

Citizen Participation and Public Petitions Committee

15th Meeting, 2022 (Session 6), Wednesday
9 November 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 18 May 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 18th May 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 the Scottish Government guidance "Right First Time: a practical guide for public authorities to decision-making and the law".

We last considered the petition on 2 February, when we agreed to write to NatureScot, asking whether it routinely provides information about its conservation objectives when rejecting licensing applications. In its response, NatureScot explained that the circumstances under which licences can be granted do not always relate to conservation objectives. It states that licence refusals are routinely issued, and that its approach is always to explain to the applicants the reasons for the refusals against the relevant legal tests.

In their recent submission, the petitioner cites case law that they believe highlights the requirement for NatureScot to balance objectives when deciding whether to grant exemptions for licensing. They also stress the requirement on NatureScot to be transparent, accountable, consistent and proportionate, and express concerns about conflicts with NatureScot's policies and a lack of oversight and accountability. Do members have any comments to help us advance our thinking?

David Torrance: I think that we should write to NatureScot to seek reassurance that its processes are in place for licence refusals and that the reasons for any refusal are transparent and clear to the recipient, and are applied consistently across Scotland. We could also ask whether NatureScot has appropriate guidance for staff on the procedure for licence refusal to ensure that the issues raised by the petitioner in regard to transparency and clarity have been addressed by consistent procedures.

The Convener: That seems reasonable.

Do members agree with that course of action?

Members *indicated agreement.*

Annexe C

NatureScot submission of 28 July 2022 PE1895/G: Mandatory accountability for NatureScot's decision making procedures

Scottish Ministers delegated licensing functions under the Wildlife and Countryside Act 1981 and the Conservation (Natural Habitats, &c.) Regulations 1994 to SNH (now NatureScot) in 2011.

NatureScot assess licence applications against three licensing tests:

- Test 1, there must be a legal purpose
- Test 2, there must be no satisfactory alternative
- Test 3, the proposed action must not be detrimental to the maintenance of the species at 'favourable conservation status' in relation to European Protected Species, or conservation and/or welfare in relation to other birds, plants and animals.

In relation to the Wildlife and Countryside Act 1981, tests 1 and 2 are statutory for wild birds – with test 3 compliance (conservation and/or welfare) being a policy decision to reflect the reality that 'conservation' issues can sometimes be more, or indeed less, important than 'welfare' issues'.

Licensing Officers assess and grant licences in accordance with legislation following internal policy and procedures. The details of the assessment are recorded on NatureScot systems. Cases where an application fails to meet the licensing tests are first discussed with the Licensing Manager, who will also inform the Unit Manager. Applicants who have had applications refused are clearly informed in writing of the reasons for refusal.

While there is no appeal procedure for licensing decisions provided for in the relevant legislation, all decisions by NatureScot are subject to their complaints handling process. In line with public sector complaints handling arrangements, any outstanding issues can be referred to the Scottish Public Sector Ombudsman (SPSO) for final adjudication if necessary. Details of the NatureScot complaints handling system are available at NatureScot website.

Petitioner submission of 26 September 2022

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

Tests 1&3, referred to by NatureScot, can clearly be established with fact.

Test 2 is decided by the authority, in my experience, without addressing case law, government policy, or international conventions. In particular, how they have applied proportionality in relation to these responsibilities.

The authority unilaterally decides what is an alternative "solution" and whether it's "satisfactory". This discretion, I believe, often discriminatory, the authority applies to "other satisfactory solutions" is contrary to EU case law, C-339/87, which focuses on the implementation of EU Directives and states "mere administrative practices, which by their nature may be changed at will by the authorities, do not constitute proper transposition." In my experience, NatureScot's decisions are based upon an unqualified opinion of what they consider to be a satisfactory alternative, which can be changed to suit their agenda, and the European courts have judged that this discretionary "will" doesn't constitute proper transposition of a Directive.

My experience is, NatureScot refuse my license applications even though they accept they would have no negative effect on the favourable conservation status of the species and offer up their satisfactory alternative which doesn't address what I'm trying to achieve without explaining how they've applied the principle of proportionality. So, given the focus of the EU Birds Directive is maintaining the favourable conservation status of the species, what is their conservation objective in refusing me a license? I don't believe they have one and as such are acting out-with the powers given to them by Scottish Government and the Natural Heritage (Scotland) Act 1991.

I believe, NatureScot ignores its statutory obligation under the Nature Conservation Act 2004, Section 1(2), to "must have regard" to the UN's Convention on Biodiversity which highlights "sustainable use of natural resources" as positive to conservation. This is detailed in the related "Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity". There's also the related Nagoya Protocols on access to

genetic resources, and the Aichi Targets, targets 13 & 18 especially relevant to cultural use. In my experience, NatureScot appear not to "have regard" to any of these when case law has determined that to "have regard" means that unless there's some overwhelming reason not to comply (e.g. a threat to the favourable conservation status), these international obligations should be adhered to. I don't feel they are adhered to, and NatureScot won't explain why!

NatureScot state there's no appeals process provided for in legislation. The Scottish Regulators Strategic Code of Practice which is provided for by the Regulatory Reform Act 2014 states " regulators SHOULD - Offer an independent, impartial and transparent appeals procedure " and "SHOULD recognise.....five principles of better regulation: regulation SHOULD be transparent, accountable, consistent, proportionate and targeted ONLY where needed." NatureScot's complaints process is dealt with by NatureScot staff, which I don't feel is impartial, it doesn't allow for discussion and the Ombudsman only examines procedural issues. The stated purpose of the Regulatory Reform Act 2014 is to "promote regulatory consistency" but the present licensing criteria lacks a conservation objective for license refusals so creates inconsistency. Surely a clear conservation objective would address this?

In retirement, and with 50 years' experience, I want to create a captive bred population of native species, maintained within a studbook, with cultural and conservation benefits, at no cost to public funds, and NatureScot think that using non-native species is a satisfactory alternative, contrary to the GB Invasive Non-Native Species Strategy and Covenant of Social, Economic and Cultural Rights. I'm being denied my cultural right of sustainable access, when other cultures are granted theirs. Article 13 of the EU Birds Directive states "measures taken pursuant to this Directive may not lead to deterioration in the present situation as regards the conservation of the species", when, in my case, using non-native species increases the risk of genetic pollution, a risk NatureScot don't monitor, either physically or through registration, the latter a devolved matter which they have left with Defra.

I had a video meeting with NatureScot after submitting my last application, at that meeting I was told they hadn't read the application yet. I made 6 requests for further meetings, all ignored. I made a complaint detailing all the issues I had with their refusal, they rejected my complaint and informed me they hadn't got the resources to address them.

In my experience, NatureScot are not a competent authority on all issues related to Scotland's natural heritage and I wouldn't expect them to be, but FoI shows they are making decisions without competent specialist advice, including qualified legal advice. I feel citizens, many who have a lifetime experience in managing natural resources sustainably and giving them a deep understanding of conservation issues, are being locked out by NatureScot because of a political agenda, and our natural heritage is clearly suffering for it. The dictatorial treatment I feel I've been subjected to has to stop, citizens need accountability.