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Convention on the Conservation of European Wildlife and Natural Habitats

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Lack of legal protection for Northern Goshawk and other birds of prey in Norway

BirdLife Norway wish to raise an issue of breach of the Bern Convention following a court decision made in Norway which opens for destruction of protected raptors as a precautionary measure under the cover of a self-defence clause, even when there are other alternative actions. Such a judgement was made in the Norwegian Supreme Court, which interpreted current legislation in this manner. The wording of the Norwegian self-defence clause was altered when the provisions around this were transferred from the former (and now defunct) *Act No. 38 of 29th May 1981 Relating to Wildlife and Wildlife Habitats* (hereafter referred to as the Wildlife Act) and included in the newer (and current) *Act of 19th June 2009 No. 100 Relating to the Management of Biological, Geological and Landscape Diversity* (hereafter referred to as the Nature Diversity Act). The unfortunate judgement in the relevant court decision is based on an oversight during the process of replacing the Wildlife Act with the Nature Diversity Act.

The High Court decision stated that even if the lack of protection of the Northern Goshawk *Accipiter gentilis* is an result of an oversight, they could not convict the accused without a basis in the law, such as is stated in the Norwegian Consitution's Section 96, as well as in Article 7 of the European Convention on Human Rights. The Supreme Court maintained the view that if the law erroneously become different than intended, that this must be rectified by a change in law.

Under the present national regulation and the interpretation by the courts, BirdLife Norway point to the fact that any bird of prey may now be killed under the pretext of attack on domestic livestock. What constitutes an attack is open to misinterpretation and may be an easy excuse to use when removing birds of prey in an area. BirdLife Norway refer to the well accepted practice of reducing the risk towards e.g. poultry by fencing or similar. This is also in line with the requirements of the Bern Convention.

As a consequence of the changes to the law and the interpretation as to what is covered under the self-defence clause, other parties in Norway have also taken note of what BirdLife Norway consider to be a weakness in the current legislation. With reference to the current legislation and the loophole surrounding the self-defence clause, the leader of one local

grazing organization (the local branch in Fitjar municipality of the Norwegian Association of Sheep and Goat Farmers - Fitjar Sau og Geit) wrote a letter published in a newspaper (Sunnhordaland) encouraging people to shoot any Golden Eagles *Aquila chrysaetos* that flew below 35 meters over ground level, in a forbidden flying zone covering the whole of Fitjar municipality. In the same letter, sheep farmers were encouraged to take matters into their own hands, without any form of bureaucracy. In other words, sheep farmers were being encouraged to act without first applying to the county governor's office for a licence if they considered that a particular individual bird was causing them hardship. The letter in the newspaper made reference to a decision made by the Supreme Court in 2014, and meant that sheep farmers also had a right to use the self-defence clause as necessary. Current Norwegian legislation unfortunately allows any person who is in disagreement with management practices for any raptor (or indeed any bird for that matter) to use any means to kill protected wildlife.

Both the oversight in the changed national legislation as well as practices following the implementation of the Nature Diversity Act, must now be rectified to adhere to the requirements of the Bern Convention. BirdLife Norway wish to raise this issue with the Bern Convention and request that a case file be raised against the Norwegian authorities for failing to meet the requirements of the Bern Convention. BirdLife Norway believe that the current Norwegian legislation is a violation of Article 9 point 1 of the Bern Convention.

Northern Goshawk is a declining species in Norway and categorized as near-threatened (NT) on the Norwegian Red List of Species (2015), and is included in Appendix II of strictly protected fauna species of the Bern Convention. Northern Goshawk is also included in Annex II of the Bonn Convention.

