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EDITOR'S NOTE

Animal law is increasing in popularity. This popularity is reflected by the increasing numbers of seminars and conferences that are taking place internationally. Two important conferences were held in the UK this year, one co-hosted by A-Law. Mina Da Rui explores common themes across both conferences.

Stephen Foster looks at the potential impact of changes to sentencing provisions by the Animal Welfare (Sentencing) Bill 2018 in relation to the prosecution of animal protection. Two articles look at issues affecting dogs: puppy smuggling and greyhound racing. In the first of an occasional series of book reviews Randi Milgram reviews *Should Animals have Political Rights* by Alasdair Cochrane.

Finally, a massive thank you, and all good wishes to A-law members, contributors and supporters in the new decade ahead. A-law is proud to continue its support of the animal protection community and its work towards bettering the lives of animals and strengthening their protection in the 2020s.

Jill Williams
Editor

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Prosecuting under Animal Welfare Legislation: Why Time is of the Essence?

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Abstract

This article exams both the legislative provisions and authorities surrounding the application of jurisdictional time limitations in commencing criminal proceedings for animal protection offences in the magistrates' court and highlights the difficulties and consequences that are often encountered without paying careful attention to them. In particular, the article focuses on how the courts have construed s.31 of the Animal Welfare Act 2006 and seeks to evaluate the legal principles derived from those authorities in a comprehensive way to assist the reader with a better understanding from both a prosecution and defence perspective. The article also looks at the changes to be made to sentencing provisions by the Animal Welfare (Sentencing) Bill 2019 and, importantly, the reclassification of several offences as triable either way and the impact this will have on the prosecution of animal protection offences.

Introduction

According to the RSPCA 2018 Annual Report, the charity dealt with 1,182 cases that warranted a prosecutorial decision, of which 747 defendants were convicted for a total 1,678 offences leading to a success rate of 92.5%[1]. In contrast, the CPS in the same year dealt with just under 495,000 prosecutions

[1] Trustee's Report & Accounts 2018, www.rspca.org.uk

with an 83.7% conviction rate[2]. Nevertheless, the RSPCA, being a registered charity, has no special prosecutorial status or authority and simply acts in the capacity of a private prosecutor when commencing criminal proceedings.

Whilst the DPP has a statutory power under s.6(2) of the Prosecution of Offences Act 1985 (POA 1985) to intervene in such proceedings, which can be either discontinued or continued, (subject to an evaluative assessment of the sufficiency of the admissible evidence and the public interest), it is a recognised right, preserved under s.6(1) of the POA 1985, of a private citizen to enforce the criminal law by commencing criminal proceedings, as confirmed by the Supreme Court in *Gujra v CPS* [2013] 1 AC 484 and reinforced in *R (Kay) v Leeds Mags Court* [2018] 4 WLR, & *Charlson v Guildford Magistrates* [2006] 1 WLR 3494[3].

Unlike an individual citizen, the RSPCA is supported by a dedicated prosecutions department together with the necessary resources to commence proceedings under animal welfare legislation.

Whilst other agencies, such as Local Authorities[4], DEFRA, CPS and the FSA principally enforce other legislation protecting the welfare of farmed animals and slaughterhouses[5], the primary aim of the RSPCA is the safeguarding of domesticated animals[6]. There is little doubting the valuable contribution the RSPCA make to criminal enforcement in protecting animals, but it is this vested interest that has led to criticism[7] and an independent review of its operations[8]. Recently however District Judge Barron sitting at Folkestone Magistrates Court questioned the independency of the

[2] Annual Report & Accounts 2018-19, www.cps.gov.uk

[3] See para 46 in *Soni (Wasted Costs Order)* 2019 EWCA Crim 1304

[4] See *Qualter v Preston Crown Court* [2019] EWHC 2583

[5] Welfare of Farmed Animals (England) Regs 2007 SI 2078, Welfare of Animals (Slaughter or Killing) Res 1995 SI 731, Welfare at Time of Killing (England) Regs 2015 S1, Mandatory Use of closed Circuit Television in Slaughterhouses (England) Reg 2018 SI 556.

[6] Prosecution should be instigated on "good grounds" and all enquires and other remedies being exhausted, see *RSPCA v Johnson* [2009] EWHC 2702

[7] HofC EFRAC Report "Animal welfare in England: domestic pets" 2016-17

[8] Wooler Review 2014 published at www.rspca.org.uk

RSPCA in respect of biased publicity surrounding the case of Mark Burgess and its legitimacy to conduct its own prosecutions.[9]

Nevertheless, the current role of the RSPCA does have the support of the Government who do not consider it necessary to designate the RSPCA as a specialist prosecuting authority[10]. Accordingly, as a professional body, there is a public interest in ensuring that any prosecution instigated by the RSPCA is done so properly and with sufficient regard to the jurisdictional and procedural obligations underpinning criminal proceedings[11]. In particular are the differing statutory time limits to bringing a prosecution which must be adhered to. However, any oversight could lead to either a stay of proceedings or a conviction being quashed and a consequential loss of confidence. It is this failure which has resulted in a number of appeals coming before the High Court. This article will therefore seek to analyse the statutory time limitations in light of these judgments and

[9] See report (page 5) in Times newspaper Thursday 26 Sept 2019

[10] See page 5 of Govt response to the EFRAC report, 7 Feb 2017 HC 2017

[11] See *Valiati v DPP* [2018] EWHC 2908

provide some guidance to prosecutors.

Animal Protection Offences

The main primary piece of legislation is the Animal Welfare Act 2006. A codifying Act that seeks to draw together previous legislation promoting the welfare and protection of animals[12] on the one hand and the prevention of cruelty/harm on the other. An animal for the purposes of the Act (s.1) must constitute a non-human subphylum vertebrate species (i.e. reptiles, birds, mammals). The range of offences available essentially fall into two main categories.

The first category contained in ss4-8 covers the ambit of cruelty, namely unnecessary suffering (s.4 offence)[13], mutilation (s.5 offence), dock tailing (s.6 offence), poisoning (s.7 offence)[14], and fighting (s.8 offence). All these offences can be committed in several ways, either as a primary offender or a secondary party, by permitting the prohibited act or omission. Each offence is wide ranging in its ambit (s.8 for instance dealing with fighting can be committed in 14 possible circumstances)[15]. Some are quasi-strict liability with a lawful authority or reasonable excuse defence, whilst others such as unnecessary suffering that involve the primary offender (s.4(1)) requires proof of *mens rea* either actual knowledge that the animal is suffering or *likely to* suffer unnecessarily, or objectively ought to have known this by his negligent act or omission, subject to a mistaken belief defence[16]. Similarly, a secondary party (provided they hold responsibility for the animal) will attract criminal liability by either (1) permitting or (2) failing in all the circumstances to take reasonable steps to protect the animal from the

[12] It is now a specified offence to use wild animals for circus performance-see the Wild Animals in Circuses Act 2019, see the case of Bobby Roberts and the ill-treatment of Anne an Asian elephant.

[13] For the regulation of necessary suffering in animal testing, see the Animals (Scientific Procedures)Act 1986 & European Directive 2010/63/EU

[14] In a different context on the meaning of poisoning in the OPPA 1861, see the illuminating discussion in *R v Veysey* [2019] EWCA Crim 1332 & also *Cruelty Free International v SofS HD* [2017] EWHC 3295

[15] For application see *Wright v RSPCA* [2017] EWHC 2643 & *RSPCA v McCormick* [2016] EWHC 928

[16] This accords with the legislative intent-see the detailed judgment in *RSPCA v Grey* [2013] EWHC 500

cruelty of another. Although it is a necessary ingredient that the offender is aware of the potential harm, the culpability arises from unreasonably ignoring or avoiding it which is objectively determined[17].

Section 9 sets out the second category covering welfare protection and specifically imposes criminal liability on those who hold an s.3 responsibly for an animal and fail to take all reasonable steps in all the circumstances[18] to engage in good practice of ensuring the animal's needs are sufficiently catered for, in terms of environment, food and behaviour. Section 9 which clearly overlaps with an s.4 offence depending on the circumstances is less culpable than s.4 and therefore can treated either as a separate offence or as an alternative to s.4 without being duplicitous, provided the conduct relating to the s.9 offence is wider than the conduct of unnecessary suffering[19]. A more extensive list of specified welfare protection duties exists for farm animals in the Welfare of Farmed Animals (England) Regs 2007 SI 2078[20]. The offence creating provision is regulation 4 which imposes criminal liability on a responsible person who fails in their duty to take all reasonable steps to ensure a farmed animal[21] is bred or kept in accordance with the 30 specified conditions contained in schedule 1.[22]

Section 32 as amended by the Animal Welfare (Sentencing) Bill 2019

Section 32 of the AWA 2006 stipulates that the maximum sentence of imprisonment for all the offences is 6 months and or a fine[23] and therefore treated as minor summary offences triable only in the Magistrates Court[24]. This was seen as wholly ineffectual, particularly in unnecessary suffering cases in which a number of reported

[17] See *Riley v CPS* [2016] EWHC 2531

[18] Any alleged failure is based on a "purely objective standard of care" which accords with the legislative intent of the Act- see *RSPCA v Grey* [2013] EWHC 500

[19] See *RSPCA v Grey* [2013] EWHC 500

[20] As amended by 2010 SI 3033. These regulations were created by the relevant Minster using the power conferred on him under s.12.

[21] Defined in reg 3

[22] Reg 5 deals with poultry duties & reg 6 deals with compliance with the relevant code of practice in force.

[23] See Magistrates' Court Sentencing Guidelines on Animal Cruelty Offences on the imposition of sentencing, see also *Williamson v RSPCA* [2018] EWHC 880.

[24] See s.2 of the MCA 1980

cases involving appalling and sustained cruelty, and in some instances sadistically filmed and shared on social media for which the offenders received minimal punishment that often does not nearly reflect the gravity and culpability of the offending, as rightly being abhorrent[25]. Section 142 of the Criminal Justice Act 2003 states that the aim of sentencing includes the punishment of offenders and the reduction in crime by imposing deterrent sentencing.

Neither of these objectives are being met by the existing sentencing range for animal cruelty. Recognising the inadequacies in sentencing and the tireless campaign led by Anna Turley MP, the Animal Welfare (Sentencing) Bill 2019 which has cross party support and is currently before Parliament[26]. This radically reforms the sentencing provisions, by amending s.32 and reclassifying the offences contained in ss4-8, as either-way offences and increasing the maximum sentence if convicted on indictment to five years. It will be expected that the Sentencing Council will revise the current guidelines and the level of culpability and harm, the indicative starting point, balanced against any non-exhaustive aggravating and mitigating factors.

