

Citizen Participation and Public Petitions Committee

9th Meeting, 2022 (Session 6), Wednesday
18 May 2022

PE1895: Mandatory accountability for NatureScot's decision making procedures

Note by the Clerk

Lodged on	23 August 2021
Petitioner	Gary Wall
Petition summary	Calling on the Scottish Parliament to urge the Scottish Government to make it mandatory for NatureScot to explain its conservation objectives in decision making within the framework of the Scottish Regulators Strategic Code of Practice and Scottish Governments guidance, 'Right First Time'.
Webpage	https://petitions.parliament.scot/petitions/PE1895

Introduction

1. The Committee last considered this petition at its meeting on [2 February 2022](#). At that meeting, the Committee agreed to write to NatureScot.
2. The petition summary is included in **Annexe A** and the Official Report of the Committee's last consideration of this petition is at **Annexe B**.
3. The Committee has received new responses from NatureScot and the petitioner which are set out in **Annexe C**.
4. Written submissions received prior to the Committee's last consideration can be found on the [petition's webpage](#).
5. Further background information about this petition can be found in the [SPICe briefing](#) for this petition.

6. The Scottish Government's initial position on this petition can be found on the [petition's webpage](#).

Action

The Committee is invited to consider what action it wishes to take.

Clerk to the Committee

Annexe A

PE1895: Mandatory accountability for NatureScot's decision making procedures

Petitioner

Gary Wall

Date lodged

23/08/2021

Petition summary

Calling on the Scottish Parliament to urge the Scottish Government to make it mandatory for NatureScot to explain its conservation objectives in decision making within the framework of the Scottish Regulators Strategic Code of Practice and Scottish Governments guidance, 'Right First Time'.

Previous action

Persisted on holding NatureScot to account, this resulted in them cutting off communications. Contacted 3 MSPs and the Environment Minister and they have failed to get answers. Asked the Chairman and vice Chairwoman to assist in getting answers, and that failed. I went to the SPSO who rejected my complaint and then after appeal and complaint related to the Ombudsman's code of conduct they admitted they were wrong but were unable to change the decision, that would require judicial review.

Background information

I've had several license applications refused but from this experience I've spent hundreds of hours researching case law, government policy and international conventions so I have a deep understanding of the legal aspect of licensing under Section 16 of the Wildlife & Countryside Act, which isn't black or white. The main influence being the principle of proportionality which originates from Article 5 of the EU Treaty, this states regulation should be the minimum required to achieve the

objective. It should be mandatory for NatureScot to explain its "conservation objective" when refusing license applications.

NatureScot are independent of government in decision making but I don't believe that should mean they are unaccountable to the people of Scotland, which is my experience. In challenging them I have felt as though my human rights of freedom of expression, right to a fair trial and freedom from discrimination have been removed. Accountability should be mandatory.

Annexe B

Extract from Official Report of last consideration of PE1895 on 2 February 2022

The Convener: PE1895, which was lodged by Gary Wall, calls on the Scottish Parliament to urge the Scottish Government to make it mandatory for NatureScot to explain its conservation objectives in decision-making within the framework of the Scottish regulators' strategic code of practice and Scottish Government's guidance, right first time.

The committee wrote to the Scottish Government seeking information on the application of test 2, including whether assessing licence applications on the basis of there being no satisfactory alternative, as opposed to no other satisfactory solution, is likely to lead to a different outcome.

The Scottish Government sought advice from NatureScot and responded to state that "The terms 'no satisfactory alternative' and 'no other satisfactory solution' are considered to be analogous. This view is supported by the European Commission's recently updated guidance on the strict protection of species, which refers to birds directive case law for the interpretation of test 2".

The petitioner highlights that although NatureScot references European Union Commission guidance, the rejections that he has received in relation to licence applications have been on the basis of actions that are not challenged by the EU Commission in other countries. He states that the "Scottish Government recognise that 'proportionality' is one of the foundations of regulation and yet in ten years of license refusals it has never been explained to me what factors have been considered in relation to 'proportionality'."

The petitioner concludes by stating that "at least a citizen should be able to expect clarity in what the conservation objective is in refusing a license."

Do any members wish to comment?

David Torrance: I suggest that we write to ask NatureScot whether it routinely provides information about the conservation objectives it is seeking to achieve when rejecting a licence application and whether it plans to do so in the future.

The Convener: Are we happy to write to NatureScot?

[Members indicated agreement.]

The Convener: As there are no other suggestions, I take it that the committee is content to hold the petition open and we will write to NatureScot.

