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DOG LAW

Steve Forster considers whether the Dangerous Dogs Act 1991 is a danger to dogs

AG-GAG

Addison Luck reports on the latest successful challenge to US Ag-Gag laws

WILD BIRDS

Rob Espin examines the recent Wild Justice JR challenging wild bird culling in Wales

SLAUGHTER

Dr Joe Wills summarises *Centraal Israëlitisch Consistorie van België and Others*

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EDITOR'S NOTE

In this first edition of the journal in 2021, Steve Fosters (Senior Lecturer in Law at Liverpool John Moores University) discusses the background and controversies around the Dangerous Dogs Act, and Dr Joe Wills (Law Lecturer at the University of Leicester) provides an in-depth analysis of *Centraal Israëlitisch Consistorie van België and Others* in which the Court of Justice held that EU law does not preclude the use of reversible stunning methods by Member States in the case of religious slaughter and the balance between animal welfare and human freedoms.

We also have case analysis from Addison Luck, who provides a briefing around North Carolina's Ag-Gag law being declared unconstitutional following a challenge from various animal welfare organisations. In the field of animal testing, David Thomas, co-founder of Advocates for Animals, discusses *Lubrizol and others v European Chemicals Agency,* while Rob Espin and Francesca Nicholls from A-Law's Wildlife Law Working Group discuss the decision in *R v Bellway Homes* including penalties for deliberate harm to wildlife. Rob Espin also provides a case summary regarding Wild Justice's judicial review of bird culling in Wales.

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The Dangerous Dogs Act 1991: A Criminal Act that is Dangerous to Dogs?

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Abstract

For a short Act, the Dangerous Dogs Act 1991 has undoubtedly generated a significant amount of litigation and debate as to the ambit of its terms and application. This article therefore seeks to unravel and provide a comprehensive review of this controversial piece of animal legislation.

Introduction

According to NHS England, in the year 2018-19 8525 people were treated in hospital for being "bitten or struck by a dog", up from 8014 in the previous year and an 85% increase over the last ten years[1]. The most affected group according to the figures is the 0-10 age group and therefore young children are more at risk of being bitten[2]. Since 2000, on average 3-4 people are fatally wounded by a dog each year. Similarly, another vulnerable group are postal workers, with 2,484 recorded dog attacks by the Royal Mail on its workforce in 2018-19, an increase of 9% from the previous year[3]. This shocking figure led to the Communications Union launching a "bite back" campaign to better protect its members and highlighting some of the more graphic attacks on individual posties[4].

The Kennel Club, which supports the well-being of dogs, recognises that there are 211 different breeds of dog (pure and cross breed). All dogs, like humans, will have an instinctive temperament and, being canine, can cause injury of differing gravity from minor bites to more life changing and even fatal injuries. However, the individual circumstances surrounding a dog attack are likely to engage various factors, such as

- was there provocation?
- was it out of character and/or loyalty?
- does the dog have a propensity to bite?
- is the dog manifestly aggressive or inimical and why is this?
- is it the breed, or is it characterised/conditioned by its owner?
- who is at fault, the dog, its owner, or both?

In its annual animal well-being report the charity "People's Dispensary for Sick Animals" estimate 9.9 million pet dogs are living in the UK and cared for by 26% of the adult population. It is inevitable that a dog will come into conflict with another animal or person and cause damage and therefore engage both the civil and criminal law. Carelessness and complacency on the part of a dog owner can be a common feature in civil claims. However, the threat of civil proceedings alone to some is not sufficient to compel owners to take the necessary preventative measures to keep their dogs under proper control. Accordingly, the criminal law in the form of the Dangerous Dogs Act 1991 as amended by the Anti-social Behaviour, Crime & Policing Act 2014 seeks to safeguard and protect the public from the risk posed by dog attacks[5]. Whilst the statutory framework is relatively short, it has been criticised for a lack of effectiveness and fairness, especially on cost, unlawful breed labelling and destruction[6].

1 British Health & Social Care Information Centre

2 Some older victims may decide not to seek medical treatment or advice

3 www.royalmail.com/dog-awareness.

4 www.cwu.org

5 Dog attacks on livestock in dealt with in other legislation-see Dogs(Protection of Livestock)Act 1953

6 See the Kennel Club brief statement "Dangerous Dogs": Deal with the Deed, No the Breed" & also the report by

Background to the Dangerous Dogs Act 1991

In the late Eighties the Conservative government at the time was faced with two social menaces, one was joyriding and the other was savage dogs. Both were portrayed by the media as a form of lawlessness blighting local communities and immediate action was needed in order to robustly address it. The then Home Secretary Ken Baker in Parliament whilst acknowledging that a significant number of dog attacks occur not because of the specific breed, but due to "irresponsible owners" nonetheless singled out the American Pitt Bull Terrier for several widely reported savage attacks and stated that "the public are increasingly concerned about attacks by those vicious dogs and are entitled to look to the Government to take action to tackle the problem"[7]. The Home Secretary therefore felt justified in expediating the Bill through the Commons in just one day[8].