The comparable offence in the Republic of Ireland which is subject to a 5 year term of imprisonment was recently considered in the sentencing case of *DPP v Kavanagh* [2019] IECA 110, in which the Court of Appeal upheld a sentence of 3 years imposed on the appellant who had pleaded guilty to 30 counts on an indictment containing 126 counts. The appellant had been involved in a large-scale operation of movement of dogs for commercial gain. Rightly describing the scenes at the farm of death and suffering as being "a truly shocking one" and "of exceptional seriousness" fully merited the sentence imposed.

[25] See the debate pack "Sentencing for animal cruelty" (CDP-22106/0202 3rd Nov 2016 presented by Anna Turley MP promoting her PMB which unfortunately was unsuccessful.

[26] Unfortunately the Bill failed to complete all its Parliamentary stages due to the sudden prorogation of Parliament. Nevertheless, the Bill is expected to be reintroduced in the next Parliamentary session having been announced in the Queen's Speech on the 14 Oct 2019. Given the support for the legislation this article is presented on the expectation that the Bill will pass in its current drafted form which is likely to be in 2020.

Whilst this is undoubtedly a welcome reform in the protection of animals. It will be interesting to see whether the RSPCA is able to absorb not only the financial implications with increased costs, but the extra demands place upon it in the Crown Court, or will the CPS as a public prosecutor take on the more serious cases whilst the RSPCA continue to deal with the summary cases? It will be equally interesting to see what impact this change will have on how a defendant chooses to plead. They may prefer to test the evidence before a jury, rather than a Magistrates court, with potentially more disputed cases going to the Crown Court. Conversely, a risk of a higher sentence and the potential impact of any distressing images on the jury may encourage guilty pleas. Of obvious importance is that the welfare offence contained in s.9 remains a summary-only offence unaffected by the change and in effect becomes a less culpable offence to the now more serious s.4 offence. However, despite the potential overlap between the factual circumstances between the two offences, s.9 is not a specified linked summary offence for the purposes of s.40 of the Criminal Justice Act 1988 and cannot therefore be joined in the same indictment as an alternative to charging an indictable s.4 offence and would have to be dealt with separately in the magistrates court. Neither can a count be added later in the Crown Court under s.6(3) of the Criminal Justice Act 1967. Without careful consideration it is easy to misconstrue the jurisdictional power of the court, a point highlighted in *R v Buckley* [2009] EWCA Crim 1178 and repeated in *R v Williams* [2011] EWCA Crim 1716. In both cases the Court of Appeal had to quash the sentences on the bases of being convicted of the lesser, non-aggravated form of having a dog dangerously out of control under s.3 of the Dangerous Dogs Act 1991, a summary-only offence not specified in s.40 and therefore not within the jurisdiction of the Crown Court.

Commencing criminal proceedings in the Magistrates' Court

Section 21 of the Access to Justice Act 1999 defines criminal proceedings as proceedings before any court for dealing with an individual accused of an offence. Likewise, Lord Bingham in *Majesty's Commissioner for Customs and Excise v City of London Magistrates' Court* [2000] 2 Cr App R 348 confirmed that "the general understanding that criminal

proceedings involve a formal accusation made on behalf of the State or by a private prosecutor that a defendant has committed a breach of the criminal law, and the State or the private prosecutor has instituted proceedings which may culminate in the conviction and condemnation of the defendant."

In bringing a private prosecution the informant, unlike the CPS, does not have to satisfy the evidential and public interest test. Whilst the criterion is much less onerous, it would be wise for organisations like the RSPCA to adopt either the code for crown prosecutors, or apply similar criteria[27]. In *R (Kay) v Leeds Magistrates' Court* [2018] 4 WLR, the High Court emphasised that any private prosecutor, is still "subject to the same obligations as a Minister for Justice as are the public prosecuting authorities -including the duty to ensure that all relevant material is made both for the court and the defence."

Likewise, any professional advocate having conduct of a private prosecution must display "the highest standards of integrity" and have full regard for the public interest and fulling their duties, not to mislead the court and ensuring the proceedings are fair. This unquestionably invokes the common law "duty of candour" of "full and frank disclosure", including any adverse information, which would assist the court and is now reflected in Part 7 of the CrimPR 2015.[28]

Part 7 of the Criminal Procedure Rules 2015, as amended sets out the necessary conditions in applying for and issuing a summons. This is a two-stage procedure, the first step is the formal laying of information of the alleged offence(s), followed by the magistrates serving (issuing) a summons to attend court.

Rule 7.2 provides that the prosecutor must first serve on the court a written application which must fully conform with rule 7.3 by sufficiently identifying the relevant offence(s) which is known to law and providing brief particulars of the alleged conduct that constitutes the alleged offence(s). In addition, not only must a prosecutor (other than a public authority)[29]

[27] See Wooler Review 2014 Chapter 6 and generally on the code *Queen(Torpey) v DPP* [2019] EWHC 1804

[28] See also *Suleman v Leeds District Mags* [2017] EWHC 3656

[29] s.17 of the Prosecution of Offences Act 1986

demonstrate that the application accords with any statutory time stipulations (rule 7.2) but must also, under rule 7.2(5&6), provide sufficient grounds to justify that the defendant has committed the alleged offences, endorsed by a statement of truth that all the material evidence is available and all relevant information is disclosed.

In *R (Kay) v Leeds Magistrates' Court* [2018] 4 WLR, the High Court provided valuable and useful guidance on the legal framework governing the summons procedure in the Magistrates Court. Sweeney J who gave the leading judgment, noted that the issuing of a court summons is exclusively "a judicial function involving the exercise of a discretion which is subject to control by judicial review." Any application for a summons is a preliminary step to instituting criminal proceedings, and that the guiding principles gleaned from the previous authorities oblige the magistrates to issue a summons promptly unless there are "compelling reasons not to do so" such as the application is time barred, lacks jurisdiction, is defective, vexatious, or an abuse of process. In *Westminster Mags (Johnston) v Ball* [2019] EWHC 1709, the High Court decisively ruled that the threshold test to issuing a

summons is not a low one as contended by the complainant. On the contrary "when determining an application for a summons a magistrate must ascertain whether the allegation is of an offence known to law, and if so whether the essential ingredients of the offence are *prima facie* present"[30].

The court must protect the criminal process from any malpractice or manipulation of it by the prosecution and must not be seen to condone such conduct. If the misconduct is such as to deprive the defendant of any protection under the law and suffer unfairness, then the proceedings ought to be stayed as an abuse of process. The relevant principles have been authoritatively clarified in *R v Maxwell* [2011] 1 WLR 1837 by the Supreme Court and based on two limbs, either it is now impossible to give the accused a fair trial, or a fair trial is still possible but offends the "court's sense of justice and propriety." The burden of proving an abuse is on the defendant on a balance of probabilities[31]. An insuperable hurdle given the power to stay should only be used in exceptional cases, but very much dependent on the individual facts of each case in question.

Statutory Time limitations under the Animal Welfare Act

Unless otherwise stated, all summary offences are subject to s.127 of the Magistrates Court Act 1980 which places a statutory time limit on commencing criminal summary proceedings. This prevents the trial of an offence, unless the information was laid within six months from the time when the offence(s) was committed[32]. If the offence involves a course of conduct or acts committed "continuously or intermittently, over a period of time" then, as stated in *DPP v Baker* [2004] EWHC 2782, the time limit starts from the final incident.

For the purposes of calculating the duration of the statutory time restrictions, the High Court in *Rockall v DFRA* [2007] 1 WLR 2666 having reviewed the previous

[30] See also *R (DPP) v Sunderland MC* [2014] EWHC 61

[31] See *DPP v Fell* [2013] EWHC 562

[32] In *RSPCA v Webb* [2015] EWHC 3802, the High Court left open the question whether proceedings for a civil order under s.20 of the AWA 2006 to dispose of any animals seized under s.18(5) amounts to a complaint and therefore subject to s.127.

authorities, ruled that the laying of information arose when the information is "made available to the justices, or the clerk to the justices, within time", not when the summons is served, unless the contrary is specifically expressed in the offence creating provision or Act. Davies J recognised that whilst "institution" and "commencement" can be construed as having the same meaning, they are not "always synonymous", it will very much be dependent on the context in which they are used. Provided the summons is properly served, then should the accused fail to attend at the magistrates' court as directed, the court may in accordance with s.11 of the MCA 1980 proceed in their absence, provided the prosecutor is in attendance, or issue a warrant of arrest.

To proceed to trial when a summons is out of time, would amount to an abuse of process and the proceedings inevitably being stayed, nullified, or subject to a judicial review challenge[33]. However, given the clear policy reasons in protecting animals and the difficulty in obtaining the relevant evidence together with the potential delay in discovering the commission of the actual offence, Parliament has in s.31(1)(a) decreed an extended time limitation of three years to commence criminal proceedings from the actual date of the alleged offence, provided those proceedings are commenced within a period of 6 months from the date when sufficient evidence comes to the knowledge of the prosecutor (s.31(1)(b)[34]. In light of the changes to be made by the Animal Welfare (Sentencing) Bill 2019 and the reclassification of the offences contained in ss.4-8 to triable either way, these are no longer subject to the time limits in s.31 by virtue of s.127(2) of the MCA 1980 and schedule 1 of the Interpretation Act 1978.

The alternative method of instituting proceedings by way of a written charge, a requisition (if permitted), together with a single justice procedure notice introduced by s.29 of the Criminal Justice Act 2003, is only available to designated "relevant prosecutors", whilst a Local Authority is designated, the RSPCA is not and therefore must

[33] See *R v Aston* [2006] EWCA Crim 794, *RSPCA v Johnson* [2009] EWHC 2702

[34] It is for the prosecution to prove that the time limits have been complied with, see para 31 in *Chesterfield Poultry v Sheffield Mags Court* [2019] EWHC 2953

follow the s.1 MCA 1980 procedure[35]. Whilst this method is mainly aimed at simplifying the reporting of traffic offences, the High Court in *Brown v DPP* [2019] EWHC 798, as with laying of an information, drew a clear procedural distinction between issuing a written notice on the one hand and the actual serving of the documents on the other and that written charge will deemed to have been issued on the date it was completed, provided this was within the 6 month time limit and not when served, or in the public domain as contended by the appellants. In a cautionary warning to prosecutors, Irwin LJ noted that any "inordinate or unwarranted or unjustified but significant delay" between the issuing and actual service "should not and cannot go without a remedy" namely an abuse of process. To avoid any difficulties prosecutors should strive to ensure both the issuing and actual service occurred within the 6-month limitation period.

