

Case Summary posted by the Task Force on Access to Justice

SWITZERLAND: Federal Supreme Court BirdLife Appeal 2015 in case 2C_1176/2013	
1. <i>Key issue</i>	Appeal against a cantonal decision of shooting protected birds in order to regulate their population; access to justice – a decision by public authorities that may have an impact on nature protection concerns can not be taken in the form of simple internal instructions, but has to be issued as a formal ruling. Additionally, the qualification of such a decision as a formal ruling can not depend on a quantity criterion (i.e. when the intended measure affects less than 10% of the local animal population).
2. <i>Country/Region</i>	Switzerland
3. <i>Court/body</i>	Federal Supreme Court
4. <i>Date of judgment</i>	2015-04-17
5. <i>Internal reference</i>	2C_1176/2013
6. <i>Articles of the Aarhus Convention</i>	Art. 2, para. 5; art. 9, para. 3
7. <i>Key words</i>	Access to court, Aarhus Convention, Meeting of the Parties, decision of the Meeting of the Parties, biodiversity, biodiversity, species protection, standing for NGOs, legal standing, locus standi, public interest, sufficient interest
8. <i>Case summary</i>	<p>According to Art. 7 para. 1 of the Federal Act on Hunting and the Protection of Wild Mammals and Birds (FAH), all animals that fall under the scope of the Hunting Act are protected, unless they have been declared "hunnable". According to Art. 12 para. 2 FAH the Swiss cantons are also allowed to take measures against individual animals protected or huntable, if they have caused significant damages. These measures can only be executed by a supervising institution or by entitled huntsmen.</p> <p>According to Art. 12 para. 1 lit. b of the Federal Act on the Protection of Nature and Cultural Heritage (NCHA), the right of appeal against rulings of the federal or cantonal authorities is also accorded to organisations concerned with the protection of nature's subjects if they fulfil the following requirements: 1. the organisation has to be active throughout Switzerland; 2. it pursues a solely non-profit-making objective; 3. any commercial activities must serve to achieve its non-profit-making objectives.</p> <p>The NGO Swiss Birdlife (Schweizer Vogelschutz, SVS) has demanded that the canton of Berne shall provide all permissions and decisions based on the FAH as rulings that will be regarded as subject to appeal.</p>

In response to this request the Cantonal Hunting Inspectorate stated amongst others that decisions concerning individual "ad-hoc"-measures based on Art. 12 para. 2 FAH that did not affect more than 10% of the local animal population were not to be regarded as subject to appeal.

In the following legal dispute the lower court argued that the cantonal decision based on Art. 12 para. 2 FAH could not be interpreted as a "ruling" in the sense of Art. 12 para. 1 lit. b NCHA. It came to the conclusion, that the decision had to be interpreted as an internal instruction and therefore was not designated to regulate a legal position.

The Federal Supreme Court, however, did not follow the opinion of the lower court. The Federal Supreme Court noted that the non-material associations' right of appeal based on specific legislation given to national Swiss organisations for nature and cultural heritage in order to enforce purely public interests, in derogation from the general requirements for entitlement to take legal action, required neither a personal (actual or legal) interest nor (in contrast to a selfish associations' appeal) the need to safeguard the interest of members.

Whether an administrative decision is considered to be a subject to appeal or not, shall not be dependent on whether it is addressed to a private person or a subordinated administrative unit. A police-order given by an administrative unit that allows a private person or a subordinate administrative unit to undertake an activity that is normally prohibited by Art. 7 para. 1 FAH (no shooting of protected animals), cannot be interpreted as an internal instruction, but has to be seen as a ruling subject to appeal. Moreover, a legitimate interest can not be denied due to the reason that the intended measure may affect less than 10% of the local animal population. According to Art. 12 NCHA all state-decisions that could affect the objectives of nature and landscape protection (Art. 1 NCHA) have to be taken in form of a ruling, thus permitting the effective exercise of the associative right of appeal. The legislator has not foreseen that the qualification of a ruling should be dependent of any quantitative criteria.

In his decision the Federal Supreme Court underlined, furthermore, that this conclusion also corresponds with the obligations resulting from art. 9, para. 3, of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), which entered into force for Switzerland on 1 June 2014.

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Link

http://www.unece.org/fileadmin/DAM/env/pp/a.to.j/Jurisprudence_prj/SWITZERLAND/BirdLife_Appeal_2015/CH_FedTribunal_BirdLife_Appeal2015_Judgement_EN.pdf