy, advice or guidance (as is usually the case with "have regard" duties) but to "requirements". Where these could be met in different ways, authorities would still have some discretion, but this was very limited where, as here, an authority is responsible for the steps needed to ensure that those requirements are fulfilled.

Secondly, it was held that the obligation on the state to prevent the deterioration of habitat within Special Areas of Conservation continued to be enforceable after the UK's departure from the EU. Section 4 of the European Union (Withdrawal) Act 2020 states that obligations arising under an EU Directive are still to be recognised and enforceable in domestic law, so long as they had been recognised by EU or domestic courts before the end of 2020. It was held that decisions in both the European Court and England meant that the obligation in question did pass this test and therefore "continues to be recognised and available in domestic law and is to be enforced accordingly."

Thirdly, it was held that the Environment Agency's limited review of licences, focussing on the impact on just some sites within the designated area, was not doing enough to protect the Special Area of Conservation. Accordingly there was a breach of both the Directive and Regulations. Finally, it was irrational of the Agency not to expand its review process without having any alternative mechanism for ensuring that its obligations were being met. The claimants therefore won their case that the Agency was acting unlawfully.

Comment

Even for members of the EU there are often difficult legal questions over how far the terms of a Directive create obligations that can be directly relied on in their domestic courts. The complex legislation on the continuity of EU law following the UK's withdrawal makes the position here even harder. Now, though, we have a decision that an important general obligation under the Habitats Directive, to ensure the health of certain protected areas, does survive and can be enforced. The same will apply to similar obligations under other Directives, so that it is not just the specific domestic implementing measures but some parts of the text of the Directives themselves that can still be relied on.

Also important is the discussion of the distinction between the duties "to secure compliance with" and "to have regard to" the requirements of the Habitats Directive (reg 3 of the 1994 Regulations in Scotland). The Ministers and NatureScot have the obligation to secure compliance overall. That may give other bodies (subject to the "have regard" duty) some discretion as to how they act where there are different routes to that objective, but where what they do in effect determines whether or not the aims Directive will be satisfied then they too must act so as to ensure that this is achieved. Having regard to a "requirement" is different from having regard to policy or guidance.

The specific decision strengthens the impact of the conservation law inherited from the EU. The very wide powers to alter retained EU law mean that the position may be changed in the near future, especially if the deregulatory rhetoric of the new UK government is acted on. For now, though, this decision shows that the text of EU Directives, which are so important for so much environmental law, may still impose obligations which have full legal force.

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