This is especially important if the difficulties highlighted in *Dougal v*

[35] See CJA (New method of instituting proceedings (Specification of relevant prosecutors) Order 2016 SSI 430

CPS [2018] EWHC 1367 are to be avoided, in which High Court distinguishing the decision *in R v Scunthorpe Justices exp McPhee* [1998] EWHC 228, unequivocally ruled that "if no information is laid within the period of six months, but an indictable offence is later charged and then subsequently amended to a summary offence, that amendment does not avoid the consequences of the statutory time limit" in s.127 of the MCA 1980. This, it is contended, would be equally applicable to s.31 and that a prosecutor will only be permitted to substitute, an s.4 unnecessary suffering allegation (when it becomes an either-way offence) with an s.9 welfare offence (a summary only offence) provided this arises from the same misdoing and if the original s.4 offence was brought within six months of the prosecutor having sufficient knowledge to bring proceedings, and within three years of the offence being committed. Otherwise the amended charge will be out of time and the court would have no jurisdiction to hear it.

Sufficiency of Evidence Test and meaning of "Prosecutor: Section 31(1)(b)

Nevertheless, the legitimate aim underpinning the extension of time, must be balanced against the finality rule and the need for criminal proceedings to be concluded within a reasonable time so that any alleged offender is able to govern their lives with some degree of certainty and confidence. The legal test to be applied and which was confirmed in *Letherbarrow v Warwick CC* [2015] EWHC 4820, is not only must the prosecutor be satisfied "whether there is a *prima facie* case but whether the evidence is sufficient to justify a prosecution" in the public interest[36]. The prosecutor must be astute and "apply his mind" to the case file and in doing so take full account of the public interest factor, including the account (if any) provided by the defendant and the strength of the prosecution's case, only then will a prosecutor be in a position to have the relevant knowledge. It is at this critical point the 6-month time limit will start to elapse and the prosecutor must either proceed to initiate

[36] As stated in *Chesterfield Poultry Ltd v Sheffield Mags Court* [2019] EWHC 2953, this is a two- stage test, firstly there be sufficient evidence, and secondly it must be in the public interest to prosecute.

proceedings, or discontinue, or invite further investigation.

Whilst s.30 gives expressed prosecutorial status to Local Authorities to bring proceedings under the Act, this does not preclude any other person or organisation from doing so[37]. In *Lamont v RSPCA* [2012] EWHC 1002, the High Court rejected the contention of the appellant that this should be narrowly construed to mean only bodies or organisations with a statutory power to prosecute. Accepting that the issuing of summons under s.31(2) "is a considerable one" and "not a power lightly to be conferred upon any prosecuting authority", when considered "in the context of the Act as a whole," there is no basis to conclude that Parliament intended to impose such a narrow restriction by excluding interested parties, including individuals, from the policy of the Act. Accordingly, in *Letherbarrow v Warwickshire CC* [2014] EWHC 4820 the High Court asserted that the expression "Prosecutor" in s.31 refers to "the individual who is given responsibility for making the important decision whether to prosecute." That person must at least be identifiable to avoid any confusion. In *CPS v Riley* [2016] EWHC 2531, the High Court acknowledged a clear role distinction between those who, on the one hand investigate and gather the evidence (in this case the FSA), and the prosecutors on the other who assess the sufficiency and admissibility of that evidence (in this case the CPS, as the FSA have no expressed authority to prosecute directly)[38].

Likewise, in *R v Woodward* [2017] EHWC 1008, the High Court felt bound by the decision in *Riley* which was factually indistinguishable from the disputed case. Accordingly, the District Judge having wrongly assumed that the FSA and the CPS as being one and the same, miscalculated the appropriate date as being when the FSA had gathered enough evidence to justify a prosecution, as opposed to when the CPS reviewing lawyer had considered the evidence independently in the public interest to warrant proceedings, which was

[37] See paras 26 in *Lamont v RSPCA* [2012] EWHC 1002

[38] Prosecuting offences in slaughterhouses transferred from DEFRA to the CPS by the AG under s.3(2)(g) of the Prosecution of Offences Act 1985 ON 12 July 2011.

much later and therefore still within the time stipulation[39].

Whilst in *RSPCA v Johnson* [2009] EWHC 2702 the High Court, having reviewed the previous authorities and in particular the decision in *R (Donnachie) v Cardiff Mags Court* [2007] EWHC 1846, was unable to derive any "principle of law that knowledge in a prosecutor begins immediately any employee of that prosecutor has the relevant knowledge." To rule otherwise would be unduly cumbersome on a prosecutor and contrary to the purpose of the legislation.

For the same reason the High Court in *CPS v Riley* [2016] EWHC 2531, gave warning to any prosecutor that the "long stop" three year time limitation, whilst providing a "margin of judgment"[40] "is not a charter for paper-shuffling," and any subsequent avoidable delays, or absence of case management, or abuse of the privilege "will not avail a prosecutor where the relevant delay has exceeded the six-month period in s.31(1)(b)." On the facts which involved the mistreatment of a cow about to be slaughtered (s.4 offence against the individual partners), the High Court ruled that whilst the evidence could have come before the prosecutor sooner, this was not sufficiently serious so as to render the proceedings unfair and that "whether in a case of egregious delay on the part of investigators impacting on the fairness of the proceedings there might be some other remedy, can safely be left to a case where the issue arises for decision"[41].

Similar sentiments arose in *RSPCA v Johnson* [2009] EWCA 2702, when Pill LJ warned that "the prosecuting authority is not entitled, by passing papers from hand to hand and failing to address the issue, to delay the running of time"[42]. On the individual facts the defendant himself was the author of the delay in commencing proceedings by not engaging with the investigator, despite repeated attempts to do so and therefore the District Judge was

[39] This case involved allegations against directors and individuals of cruelty covertly filmed at a abattoir

[40] *R v Haringey Magistrates' Court, ex p Amvrosiou* [1996] EWHC 14, at para 23 & *Burwell v DPP* [2009] EWHC 1069 at para 20 which involved s.11 of the Computer Misuse Act 1990

[41] This could include specific directions, or a wasted costs order, or not award prosecution costs after conviction, or form part of sentence mitigation.

[42] Pill LJ followed the approach in *Morgans v DPP* [1999] 1WLR 968

wrong to conclude that there had be an abuse of process by the prosecutor in not bringing proceedings when the ill-treatment had been discovered and the defendant being identified as the legal owner.

Whilst s.31 should be strictly adhered to, and the prosecutor rightly needs to act conscientiously when coming to a decision and exercise "especial care"[43] in doing so, at the same time it does not impose an arbitrary duty and embodies a degree of latitude. As the High Court clearly recognised in *R v Woodward* [2017] EWHC 1008, before coming to a decision the relevant prosecutor must be afforded a reasonable time to properly evaluate the material evidence disclosed by the investigator. Additionally, in *RSPCA v Johnson* [2009] EWHC 2702, Pill LJ acknowledged that it would be contrary to the public interest if a prosecution was commenced other than on "good grounds" and then only if the evidence has been properly considered by an "expert mind" with "appropriate skills to consider whether there is sufficient information to justify a prosecution" provided always this is not misused to take full advantage of the extended time[44].

The whole question of prosecutorial time limits again came to be considered by the High Court in *Chesterfield Poultry Ltd v Sheffield Mags Court* [2019] EWHC[45]. This case involved the application of regulation 41 in Welfare of Animals at Time of Killing Regs 2015[46] and whether or not the CPS had commenced proceedings in time. The case involved a prosecution brought by the CPS on behalf of the FSA into the treatment of chickens found dead at the defendant's premises.

Having considered the previous authorities in some detail, Males LJ was firmly of the view that the relevant date for the purposes of calculating the time limits to prosecution is not when the prosecutor initially receives the file, or decides to authorise a prosecution in the public interest, as favoured by Hickbottom LJ in *Woodward.* The relevant date (if different to the authorisation date)

[43] Para 23(iii) in *R v Woodward* [2017] EWHC 1008

[44] See also para 57 for similar observations in *Lamont v RSPCA* [2012] EWHC 1002

[45] The judgment was handed down on the 6 November 2019

[46] An identical provision to s.31 of the AWA 2006

is when the prosecutor reviews and considers the file of evidence "so that knowledge of the content has been imparted" sufficiently to satisfy the statutory test (the review date). Accordingly, the High Court on clear authority rejected the claimant's contention the relevant date was when the CPS received the file not when the file was later reviewed with a view to prosecution.

This will be determined on a case by case basis with some cases obviously being more complex than others depending on whether it is a multi-handed case of sustained offending over a period of time, or an isolated incident of mal-treatment involving vulnerable individuals. Equally, the type of evidence to be reviewed, such has video evidence obtained covertly, hearsay and bad character evidence and points of law/admissibility needing Counsel's opinion, the importance of obtaining veterinary expert opinion all take time to process and will often form part of an ongoing review. Nevertheless, it can never be justified for any prosecutor to hide behind the statutory time limits to simply postpone this decision unnecessarily as a convenient way to circumvent the statutory duty in s.31. This will be especially important if the initial investigation is focused on a suspected s.4 offence which is not subject to s.31, but later due to a lack of evidence, downgraded to an s.9 inquiry which is.

Certificate of confirmation and a question of jurisdiction: Section 31(2)

Section 31(2) allows the prosecution to formally acknowledge the date on which sufficient evidence factually existed to justify a prosecution under the Act. This is not a mere formality, but a process to ensure certainty for both parties as to jurisdiction, subject to an extended time limitation. Recognising that this may give the prosecutor a certain amount of "undue power" in asserting the timescale, and therefore as a matter of policy, a certificate must strictly comply with the statutory requirements, the High Court in *Chesterfield Poultry Ltd v Sheffield Mags Court* [2019] EWHC 2953, rejected a claim that the presentation of a certificate invokes article 6. The issuing of a certificate is a formal step to inform the defendant that the proceedings are procedurally in time, and does not deny his right to a fair trial under Article 6.