About the actual case

The actual case in 2012 involves the shooting of a Northern Goshawk, which attacked a farmer's hens at a smallholding in Lierne, Central Norway. The farmer discovered the hawk on top of one of his hens, pecking at the hen. The farmer used a shotgun to shoot and kill the hawk. The farmer had a legal duty to inform the police following his actions, which he did immediately after the incident. A case was brought against the farmer. The farmer was subsequently found guilty by the District Court of illegal killing of a protected species. The farmer received a fine, and was deprived of his right to hunt for a limited period, and in addition had his weapon confiscated. During sentencing, the court meant that the farmer could have taken alternative actions, such as scaring the goshawk away. The accused did not accept this judgement, and appealed to the High Court, where he was acquitted. The prosecutor then took the case to the Supreme Court, which is the highest level in the Norwegian legal system. The Supreme Court decision dated 12th March 2014 is attached.

Current regulations

According to Section 15 of the Nature Diversity Act, one is not allowed to kill animals that naturally occur in the wild except under certain legal provisions. Such provisions are included under various regulations, such as Regulation on Animal Welfare and the Regulation on Hunting and Trapping. All birds of prey receive year-round protection.

The court's decision is based upon a self-defence clause in the Nature Diversity Act, under Section 17, Subsection 2. The self-defence clause provides a right to kill birds of prey and other predators under specific circumstances:

Section 17, Subsection 2, point 1:

Wildlife may be killed in circumstances where this is deemed necessary to eliminate an immediate and significant risk of injury to persons.

Section 17, Subsection 2, point 2:

The owner, or a person acting on behalf of the owner, may kill a wild animal making a direct attack on livestock, domesticated reindeer, pigs, dogs and poultry.

Here, the term “deemed necessary” means that you have first a duty to make a serious attempt to scare the wildlife involved away, before one considers killing or attempting to kill that particular animal. Note that the term “deemed necessary” is only included in subsection 2, part 1, and that the same term is not included in subsection 2, point 2.

Section 17 in the Nature Diversity Act is the result of an oversight

In a consultation letter dated 27.11.14 (reference: 13/497) “Changes to the Nature Diversity Act and the Wildlife Act (on administrative exemptions and confiscation, rectification of oversights)”, the Ministry of Climate and the Environment discussed a change to Section 17. The Ministry wrote the following: “The provisions that are currently included in the Nature Diversity Act, under section 17, were previously found in the Wildlife Act under Section 11. It was the intention to extend the content of Section 11 of the Wildlife Act to Section 17 of the Nature Biodiversity Act. The text of Section 11 of the Wildlife Act contained, in accordance to Supreme Court practice, the term “deemed necessary”. The requirement of being “deemed necessary” was however not included in Section 17, Subsection 2 of the Nature Diversity Act”.

“In a judgement referred to in the judicial periodical “Norsk Retstidende” (report from 2014, page 238) the Supreme Court has now ascertained that it cannot interpret a condition that killing “must be deemed necessary” to kill wildlife which make a direct attack on cattle, domesticated reindeer, pigs, dogs and poultry. This is given grounds in that Section 17, Subsection 2, point 2 is worded such that this provision is not formulated. When the Nature Diversity Act came into force on 1st July 2009, the provisions of Section 17, Subsection 2 replaced the self-defence clause in the Wildlife Act’s Section 11, Subsections 1 and 2.”

The provisions in the Wildlife Act were as follows:

Section 11: Wildlife may be killed irrespective of protection when the killing is deemed necessary in order to remove an existing and serious threat of injury to a person. Similarly, the landowner or a person acting on the landowner’s behalf may kill wildlife that is directly attacking cattle or domesticated reindeer.