Annexe C

NatureScot submission of 7 March 2022

PE1895/E - Mandatory accountability for NatureScot's decision making procedures

Our wildlife laws are a vital tool to protect our native wildlife. NatureScot, as the licensing authority in Scotland has the ability to grant licences in accordance within the provisions of a number of pieces of environmental legislation. These set out the circumstances under which licences can be granted, not all of which relate to conservation objectives. These licensing 'tests' vary according to the legislation in question but generally include an assessment of; whether the applicant's proposal is covered by the purposes for which a licence can be granted, that there is no satisfactory solution or alternative which doesn't require a licence, and what the impacts of the proposal will be on the conservation status of the species involved. NatureScot will only grant a licence if an application can meet the relevant statutory tests. NatureScot routinely issues licence refusals and our approach is to always explain to the applicants the reasons for the refusals against the relevant legal tests.

Petitioner submission of 6 May 2022

PE1895/F: Mandatory accountability for NatureScot's decision making procedures

The Court judgement, para' 141, McMorn v Natural England states "The (Birds) Directive provides a broad and general protection, sufficiently broad to require derogations in a wide variety of interests so as to create the desired balance between wildlife and human interests. There is no warrant for requiring the principal derogations to be construed narrowly; they should be construed with proportionality and the balance of the objectives in the Directive in mind.". This means that the Directive is broad in order to allow exemptions in a number of circumstances in order to create balance between the interests of wildlife and humans.

Also of note is para' 140 "The phrase "no satisfactory alternative solution" must not be construed so as to make the derogation nugatory in operation."

NatureScot have told the Committee that the circumstances set out in legislation determines whether or not a conservation objective is required but this statement ignores case law. The above court judgement shows the balance of the objectives should be the focus when deciding whether to grant exemptions. This influences the way our national law should be implemented. NatureScot's license refusals appear to ignore this balance and their own recent policy statement "What We Do" - "Our purpose is to - PROMOTE the sustainable use of Scotland's natural resources."

The Regulatory Reform (Scotland) Act 2014 creates the Scottish Regulators Strategic Code of Practice, Section 6 of the Act requires the code to include the following principles, which are implemented within Section 2 of the Code –

"Recognise, in their policies and practice, a commitment to the five principles of better regulation: regulation should be transparent, accountable, consistent, proportionate and targeted only where needed."

I don't feel the treatment I've experienced from NatureScot has been either transparent, accountable, consistent or proportionate. For them to have no conservation objective means their target is unclear, so it is impossible to determine if one is needed, as such I feel they're in breach of their statutory code of practice by having no conservation objective.

NatureScot also have a statutory obligation under the Nature Conservation (Scotland) Act 2004 to have regard to the UN's Convention of Biodiversity, Article 10(c) states "Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements". I feel this is ignored and not addressed.

Article 5 of the EU Treaty states that regulation should be the minimum required to achieve the objective. NatureScot appear to imply they don't need an objective to refuse a license application but Natural Heritage (Scotland) Act 1991 provides them with general aims –

"Section 1.(1A) SNH 's general aims and purposes in relation to natural heritage are –

(a)to secure the conservation and enhancement of; and

(b)to foster understanding and facilitate the enjoyment of, the natural heritage of Scotland; and SNH shall have regard to the desirability of securing that anything done, whether by SNH or any other person, in relation to the natural heritage of Scotland is undertaken in a manner which is sustainable."

My license application provides an opportunity for a better understanding of our natural heritage and facilitates its enjoyment through a connection with my cultural heritage. It's possible to do this in a sustainable way that provides conservation benefit by reducing the threat of genetic pollution and addressing degradation of natural instinct in captive populations.

I believe NatureScot ignore their statutory duty under Section 1 of the Natural Heritage Scotland Act. I don't understand their actions and if I had the opportunity to tell the full story I don't think any reasonable person would understand it either.

I've recently received another refusal from NatureScot in which they've decided the purpose I require the license for isn't what I say it is, it's something else, which fits their perception of addressing it with their concept of an alternative. This is what I'm being subjected to when there is no clear conservation objective. As the Scottish Government hasn't fully implemented the Aarhus Convention and citizens have no way of addressing environmental issues at reasonable cost, I don't believe the present situation is compliant with case law in the form of the Wednesbury principle, which is covered in Scottish Governments decision making guidance "Right First Time". This addresses the test of unreasonableness, so surely Scottish Government should implement conditions that clarify whether a "target" is required by highlighting a conservation objective, which facilitates understanding of licensing decisions? Is it not reasonable to expect a defined conservation objective when being refused a license given what I outline here and previously?

In my experience NatureScot don't explain refusals in the context of proportionality but then that would be impossible if they have no objective. When I've contacted Scottish Government about conflicts with their own policies all they do is seek advice from NatureScot on a response, leaving NatureScot as judge, jury and executioner. My feeling is there's no oversight and no accountability, and our natural and cultural heritage is paying the price.