Accordingly, the certificate in order to comply with s.31(2)(a) must provide the relevant date in which the prosecutor subjectively forms the opinion that there exists sufficient evidence which has come to his knowledge to justify a prosecution being in the public interest[47]. Provided this is signed by or on behalf of the prosecutor[48], then it becomes conclusive evidence of the facts stated therein and cannot be rebutted or challenged unless as was strongly noted in *Downes v RSPCA* [2017] EWHC 3622, the defence can clearly show "that there is a prima facie case for undermining the certificate" on the basis that it is "plainly wrong", or factually inaccurate, or tarnished by fraudulent behaviour, or "patently misleading."[49]

Even then Knowles J considered "that it will seldom be proper to open up a lengthy evidential inquiry into the decision-making process" since to do so would not only undermine the bindery effect of s31(2) but it would also disrupt on-going proceedings. As stated by Males LJ in *Chesterfield Poultry v Sheffield Magistrates Court* [2019] EWHC 2953, whether a certificate is erroneous can only be determined on its face and without any regard to any extraneous material to the contrary which would be irrelevant and inadmissible. A defendant cannot therefore go behind the certificate in order to seek to undermine its validity in this regard, unless there is evidence of fraudulent misconduct, bad faith on the part of the prosecutor, or the prosecutor failed to act due diligently in deciding whether or not to prosecute rendering the proceedings unfair and an abuse of process. Essentially the prosecutor has the exclusive authority to determine the relevant date for the purposes of the time limits without necessarily being answerable or provide reasons for doing so and it is this that the court must be mindful of and guard against to ensure "that the conclusive provisions must not be manipulated

[47] See para 27 in *Chesterfield Poultry v Sheffield Mags Court* [2019] EWHC 2953

[48] There is no statutory requirement that the certificate itself must be dated and likewise the application for a summons- see para 12 in *Browning v RSPCA* [2012] EWHC 1003

[49] In *Lamont v RSPCA* [2012] EWHC 1002 William J emphasised that the expression "patiently misleading" is not an additional ground, but simply denotes that it must be plainly (inaccuracy) wrong on its face,

to deprive a defendant of a time-bar defence."

It follows therefore that if the defence is able to show that the certificate is tainted by fraud, or plainly wrong and therefore "inaccurate on its face"[50], then clearly from the judgment in *Burwell v DPP* [2009] EWHC 1069, the certificate could not be relied upon in such circumstances and the jurisdiction of the court must be an open to challenge, either by judicial review under s.29 of the Senior Courts Act 1981, or alternatively as an abuse of process if merited on the facts. Nevertheless, whilst these are appropriate routes to a challenge the validity of a certificate depending on the grounds, the High Court in *Lamont v RSPCA* [2012] EWHC 1002, (preferring the decision in *Atkinson v DPP* [2004] EWHC 1457, to that in *Burwell v DPP* [2009] EWHC 1069, and *Azam v Epping* FDC [2009] EWHC 3177), felt that it would be unwise to be "unduly proscriptive" and that "there are considerable practical advantages if a challenge to the jurisdiction" is dealt with by Magistrates' at a preliminary hearing, rather than "satellite litigation by way of judicial review."

If the magistrates decline jurisdiction, then this would clearly be a final determination, and therefore subject to a possible challenge under s.111 of the MCA 1980 by way of case stated on a point of jurisdiction is not disputed. On the other hand, if the magistrates do accept jurisdiction, this brings into question whether this is a final determination on a point of jurisdiction by reason of the decision itself being final, although not the proceedings, which formed the opinion of the High Court in *R (Donnachie) v Cardiff Magistrates* [2007] 1 WLR 3085 or, as stated in *Steames v Copping* [1985] QB 920, a preliminary ruling accepting jurisdiction as a matter of law is not final outcome, since the on-going proceedings remain in-tact and cannot be appealed under s.111 until such time they are concluded.

This conflict of opinion was resolved in *Downes v RSPCA* [2017] EHWC 3922 with the High Court preferring the decision in *Steames* having been correctly decided which was directly to the point of law in issue, whereas the decision in *Donnachie* was a judicial review challenge to the decision to refuse to state a case. Neither does the decision in

[50] See para 48 in *Chesterfield Poultry Ltd v Sheffield Mags Court* [2019] EWHC 2953

Steames appear to have been cited in *Donnachie* and thus in the opinion of Holroyde LJ, *Donnachie* "should be regarded as made *per incuriam* and should no longer be followed on this specific point".

Knowles J expressed a similar view and ruled that there is no power for a court to state a case in circumstances in which a decision is made to accept jurisdiction under s.31 of the AWA 2006. In such circumstances his Lordship accepted that whilst a claim for Judicial review remains open to the aggrieved party, the magistrates "should not adjourn, unless there are particularly good reasons to do so" or if leave in the meantime is granted to seek a judicial review. In all other cases "it will very usually be better to carry on and complete the case, allowing for all matters to be raised on appeal at the conclusion of the case in the normal way", or "if appropriate to do so in a special case" formally state a case to the High Court.

Finding the reasoning in *Downes* as "highly persuasive" [51], the High Court in *Highbury Poultry Farm v CPS* [2018] EWHC 3122, had no hesitation in applying the guidance in *Downes* to the instant case in which a ruling by the District Judge that the offence contained in Regulation 30(1)(g) of the Welfare of Animals at Time of Killings Regs 2015 SI 1782 imposed strict liability and was only open to challenge by judicial review. Kay J with whom Hickinbottom LJ agreed, observed that whilst such a ruling may adversely affect the position of the defendant, the proceedings still remained "extant" until such time after the outcome of a contested trial, or the defendant decides to plead guilty. Either way, only then would an appeal by case stated be permissible, otherwise the most sensible and effective approach is by judicial review.

Section 31(2) simply denotes "for the purposes" of identifying the date the prosecutor formed their opinion. Accordingly, a certificate is conclusive proof of that fact, but is not essential to it, and is left entirely as a matter for the prosecutor to decide whether or not to use it, which can be issued at any time, during the proceedings and up to the closing of the prosecution case. Naturally the better course is to

[51] despite what appears to be a relatively narrow ratio in the House of Lords decision in *Atkinson v USA* [1971] 1AC that concerns a challenge to the decision of magistrates whilst acting an examining Justices.

serve a properly drafted certificate as determinative of the time limits being complied with.

A defective certificate does not render the proceedings automatically an abuse, unless promulgated by fraud. Instead the magistrates, regardless of the omission of a certificate, need to determine whether or not the proceedings were nonetheless properly brought within the statutory time limits, the burden of which clearly rests with the prosecution. In *Letherbarrow v Warwickshire CC* [2014] EWHC 4820, the High Court ruled that this can be fulfilled in one of two ways, either by issuing a new written certificate which can, as happened in *R v Woodward* [2017] EWHC 1008[52], include the issuing of a second certificate to rectify any honest and genuine error made in the first one, or alternatively by "adducing evidence of fact showing who made the decision that a prosecution was justified and when." If the latter course is taken, then Hinkinbottom LJ in *Letherbarrow* was firmly of the view that "all evidence (including documentary) can, and must be considered."

S.127 of the MCA 1980 and offences under the Welfare of Farmed Animals Regulations

Section 12(1) of the AWA 2006 provides the relevant minister with a discretionary power to make regulations specifically aimed at promoting the welfare and progeny of animals, including the creation of summary offences (s.12(2)). One such regulation is the Welfare of Farmed Animals (England) Regulations 2007 SI 2078 which came into effect on 1st October 2007. Any person responsible for a farmed animal[53] commits a summary offence[54] under regulation 7 if they fail, without

[52] In *Woodward*, the prosecutor had inserted the wrong date to justify a prosecution by honest mistake, by noting the date when the evidence was collated, and not the correct date when he had sufficiency reviewed it. The DJ had erroneously concentrated on earlier certificate rather than whether the second certificate was valid.

[53] Farmed animal is defined in reg 3 and means "an animal bred or kept for the production of food, wool, skin or other farming purposes but not fish, retile or amphibian, wholly for competition, sporting activities, scientific testing or living wild.

[54] Under regulation 9 the offender on conviction is a risk of a six-month custody and or unlimited fine

lawful authority or excuse[55], to ensure under regulation 4 that all reasonable steps are taken to maintain high standards of welfare across a broad range of 30 specified welfare conditions listed in schedule 1, such as drink and feed, adequate lighting and ventilation.

However, the regulations are silent on which particular time limitation applied creating a level of uncertainty which had to be addressed by the High Court in *Staffordshire CC v Sherratt & Sigley* [2019] EWHC 1416. The respondent's faced multiple offences in relation to the poor welfare conditions of a number of cows and calves kept at two farms. Six of these specifically related to breaches of regulation 7, whilst another twelve where brought under s.9 of the AWA 2006.

All 18 offences were commenced 8 months after the commission date, bringing into question whether the regulation 7 offences where time barred and out of jurisdiction under s.127 or in time under s.31. Challenging the ruling of the District Judge that the former applied, the appellants contended that this plainly conflicted with the purpose and substance of the Regulations. Whether the allegations related to domestic animals or farmed animals the same investigative challenges and policies aims arose and therefore any differences in prosecutorial time limits would be anomalous, illogical and prohibitive, especially, as in this case, the defendant is charged under both provisions but with potentially different prosecutions period. This contention was further advanced on the basis that the offence creating provisions are worded in substantively the same form and therefore ought to benefit from the same legal effect of s.31.

In rejecting these contentions, the High Court in the judgment of Flaux LJ ruled that as a matter of procedure, the statutory language leads inescapably to these different consequences. Without unequivocal language to the contrary, s.127 cannot be disapplied. Neither can any views formulated in any advisory material be elevated to statutory intent. Faux LJ alluded that if s.31 had been intended to equally apply to the 2007 Regulations, then this could

[55] Such expressions are well established and amount to a question of fact subject to supporting evidence-*see R v Jodie* [2003] EWCA Crim 8 in the context of offensive weapons.

have easily have been provided for in s.12(3)(a) "in terms that an offence created by the Regulations would be treated as an offence under the 2006 Act."

The High Court was fortified in its ruling by reference to s.12(5) which gives expressed authority for any regulatory offences to be treated as a relevant offence for the purposes of a search warrant under s.23, and that "the absence of any equivalent reference to s.31" is materially significant to suggest that Parliament must have intended to statutorily exclude any regulatory offence from the ambit of s.31 without expressed intent to the contrary. Strong reliance can also be found in other legislation and vividly illustrated in the Mandatory Use of Closed-Circuit Television in Slaughterhouses (England) Regs 2018 SI 556, implemented in accordance with s.12 of the AWA 2006. Regulation 14 is drafted in identical form as s.31, and shows a clear intent by Parliament to not only disapply s.127 but specifically grant a three-year prosecution period for offences in regulation 9 & 10 relating to any breaches of the duties in regulation 3 on the installation and retention of a CCTV in all areas where live animals are present.