Originally, Section 11, Subsection 1 of the Wildlife Act included a general rule that allowed anyone to kill wildlife in order to remove a threat towards a person or to cattle, and the condition of “being deemed necessary” covered both these situations. The provisions were split up in 1993, when the self-defence clause to defend domestic livestock was limited to fulfill Norway’s international obligations under the Bern Convention. An emergency situation was limited to situations where there was a direct attack, and authorized persons were restricted to the owner of the livestock (or someone acting on behalf of the owner). After the change was made to the law, Subsection 1 of the Nature Diversity Act still states that wildlife can be killed «without consideration to the species’ protected status when killing is deemed necessary» to avoid injury to a person. However, Subsection 2 on injury of livestock did not contain such wording, but was instituted that killing could take place “in the same way”. Under the Wildlife Act it was clearly stated that killing to protect livestock must be

«deemed necessary» to be covered by the self-defence clause. This is binding in Norwegian case law according to the judicial periodical “Norsk Retstidende” (in the 1997 edition, page 1341 and pages 1345-1346, as well as on page 1854 (paragraph 13) of the 2004 edition).

Under the Nature Diversity Act, these two provisions were again merged into one subsection, such as stated above. The legislative background of the Nature Diversity Act states clearly that Section 17 of the Nature Diversity Act shall not alter the state of law from that which applied under the Wildlife Act. This is evident in several official political documents and reports NOU 2004: 28 s. 588 sp. 2 and legislative bill no. 52 (2008–2009) s. 129 sp. 2 og 387 sp. 2. As the actual wording of Section 17, Subsection 2, point 2 of the Nature Diversity Act no longer state that killing must be “deemed necessary” then the Supreme Court has, on page 238 of Retstidende 2014, concluded that the state of law be changed when the Nature Diversity Act came into force and Section 11 of the Wildlife Act was thus obsolete. The Supreme Court also commented that if the law has erroneously become different than intended, that this must be rectified by a change in law.

The Ministry wishes to rectify this situation so that the provisions are enforced in accordance to the legislator’s intention, which was to extend the state of the law which applied under the second subsection of section two of the Wildlife Act. In order to restore the state of the law as before the Nature Diversity Act came into force, the department therefore suggests that the wording of Section 2, Subsection 2 of the Nature Diversity Act be altered as follows: «Wildlife may be killed when it is deemed necessary to remove a real and considerable threat to a person. The owner, or someone acting on behalf of the owner, can kill wildlife when it is deemed necessary during a direct attack upon cattle, domesticated reindeer, pigs, dogs and poultry.

BirdLife Norway supported such a change to the law in the hearing, which we stated in our reply to the hearing dated 13th January 2015.

Opportunity to rectify the oversight in autumn 2016

The Government Committee for Energy and the Environment discussed a proposition to amend the Nature Diversity Act (administrative exemptions and confiscations) on 18th October 2016.

However, the Ministry department decided that they would not forward a motion to change Section 2, Subsection 2 of the Nature Diversity Act. This was dealt with on page 7 of the proposition. Here it is stated that:

“Besides these named changes, the department suggested in a consultation document of 27th November 2014 a clarification of the self-defence clause in the Nature Diversity Act. The provisions deal with killing of wildlife during a direct attack on cattle, domesticated reindeer, pigs, dogs and poultry. After an examination of consultation documents the department has concluded that it may be appropriate to look at how such a practice based upon today’s self-defence clause develops before a parliamentary bill is presented to Parliament, and that a change to the self-defence clause ought not to be made on this occasion”.

Conclusion

BirdLife Norway are concerned that the current legislation is too weak to safeguard protected birds of prey and also clearly a breach of the Bern Convention. We note that Parliament could have rectified this situation in the autumn 2016, but that the Ministry of Climate and the Environment have deliberately not presented such a change to the legislation to the Parliament. This is despite the fact that any wildlife that attacks poultry and livestock has, due to an oversight, a lesser level of protection today than previously.

We call therefore upon the Bern Convention to react, as we consider that Norwegian legislation is in breach of the protection of Northern Goshawk and other birds of prey under the convention.

On behalf of BirdLife Norway

Kjetil Aa. Solbakken

Kjetil Aa. Solbakken, director

ATTACHMENTS:

Completed complaint form to the Bern Convention

Copy of decision by The Supreme Court dated 12th March 2014

COPY:

Norwegian Environment Agency

Ministry of Climate and the Environment