Likewise, regulation 18 of the Food Safety & Hygiene (England) Regs 2013 SI 2996 gives equal effect to a three-year prosecution period for offences contained therein as does s.24 of the Food Safety Act 1990. Also, the Road Traffic Offenders Act 1988 in common parlance with other examples has its own self-contained prosecution time period in s.6. Whilst the distinction between the two statutory regimes is arguably rationally incoherent in terms of investigating the welfare of farmed animals as opposed to domestic animals, this can only be rectified by Parliament. In the meantime, when dealing with farmed animal cases, both investigators and prosecutors will undoubtedly have in mind the ruling in *Sherratt & Sigley* when considering the appropriate charge(s) and under which legislation.

However, if the prosecution decides to charge under s.9 of the AWA 2006, in what is clearly a farmed animal case, so as to avoid the strict 6- month time limit, then such a move is likely to lead to an abuse of process challenge on the grounds that it deprives the defendant of this procedural protection, clearly proscribed by Parliament in the regulations. No matter how inconvenient it is to the

prosecution, the rule cannot be circumvented simply by charging a different offence because the conduct in question overlaps both offences.[56]

Concluding Remarks

It is incumbent on both investigators and prosecutors alike to ensure they fulfil their statutory duties under the Animal Welfare Act effectively. The importance of protecting animals from harm is obvious, but this must rightly be balanced against the need to avoid uncertainty and inordinate delay. The imposition of prosecution time limitations is not a burden, but a measure of ensuring criminal proceedings for relatively minor offences are concluded in a timely manner. Those who investigate and prosecute animal welfare offences occupy a position of privilege under s.31 and therefore need to observe the exigencies of the provision which has the clear effect to extend the ability to bring criminal proceedings long out of time in contrast to the strict six-month rule in s.127 MCA 1980. Whilst the s.4-8 offences will no longer bound by this rule, this does not lessen the need to comply with the objectives of the Criminal Procedure Rules in dealing with cases expeditiously.

[56] See the reasoning of the House of Lords in *R v J* [2005] 1 AC 562 and also *R v Perrett* [2019] EWCA Crim 685

Addressing Puppy Smuggling

Michelle Strauss & Randi Milgram, Co-Chairs A-law Companion Animal Special Interest Group

The Environment, Food and Rural Affairs Committee has undertaken a review of puppy smuggling as part of its inquiry into the welfare of domestic pets in England. After seeking written submissions from the public, the Committee held a hearing on October 23 at Westminster to question experts on the trafficking and welfare issues involved in this activity.

The panel comprised Paula Boyden from Dogs Trust, Robert Quest from the City of London Corporation, Danielle Dos Santos of the British Veterinary Association, and Ian Briggs of the RSPCA's Special Operations Unit. The panel responded to some of the broad issues posed by the public submissions and identified potential solutions to problems.

According to the evidence presented at the Committee Hearing, 300,000 puppies were imported into the UK in 2018. The experts suspect that the official figures under represent the true numbers of puppies brought into the country. There is no demographic information as to the age of the dogs imported or the country of origin. However, intelligence has shown that puppies are smuggled into the UK predominantly from the Republic of Ireland and countries in Eastern Europe.

The current regulations governing the importation of dogs into the UK from other EU countries are the pet passporting scheme and the BALAI directive, the latter of which applies to the importation or exportation of pets for commercial purposes. The pet passporting scheme requires domestic pets travelling from one member state to another to be issued a passport, identifying the pet via description, breed, and microchip number, and also

ensuring that (where necessary) the pet has received rabies vaccinations. Due to the requirement for dogs to receive the rabies vaccine, the pet passport scheme prevents dogs from travelling into the UK until they are over the age of 15 weeks – in theory.

However, the hearing addressed the issue that many dogs being "smuggled" into the UK are being transported on fraudulent paperwork. The ease by which this occurs is exacerbated by the identification procedures adopted when checking pet passports. So whilst border officials check the animals' paperwork, there is no clear requirement or training to ensure that the passport's description of the particular animal matches the animal being transported.

Ms. Boyden described the situation as akin to someone walking through border control at an airport with a copy of their passport, but with a paper bag over their head. Officials may be glancing at the paperwork, but are not inspecting the animal carefully, or at all. The panel discussed a famous example that demonstrated how lacking the inspection process is by noting how a stuffed dog toy, which was supposedly a live animal and issued with a passport, was not once checked when passing through the border.

The failure to identify the dogs means that large numbers of puppies are brought into the country that are under the legal age requirement. Ms. Boydon mentioned that the youngest puppy they had encountered was 4 weeks old, significantly under the age minimum and far too young to be safely transported. One reason smugglers forge paperwork is due to popular demand for puppies that are as young as possible as this is when they are perceived to be at their "cutest".

Related to the issue above is the difficulty that border officials have in ageing dogs. This is because many border officials do not have any kind of training that relates to animals. Ms. Dos Santos noted that even vets can find it difficult to establish the age of young puppies. Therefore, the panel recommended providing basic training to border officials on a variety of matters, and also – crucially – increasing the legal age at which dogs can be imported into the UK. Dogs Trust proposed raising the minimum age to 24 weeks, at which time it would be significantly easier

to determine whether a puppy is underage.

Further, under the pet passport scheme, individuals can travel with up to five dogs, yet the vast majority of dog owners only have between one and three dogs. The panel believes it highly likely that those travelling with five dogs are trafficking them. At the very least, the experts raised the issues as to whether officials could question people entering the country, including asking questions about their intentions, where they live, and whether they are able to care for so many dogs. It was noted however, there were limitations to this procedure as people could advise what their intentions are at the border, but simply say at a later date they changed their mind and there is no sanction for this. It was suggested that a better option could be to lower the number of dogs that could be transported to three.

The hearing also addressed numerous other issues within various regulatory schemes, including loopholes in microchipping legislation. Every pet in the UK is required to be microchipped. However, there is no requirement for that chip to be registered on a UK database. This huge oversight allows smugglers to seemingly meet the requirements of the legislation while also avoiding being easily traced. Experts hope that the introduction of Lucy's Law, regulating the sale of dogs and preventing third party sales, will help address this issue. But the panel noted repeatedly that the existence of legislation alone will not address these issues; effective enforcement is key.

Traceability of dogs seemed to be the key phrase of this hearing. Foreign microchips not registered on any UK databases are a large part of that problem, but there are homegrown issues to address as well. The experts stated the need to more documentation for puppies bred in the UK.

While larger breeders need to be registered, an idea was floated to also require them to produce license numbers. Also, the law does not require registration for a person breeding fewer than 3 litters per year. However, this is a loophole that is easily abused, and so a stronger regulatory scheme addressing this loophole was discussed in order to increase traceability of dogs. Indeed, the panel identified traceability as one of the most pressing issues.

The committee noted the broad concerns that puppy smuggling creates for the general public. The first concern is that the welfare of many of these dogs is compromised. These animals are often bred in squalid conditions and transported in a manner that has little regard for their welfare. Consequently, they may develop health and behavioural problems. Unwitting buyers of these dogs are then responsible for pets that can have congenital problems and behavioural issues due to poor breeding that can be very costly to address, as well as cause a huge degree of emotional distress. Some of these dogs are so ill that they require euthanasia, a devastating outcome for all involved.

This trade also presents a threat to public health. If dogs are smuggled in without having had proper veterinary care and necessary vaccinations, the UK runs the risk that diseases may be introduced that place both animal and human health at risk.

All members of the panel agreed that one crucial step in addressing the illegal dog trade is to stem demand. This would require educating the public about the puppy smuggling industry. Increasing awareness of responsible buying will, it is hoped, help curb any purchases of puppies made on a whim and will help guide the public towards responsible breeders and rescues instead.

Greyhound racing in Great Britain – is welfare really at its heart?

Michelle Strauss, Solicitor at Tees Law

The Greyhound Board of Great Britain (GBGB) launched the Greyhound Commitment in 2018 [1]. Part of the reason for the emphasis on welfare arises because of concerns that have been expressed about the safety and conditions in the sport[2] as well as allegations around doping[3]. These issues have plagued the industry for some time and have to an extent been responsible for the decline in popularity of greyhound racing.

that set out their expectation of how the sport should be run "*with welfare at its heart*

In recent years GBGB has acknowledged this and says it has made a concerted push to improve welfare standards in an effort to revive the industry[4]. Media exposes of conditions and practices in areas of the racing community have generated strong opposition from sectors of the public. A 2007

[1] GBGB. (2018). The Greyhound Commitment. Retrieved from www.gbgb.org.uk/about/the-greyhound-commitment.

[2] Spencer, K. (2018, May 7). Greyhound deaths reveal dark side to dog racing. Retrieved November 8, 2019, from Sky News: https://news.sky.com/story/greyhound-deaths-reveal-dark-side-to-dog-racing-11362388

[3] Daly, M. (2017, September 21). Doped up dogs: Why greyhounds are being given cocaine. Retrieved November 8, 2019, from Vice: https://www.vice.com/en_uk/article/8x8xak/doped-up-dogs-why-greyhounds-are-being-given-cocaine

[4] Watson, J. (2019, June 15). How greyhound racing is improving welfare and integrity to attract new supporters. Retrieved November 8, 2019, from The Independent: https://www.independent.co.uk/sport/general/greyhound-racing-dogs-the-derby-nottingham-track-greyhound-board-of-great-britain-a8959656.html

Panorama documentary revealed that in County Durham in the UK an estimated 10,000 former racing dogs had been shot because they were no longer required by their owners or trainers[5]. There was a strong public reaction to this expose and out of these events the British anti greyhound racing organisation CAGED Nationwide was established. Since this time there has been an improvement in the regulation of welfare, the care of retired greyhounds and the enforcement of anti-doping laws in Great Britain. Although it must be said the sport is by no means without controversy[6]. But no matter what steps GBGB take within the UK to address welfare concerns, it must address one of the biggest welfare issues inherent in this industry – where Great Britain sources the majority of its racing dogs from. GBGB registers show that most dogs racing on British tracks are reared in the Republic of Ireland[7]. The RTE documentary *Greyhounds: Running for their lives* aired in June 2019[8] revealed the extent of the welfare issues in the Irish greyhound industry. This article will consider the issues raised in this programme and question whether the GBGB should have regard to these problems as part of its overall strategy to improve welfare.

The Irish Greyhound Board ("IGB"), otherwise known as Bord na gCon[9], was created to regulate track racing, gambling and welfare. The IGB is a statutory body established under the Greyhound Industry Act 1958 and describes itself as a "commercial semi state body". The IGB falls within the remit of the Department of Agriculture Food and the Marine ("DAFM"). The statutory powers afforded to the IGB are significant. Greyhound racing also receives a significant amount of funding from the government proportionate to other sports in the country[10]. This status and support

[5] Foggo, D. (2014, November 3). Undercover reporter finds greyhounds 'drugged to rig bets'. Retrieved November 15, 2019, from BBC News: https://www.bbc.co.uk/news/uk-29877665

[6] Spencer, K. (2018, May 7).

[7] Preferred Results Limited. (September 2017). IGB Business Model Analysis

[8] Shouldice, F. (Director). (2019). RTE Investigates: Greyhounds running for their lives.

[9] The IGB is to be rebranded as Rasaiocht Con Eireann, upon the commencement of s8 of the Greyhound Racing Act 2019.

[10] Greyhound racing was given a government grant of 16 million euros in 2018. In contrast Sport Ireland that oversees 60 sports in the country gave out grants totalling 60 million euros

reflects the importance that this industry has traditionally held in Ireland[11]. Indeed, the country has developed a reputation for producing fast greyhounds. But what has never been considered publicly until now is how Ireland has been able to develop and sustain an industry that produces such a high number of well performing dogs. In June 2019 RTE aired a documentary that laid bare industry practices - it was a chilling expose into the racing and coursing industry. Central to the documentary was a report by Preferred Results Limited[12] who in 2017 had been engaged by the IGB to review its business model. The IGB withheld the report from the Dail (House of Parliament) under the Freedom of Information Act on the basis of commercial sensitivity. RTE requested the report under the FOIA and was also refused. It was only after the IGB learned that the report had been leaked to RTE that

(Preferred Results Limited, September 2017).

[11] Anderson, J. (2018, December 14). The legal status and difficult future of greyhound racing. Retrieved November 9, 2019, from Law in Sport: https://www.lawinsport.com/content/articles/item/the-legal-status-and-difficult-future-of-greyhound-racing

[12] Preferred Results Limited. (September 2017).

it released a redacted version on its website. Preferred Results were highly critical of the IGB, and the industry as a whole, from both a welfare and economic perspective. What was revealed by the RTE programme and the Preferred Results report is that Ireland produces in the region of 1000% more greyhounds each year than is required to sustain it. In part it is this oversupply of dogs that leads to serious welfare issues on a huge scale. A review of the number of greyhounds that were active in the IGB system showed that most dogs only had a racing career of around 7 months, whereas greyhounds can generally race until the age of around 6 or 7 years. Given the number of dogs being born every year and the very short racing careers most dogs have, this raised questions about what was happening to these non-racers – where were they ending up? The movement of about half of these dogs was known, being accounted for by illness, injury, retirement or export. The UK is a key export market for Irish greyhounds that are exported for prices which are less than 50% of "their actual production cost"[13]. This is evidently a boon for the industry in Great Britain which receives no government subsidies, nor subsidies from bookmakers[14]. But as the Preferred Results Report states *"exported dogs leave behind collateral pups which fail to make qualifying times, which places an unrecognised burden on the industry in both financial and welfare costs"*. So whilst the dogs exported to the UK may possibly face a slightly better fate[15], they leave behind other dogs that face a very uncertain existence.

Of the dogs that face an uncertain future are the approximately 6000 dogs each year that are unaccounted for. Six thousand adult greyhounds that just disappear from the system[16]. The Preferred Results Report suggest that it is very likely that most of these dogs are killed: "*While not officially recognised there have been many reports in the media and elsewhere of the large-scale culling of underperforming dogs… the conclusion that large numbers of dogs are culled based on their performance would appear to be*

[13] ibid

[14] Staunton, D. (2018).

[15] Almost 1000 racing greyhounds died or were killed in the UK in 2018 (Busby, 2019)

[16] The IGB dispute these figures

indisputable…". The findings of this report were consistent with the evidence that RTE compiled. Greyhound owners and trainers were filmed taking their otherwise healthy looking greyhounds to knackeries to be killed at a cost of 10 euros a dog. The conversations that the RTE journalists had whilst undercover indicated that disposing of greyhounds in this way was a regular occurrence, to the extent that some knackeries appeared to be used to killing dogs in bulk. It seemed to be that some greyhound breeders, owners and trainers in Ireland were producing large numbers of dogs in order to select the fastest and were simply having those that did not meet the grade, destroyed. In itself this process of breeding and selecting individual in order to produce the fastest dogs to further the pursuit of a form of entertainment is highly unethical. But the situation was made so much worse when footage from the documentary showed the method by which these dogs were being killed. The greyhounds were shot, but it was not clear that this was necessarily a quick and painless death. The programme shows one greyhound being dropped off at a knackery, a shot is heard, and there is a glimpse of a dog writhing in agony in the last moments of its life.

Whilst it is illegal for knackeries to kill and dispose of dogs in this way, there is presently nothing preventing an owner having a dog that has not met qualification times being euthanised by a vet. In principle the legislation does not in any way prevent this oversupply and killing. Following the RTE programme, the IGB have produced a number of statements stating that they were appalled by the footage, condemned the actions of those filmed and hoped that this would spur on reform of the industry[17]. Part of this has involved the introduction of the Greyhound Racing Act 2019. The 2019 law was drafted in response to concerns that had been raised in relation to welfare, traceability and doping within the Irish industry[18].

[17] Lavery, C. (2019, June 27). Irish Greyhound Board condemns the deplorable actions shown in last night's RTE Investigates. Retrieved from Irish independent: https://www.independent.ie/incoming/irish-greyhound-board-condemn-the-deplorable-actions-shown-in-last-nights-rte-investigates-programme-38259525.html

[18] Aodha, G. N. (2019, June 27). Irish Greyhound Board 'strongly condemns actions of minority in industry'. Retrieved November 8, 2019, from thejournal.ie: https://www.thejournal.ie/irish-greyhound-board-cull-4699206-

Yet what cannot be ignored is that despite these overtures of change and an alleged focus on welfare, the IGB have been aware of the culling of dogs on a large scale since late 2017[19], and until the matter became public did not see fit to tackle the issue. In response to the Preferred Results reports the IGB Board minutes recorded that addressing the issue of overpopulation is "impractical"[20]. For the IGB to say that reducing the unnecessary breeding and subsequent killing of thousands of dogs as being "impractical" entirely undermines their subsequent assurances that they take welfare seriously. Because it is this issue of oversupply that goes directly to how the industry perceives animals within it. The fundamental problem underlying this sport is the value that is ascribed to the lives of these greyhounds by the organisation that is tasked with protecting their welfare.

It appears that for a very long time some in the industry have considered the dogs at the heart of it as being expendable. To compound this the 2019 Act which could be used to address many of the problems created by the oversupply of greyhounds has only partially been enacted as the Minister for Food Agriculture and the Marine advises that the IGB are still engaged in an analysis of the transitional arrangements[21].

In the context of the welfare abuses documented by RTE, the failure by the IGB to deal with these issues expeditiously perhaps suggests that the IGB's priorities in fact lie elsewhere. This makes it difficult to have confidence that this self-regulating industry can be trusted to robustly enforce welfare legislation. Herein lies the problem for GBGB because this is the backdrop to the greyhound racing industry in Great Britain. Between 2014 and May 2017 on average 83% of registrations with the GBGB were Irish reared greyhounds. Therefore irrespective of how well cared for these dogs may be, and how

Jun2019/; Dail Eireann Debate: Greyhound Industry. (2019, July 3). PQ by TD Brid Smith; Dail Eireann debate: Greyhound Racing Bill 2018. (2019, May 15). Greyhound Racing Bill 2018 [Seanad]: Report Stage (Resumed) and Final Stage; Preferred Results Limited. (September 2017).

[19] Preferred Results Limited. (September 2017).

[20] Shouldice, 2019.

[21] The main provisions are not operational as ss 1- 58 have not yet commenced; Cahill, J. PQ 30261/19 to Minister for Agriculture, Food and the Marine.

rigorously GBGB may be enforcing welfare legislation here, the more insidious problem is that the industry in Great Britain is in part facilitating the industry in Ireland. It would seem that of all the pressing issues facing greyhound racing here, this must surely be one of the most significant. Unless GBGB acknowledges this issue and takes steps to address it, all that has actually been achieved since the 2007 expose of the British greyhound industry, is that the cruelty behind the sport has simply been outsourced across the Irish Sea.

Case Comment: Judicial Review of Ivory Act 2018 Fails

Emily Boyle, University of Otago

Case: *R (on the application of Friends of Antique Cultural Treasures Ltd) v Secretary of State for Environment, Food and Rural Affairs* [2019] EWHC 2951 (Admin)

Background

The UK is a party to the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES") which prohibits the trade of raw ivory in all but exceptional circumstances. Notably Article 14(1)(a) gives member parties the right to "adopt stricter measures…". The EU Wildlife Trade Regulations (the Regulations) adopt CITES (Regulation (EC) No 338/97) and implement stricter measures than required of CITES members. The Regulations distinguish trade within the EU and commercial export to outside of the EU as pre-1947 worked ivory items can be traded within the EU without a certificate of authorisation. The EU is moving towards more stringent regulation.

The Ivory Act 2018 (UK) will introduce stricter restraints than both CITES and the Regulations. Section 1 introduces a "prohibition on dealing in ivory" which prevents the buying, selling, hiring, and keeping, exporting or importing for sale or hire of items which are made of ivory or have ivory in them, including pre-1947 worked ivory artefacts. The Act implements both civil and criminal sanctions and is subject to only a few narrow exceptions detailed in sections 2-11. In brief these include pre-1918 items of outstanding artistic value and importance where an exemption certificate has been issued, pre-1918 portrait miniatures, pre-1947 items with less

than 10% ivory content, pre-1975 musical instruments with less than 20% ivory content, and acquisitions by qualifying museums. The explanatory note makes clear that the legislation aims to "… reduce demand for ivory both within the UK and overseas through the application of the sales ban to re-exports of ivory items from the UK…" to protect declining elephant populations.

The Secretary of State relied on four justifications by which the Act contributed to its objectives:

- By reducing the trade of illegal ivory in the UK;
- By reducing the contribution made by UK ivory in sustaining ivory demand in other consumer markets which might support the illegal trade;
- By demonstrating leadership of the UK in closing the commercial trade of ivory; and,
- By supporting other countries to close their domestic ivory markets.

The Claim

Application for judicial review of the Ivory Act 2018 brought by Friends of Antique Cultural Treasures Ltd (FACT). FACT challenged the legislation on two alternative grounds.

1. The UK lacks competence to implement more stringent regulation of ivory trade than EU law provides for where the EU has exercised competence to allow trade without permits.
2. Alternatively, if the UK was permitted to enact more stringent regulations, banning antique ivory trade within the EU, and between the UK and outside countries is disproportionate under EU law or the EU Charter of fundamental rights and/or Protocol 1 Art.1 (A1P1) of the European Convention on Human Rights, which protects the right to the peaceful enjoyment of property.

Decision of the High Court

The application for judicial review was dismissed.

On Ground 1:
It was held that competence was shared despite the Regulations. FACT argued that the EU had exercised total competence through the Regulations and therefore shared competence was displaced under the Treaty on the Functioning of the European Union (TFEU)

Article 2(2), but this argument failed. TFEU Article 193 allows member states to adopt more stringent protective measures towards environmental safeguards than those adopted by the Union under the general provision, Article 192. TFEU Article 4(e) provides that shared competence between the Union and Member states applies to the "environment" as a principal area, and in combination with Article 2(6) which directly engages Articles 192 and 193 it was evident that competence was shared. The Principal Regulation also reflects Article 193. Furthermore, being secondary legislation, the Regulations cannot override the TFEU nor did they purport to. The regulations were of minimum harmonisation.

On Ground 2:
The Court further held that the trade ban was not disproportionate. Proportionality applies in environmental cases as made evident by TFEU Article 193. The legislation could only be compatible with the Treaty if "necessary for effectively achieving the objective of the protection of the life and health of animals" (Criminal Proceedings against Tridon, Case C-510/99 [2003] 1 CMLR 2). Proportionality could not be established by ethical objection in

the absence of evidence and it was noted with reference to R (Lumsdon) v Legal Services Board [2015] UKSC 41 that economic and social justifications require evidence in support, and that moral and political judgements become relevant only where some evidence exists. The court was in an equally appropriate position to assess the evidence as Parliament had been. The precautionary principle applied under TFEU Article 191(2) which justified taking robust action despite some disputed evidence. Notably, following Lumsdon a stricter approach to proportionality applied because the legislation effects the free movement of goods.

The Act did not amount to a total deprivation of property per ECHR A1P1. The degree of interference was reduced by three factors; it prevented dealing not use, the delay in implementation gave opportunity for sale, and sales outside the UK are probably still permitted. However, it was recognised that aspects of the Act relied on were of low quality and understated the impact of the Act on private interests. There was only tenuous evidence that the Act would have a dampening effect on illegal trade within the UK, but slightly stronger evidence that UK sale of ivory items supported ivory demand in other markets and this was not necessary to prove because the precautionary principle applied. Weight was accorded to softer factors including behavioural and stigmatic reasoning, and it was noted that anything contributing to the allure of ivory could affect the illegal market. The third and fourth justifications put forward by the Secretary of State were taken together and were significant, and it was noted that if the UK retained a significant market for ivory it would be unable to take this high moral ground in terms of demonstrating leadership and closing ivory markets of other countries.

The Court held that there were no equally effective measures to serve the stated objectives. FACT had argued that stricter enforcement of the existing regime along with stricter ivory age verification requirements as part of a more onerous registration regime would suffice, but this argument failed largely because it does not satisfy justifications 3 and 4. A further argument that blacklisting certain countries for ivory export would suffice also failed because it would not be conducive to UK's aim of supporting such countries in the fight against ivory trade.

A final argument that the Act was disproportionate stricto sensu on an analysis balancing the benefits gained and the harm caused to the fundamental rights at issue had force but also failed. Only a small number of antique ivory dealers were likely to suffer significant loss.

The decision sets an important precedent for other countries wishing to join the UK in fighting to end the global ivory trade, and will no doubt be welcomed by wildlife and animal welfare campaigners around the globe.

Two important animal law conferences

Mina Da Rui

As interest in animal law and ethics grows, the calendar of animal law events gets busier. This September, two important conferences on animal law, policy and ethics took place in the UK, comprising a combined total of over 50 talks and panel sessions on a variety of animal law topics.

Liverpool John Moores University and the UK Centre for Animal Law co-hosted the Second Conference on Animal Law, Ethics and Policy on 10 – 11 September, which focused on a number of practical and student-oriented topics, as well as theoretical perspectives. A few days later the recently launched Cambridge Centre for Animal Rights Law hosted the first European Animal Rights Law Conference on 14-15 September, which had a stronger focus on the legal status of non-human animals.

A number of interlocking themes emerged from both conferences:

Theme 1 – smart working

A central theme running throughout both events was the furthering animal interests by engaging with public authorities on matters such as planning, regulation and enforcement, accountability mechanisms and highlighting and working on leverage points in the system.

Solicitor Danielle Duffield provided an overview of the law relating to animal abuse in New Zealand, a country which has recently adopted new penalties and regulations. The implementation of immediate fines is a welcome addition to the range of penalties available. However, serious design flaws have been identified, for example, fixed penalty fines are set at the same value regardless of whether natural or corporate persons have committed the abuse. This means that fixed penalty fines are a relatively low risk sanction for

businesses which profit from animal use.

Marco van Duijn, a solicitor at The Hague's Utopie law firm, and Edie Bowles and David Thomas, co-founders of Advocates for Animals, all shared insights into their efforts to take advantage of pressure points in the system that may offer scope to relive harm or achieve lasting change for animals. As van Duijn explained, the Dutch Animal Rights Foundation focuses on saving as many lives as possible by identifying strategies within existing laws to fight for animal rights.

Stephanie O'Flynn outlined her research into Irish mink fur farming. Fur farming, which is expected to be banned by the Irish Parliament soon, has been conducted unlawfully, according to O'Flynn, as it is intrinsically incompatible with Ireland's Animal Health and Welfare Act 2013. This example highlights the importance of ongoing advocacy by the animal protection community. A recent Irish animal cruelty case, *DPP v Kavanagh* [2019] IECA 110, was hailed as a positive milestone due to the handing down of a stricter sentence to the defendant.

Animal welfare regulation and enforcement continue to be major areas of academic and practical concern. Marie Fox and Sarah Singh identified a 'growing schism' between some animal protection laws and public attitudes. Debbie Rook's study into the dissonance between the lack of regulation around 'no pet' covenants in the English private rental sector and the bonds, typically familial in nature, that human guardians share with their companion animals, highlighted a significant and widely damaging, yet often ignored, issue; this is one which could likely be overcome with fairly simple regulation. Rook proposes a shift away from the prevailing freedom of contract approach in favour of a harm assessment test for all parties involved (this would include society at large, based on the positive impact of companion animals on their guardians). This method could be used to determine the fairness – a criterion used in the latest government white paper on housing – and reasonableness of allowing companion animals to live with their tenant family or of denying the family access to a rental property.

Theme 2 - constitutional principles

Birgitta Wahlberg, from Åbo Akademi University, outlined the

Finnish Animal Rights Lawyers Society's proposed constitutional amendment seeks to improve the status of animals by offering a zoocentric perspective on the requirements of Art. 13 of the Treaty of the Functioning of the European Union, which enshrines the principle of animal sentience in EU law. According to the Society, the precautionary principle demands respect for an animal's sentience unless evidence specifically proves it to be irrelevant; public authorities' responsibilities with regards to fundamental rights should apply to both human and non-human animals. Within this proposal, emphasis is placed on concrete and clearly phrased fundamental rights for animals which, whilst distinct from human rights, have the same legal value. Wahlberg stressed the role of unequivocal normative aspirations towards animal rights rather than welfare.

Dr Joe Wills of the University of Leicester identified the zero-sum game mindset that views animal rights presented as a threat, rather than a parallel cause, to human rights. Wills outlined three types of synergisms between animal and human rights – normative, psychological and practical – as possible tools to help both struggles make joint and solidly grounded progress.

Ariel Bendor and Hadar Dancig-Rosenberg expressed scepticism about the viability of strategies which employ human rights principles to advance constitutional protections for animals. Whilst proportionality analyses have led to major breakthroughs (such as banning the production of foie gras and the mass killing of stray cats), they also limit rights animals may enjoy in other areas where the gain to humans is more fundamental.

Anna Mula Arribas described the ongoing contestation over the lawfulness of Spanish bullfighting on the ground that the Spanish constitution affords protection to cultural heritage. In Catalonia, animals are recognised by the Civil Code as *not things* and bullfighting has been banned in this region (pending an appeal).

Charlotte Blattner of the Harvard Animal Law and Policy Program worked on a Swiss Citizens' Initiative campaign alongside Sentience Politics. Earlier this year, a Constitutional Court ruling confirmed the validity of the Initiative, despite opposition to its progress. The Court found that Swiss Cantons are free to expand

the circle of rights bearers beyond humans and, by virtue of their organisational autonomy, to uphold stricter standards than those required by Swiss animal welfare legislation. A ruling on an appeal against this decision is expected soon

Theme 3 – an evidence based approach

Gavin Ridley's research highlights how common the use of threats against household pets made by the domestic abuser as a way of controlling their human victims. Ridley argued that the relationship between violence to human and non-human animals remains unacknowledged by policymakers. As a result, of their systemic invisibility both human and non-human victims are exposed to danger. This should be enough, Ridley contends, to trigger serious concern amongst public bodies. More research needs to be undertaken to provide more evidence to influence policy and legislation.

Dr Steve McCulloch's discussed the British animal health and welfare policy process identifying the exclusion of ethical values and normativity from policy as problematic. Further, the intelligent use of animal welfare science across fields is absent. McCulloch proposes the implementation of a standard Animal Welfare Impact Assessment tool in all relevant policy decisions. This would feature first a description of the species affected and its characteristics, second a harms and benefits list, and third an ethical analysis of the given proposal. In light of the lack of resources and independence amongst some British animal welfare policy advisory bodies (for which animal welfare may also be a secondary concern), McCulloch also recommends the creation of an independent Ethics Council for animals, which may offer a way to advance policy and attitudes towards 'unnecessary' suffering, amongst other things.

Theme 4 – framing personhood

Advances in animal law, policy and regulation should be founded on an integrated ethical basis. If absent a disconnect may occur and legal protections are less effective than expected. For example, the protection of specific endangered animals may not, as Macarena Montes Franceschini warned, lead to improvements for other non-human species if it is only

endangerment (or any other exclusive characteristic) that leads to the consideration of their species- or individual-specific rights and needs, as the cases of Chucho, the spectacled bear, and Cecilia, the chimpanzee, suggest.

Vincent Chapeaux discussed the outcome of Kiko's case, brought by the Nonhuman Rights Project, in which the judge refused to grant Kiko habeas corpus on the grounds that it was not Kiko's full freedom – which was not a viable option – but suitable semi-captivity conditions that Kiko's advocates were arguing for. In the judge's view, this undermined the purpose of granting habeas corpus. Chapeaux also recalled Zaffaroni's encouragement, in *La Pachamama y el Humano*, to cultivate an ethos of *bien vivir* – loosely translated as wholesome living – based on the collective non-human rights envisaged by some pre-colonial communities, in contrast with a liberal model of anthropocentric rights.

Alex Pimor's paper advocated an eco-social perspective that goes beyond definitions based on species and favours a legal and ethical framework that focuses on the protection and valuation of life. The inherent anthropocentrism of law,

reveals "a two-pronged paradigm of human entitlement; that nature is both subjugated and a resource to the human race (proprietary entitlement) and that basic dignity, sentient rights are the exclusive prerogative of human beings (rights entitlement)."

Wahlberg, advocated the assignment of universal or collective responsibility for animal welfare, which invites reflection on the idea that harming an animal amounts to harming all members of the eco-social system by bringing suffering into our closely connected sentient community. Kristen Stilt, Director of the Harvard Animal Law and Policy Program pointed out, that committing a wrongful act against an animal may, in Islam for example, be construed as injuring God as the animal's creator. This suggests mainstream cultural and religious systems have the capacity to accommodate the interests of animals

From a natural law perspective, Joshua Jowitt, citing and aligning himself with Alan Gewirth, called for an ethical-legal outlook rooted in the self as a self-aware agent.

Iyan Offor asked in his presentation on the ethnocentric limitations of the mainstream global animal law discourse and the role of trade in shaping animal protection norms, why animals have to suffer in order for the need to protect them to be identified when *existence* is enough for a human's rights to be considered?

Culture, ethnocentrism and the role of practices involving animals in the affirmation of social identity were put under scrutiny by some speakers. Joe Wills explored the politics of halal slaughter and the stigma against it in Western countries where other forms of gruesome abuse are tolerated, which can lead minority communities to insist upon it as a form of resistance against a perceived double standard. However, in many countries where Islam is the dominant religion, halal slaughter is becoming obsolete. This change in attitude comes down to a choice within communities to either follow the letter of Islamic legal and religious precepts, or to modernise. Kristen Stilt pointed out that the holy texts of Islam display an intention for doctrine (legal or religious) to evolve. This gives believers permission of the highest authority to allow their ethics some dynamism, recognising that the teachings of the Hadith and, to a lesser extent the Qu'ran, are products of a particular time.

Reflections

Attending these conferences provoked further questions in my mind. For instance, is it better to focus on seeking individual progress through judicial milestones in frontier cases and hope to see a gradual extension of courts' willingness to consider the interests of a broader category of animals, or to devote one's work to develop a set of legal protections that may be difficult to secure because of lack of political will/public support. Is it more effective to advocate for better animal welfare legislation as soon as possible, or to strive to have more meaningful and fundamental animal rights enshrined in law? The animal protection movement has a long road ahead and the most sensible option may be to make use of any valuable leverage points across the board, hoping that social, ecological and political – as well as, arguably, economic and technological – developments will soon bring tail winds to any of these intricate approaches.

Review: *Should Animals Have Political Rights?* By Alasdair Cochrane

Randi Milgram, Lawyer

It's refreshing to read a book on animal policy that unequivocally answers the title question. Books that grapple with weighty questions about animal rights, whether from a political or philosophical perspective, often hedge their bets by including arguments for both sides, inevitably weakening any conclusions. What I appreciated most about this book was its clarity in stating various aspects to each argument and then actually answering the questions posed in each chapter. Of course, it helps that the author's answer to the title question is a resounding 'yes', but the simplicity and transparency of how he reached that conclusion is just as important.

In this latest edition of the Policy Theory Today series, Cochrane fills this small but potent book with challenges to long-settled political assumptions, beginning by taking aim at long-settled assumptions about the George Orwell classic *Animal Farm*. Despite all the characters being animals, we've all rightly assumed that the novel is an allegory for humans. However, Cochrane argues that we've done this because it's a story about politics, and we assume that a story about politics cannot be about animals. In a world that is changing in revolutionary ways every day, these assumptions about the relationship between animals and politics need to change in revolutionary ways as well.

Cochrane's argument relies on the simple fact that our societies are made up of multiple species, including animals living in our homes and wild animals living outside them. Our current relationships with animals are undeniably political: We use animals, we train animals, we raise

animals. Animals live in communities "defined and ruled over by humans", and those outside our communities have their habitat and wildness affected by human society and activity. Animals are dominated by humans, and that's a political relationship. As such, the politics of that relationship must be defined.

The main questions posed are how best to organize these relationships, since they already exist, and whether our politics should recognize and uphold certain animal rights. The book focuses on how to organize political relationships with animals best, not the nature of rights or whether animals can meaningfully possess them, as those are topics well considered in other, more philosophical works. Legal minds will appreciate the narrow focus on the issues.

A foundational belief, upon which the rest of the argument lies, that may be considered revolutionary is presented early on and without reservation: sentient animals have *intrinsic value*, meaning that their interests matter in and of themselves, not simply when they benefit humans. Because of this, they have a basic right to have their intrinsic value respected. To have a political system respect this value

would be radical, but Cochrane argues that this is necessary. Yet how it would look to respect this value in our political system may be different, and drastically so, than we imagine. We animal law attorneys may think that pushing for stronger animal welfare laws and regulations, or having animal welfare laws on the books at all, can, will, and/or does protect animals as needed. But Cochrane shows how the subordination of these laws to the interests and rights of humans will ensure that such laws will never protect animals as strongly as they should.

Think of a country with the strongest animal protection and welfare laws on the books. They may say animals should not experience unnecessary pain. But, because animals lack any rights, these so-called protections bend whenever humans decide such pain is 'necessary'. The pain of factory farms, the inability to live good lives, the injustice of slaughter, humans have decided these are necessary pains because we want the products of them. Human entertainment, desire for meat, and other commercial ventures outweigh the animals' desire to be free from suffering when we rely on protective laws.

Indeed, many thinkers and activists believe animal welfare laws merely maintain the unequal system, protecting animals only when doing so does not harm the interests of humans. But even if robust animal laws could protect animals from suffering, that achieves only one half of the equation: For beings with intrinsic value, Cochrane argues, it's not enough to not experience harm and suffering; they also have an interest in experiencing pleasure, joy, and their own futures. Respecting this requires higher levels of protections, such as constitutional provisions, which Cochrane analyzes next. With constitutional protections, the rights and freedoms of animals are granted higher levels of protection, and thus animal welfare laws cannot be so easily weakened. In countries with such provisions, e.g. Germany, animal interests have prevailed in circumstances where they previously would not have, such as in weighing human artistic freedom against animal suffering.

However, Cochrane states that such provisions are still not enough to prevent powerful human interests to continually prevail. While such provisions may grant animals more protection than welfare laws alone can, they still cannot successfully uphold animals' fundamental right

to respect for their intrinsic value, because they don't value animals in and of themselves. They are still seen as second class citizens. While this is true, and while such provisions will not be able to stop e.g. animal agriculture, constitutional provisions in addition to robust animal welfare legislation would be enormous achievements for most societies. They may not be as revolutionary as we would want, but it seemed that Cochrane easily skimmed over just how much good they would do.

I wanted the book to delve more into the legal potential of a strong partnership of tough animal welfare laws with constitutional provisions. Although such regulations would indeed fall short of respecting animals' intrinsic value, they could do a lot of good, far beyond what we've seen. However, it's true that human interests would continue to outweigh animal interests until such interests are protected equally. For a system to weigh human rights equally with those of animal rights, Cochrane argues that we need to look at personhood.

Discussing the groundbreaking work of Steven Wise and the Nonhuman Rights Project, Cochrane states that sentient non-human animals should be granted legal personhood. One New York court that ruled against the NhRP said that chimpanzees could not be legal persons because of two reasons: their inability to bear legal duties, and their lack of membership in the human community. Cochrane rejects these two arguments. For the former, he points to human infants who possess the same inability to bear duties, as well as adults with serious mental disabilities that affect their capacity for legal responsibilities. While I appreciate and agree with this argument, the NhRP made this argument as well. I would have appreciated further insight into this sticking point of duties that we haven't already considered.

The membership issue is more difficult to deny, since speciesist conclusions are usually not based on facts that can be refuted, which Cochrane does well, but on general feelings. Cochrane argues inter alia that many animals are already members of our society, as we do not live in isolation from each other and there are no exclusive human communities. But despite his denial of the merits of this argument, it would still be easy for a judge to simply say sentient animals aren't human, and that's that. I want more insight into how to combat speciesist assumptions.

While personhood would grant sentient animals the same legal status as humans, ensuring that animal interests could not be traded away when it suits humans, Cochrane argues that it's still not enough. Animals, he argues, deserve membership in the political community, in which their interests could shape the political aims and they could receive communal goods. This idea might seem farfetched, but he is persuasive. Since sentient animals have an interest in living well, they would have an interest in membership in the political community. To achieve this, Cochrane further argues for some form of democratic representation to be developed.

Although, as always, Cochrane's arguments are clear and often undeniable, the book becomes a bit idealistic and fantastical at this point. Cochrane states that it's clearly not enough to simply respect the interests of animals without helping them to live well, because we wouldn't accept this hands-off view when it comes to humans. He writes, with human society, we believe that it's a "vital and necessary feature of a political community that it not only protects certain humans from harm but also provides them with certain

communal goods and services." However, this principle is hard to use as a foundational tenet of any belief when human society is quickly and aggressively rejecting such ideals. Not only are many of our governments actively failing to provide certain goods and services, but the crucial keystone of our political communities – to protect people from harm – has become so warped or forgotten that to use it to argue for further protection almost seems absurd. Obviously we want this kind of care and protection for animals, but it's hard to see it has anything but a fantasy when our political communities are forsaking many humans.

If other readers can keep their cynicism in check, these arguments for further protections and rights for animals seem necessary for true justice. Despite easily skipping through all these layers of democratic revolution, Cochrane shores them up enough to keep us there with him. He may be very optimistic, but his conclusions are correct. To truly respect the intrinsic value of animals, it's not enough to keep them from harm or ensure they are left alone. They cannot be left alone, because we already live in multi-species societies, and they should be treated as members of such. This book is a fascinating and convincing look at what true justice for animals would look like.

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