At the second reading of the Bill the Home Secretary was unequivocal in spelling out the aim of the Bill as a simple one, namely "to rid the country of the menace of these fighting dogs." He denied the Bill was an over-reaction by focusing on the breed rather than the owners, recognising that certain types of dog are inherently dangerous and therefore distinguishable from others in terms of public safety. The policy of the Act is therefore to control specific breeds used for fighting and further to impose criminal liability on owners that fail to ensure their dog is properly controlled. However, the Act has been denounced as ineffectual and unjustifiably demonising specific breeds as inherently dangerous, regardless of whether or not the dog displayed aggressive tendencies. In particular, the pit bull terrier is highlighted as a breed that is unfairly and unjustifiably targeted by the legislation. Lord Houghton, in a short debate in the House of Lords, felt the Act was one of the "most outrageous ever passed in Parliament" and called for

the RSPCA "Breed Specific Legislation-A Dogs Dinner."

7 HC Deb 22 May 1991 Hansard vol 191 cc945-58

8 See HC Briefing Paper No 04974, 26 March 2020, & Dangerous Dogs Bill (Allocation of Time) motion 10 June 1991

immediate reform[9].

Section 1 Prohibited Fighting Dogs

Section 1 of the DDA 1991 specifically designates four specific breeds of dog that are deemed to be a fighting type dog and therefore per se dangerous, these are "any dog of the type known as" the pit bull terrier, the Japanese tosa, the dogo argentine and the fila brazilero[10].

It is a summary imprisonable offence to contravene any of the specified statutory prohibitions in relation to such dogs[11]. Section 1(2) & (3) set out these prohibitions with the clear aim of targeting and preventing the breeding, especially commercial breeding[12], the selling, including offering or exposing for sale or exchanging, advertising and even giving for free[13]. Equally, if in a public place, the dog must be muzzled and on a leach, not to be allowed to stray or be abandoned, whilst under s.1(3) possessing or having custody of such a dog is unlawful, unless granted a certificate of exemption and all conditions therein have been satisfied.

In *R v Knightsbridge Crown Court Ex p Dunne* [1993] (unreported), the applicant had sought to argue that "type" denotes a breed specific and therefore unless the dog is of that breed status[14] it falls outside the legislation. This was rejected in its entirety by the High Court which rightly construed the word "of a type known as" in its ordinary sense of having substantially the same characteristics, or approximately amounting to, or being near to the whole.

Whether or not a dog is sufficiently of a type is obviously a question of fact and degree. To rule otherwise would have created both technical and evidential difficulties, especially in cases of dogs that have all the hallmarks and manifestations of a particular breed, but do not satisfy the purest criteria. To have adopted such a precise narrow construction as contended would have defeated the policy aims of the Act in public safety as opposed to breed preservation.

Accordingly, s.5(5) which provides that, unless there is sufficient evidence adduced to the contrary, it will be presumed the dog falls into s.1, rightly imposes a persuasive burden on the owner to prove[15] that the dog is not an unlawful type if liability is to be avoided, was not disputed in Ex Dunne, and therefore rightly places a high level of diligence on an owner to ensure they do not contravene s.1 which accords with the legislative intent[16].

Whether or not a dog falls within one of the designated breeds will very much be dependent on expert opinion. To assist DEFRA have produced guidelines for relevant enforcers of the legislation[17]. Annex 2 lists commonly shared structural characteristics of the Pitt Bull type to assist with identification[18].

Nevertheless, the notion of a breed specific legislation has attracted considerable criticism for being ill-conceived and a disproportionate response that wrongly focuses on the breed as opposed to the conduct of the owner or person in charge. Both the RSPCA[19] and the Kennel Club believe we have reached a position in which s.1 is logically indefensible which ought to now be repealed and focus instead on the conduct of the owner, by squarely basing its case on the lack of both statistical and scientific evidence to suggest that the Pitt Bull Terrier is any more genetically aggressive towards people than any other type of dog could or would be in the right circumstances, and is therefore no more a risk to the public. A view very much shared by Lord Redesdale in the House of Lords[20]. However, the People for the Ethical Treatment of Animals

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9 HL Deb 20 Jan 1993 vol 541 cc 933-39

10 An executive power exists under s.1(c) to add other breeds that have been bred for fighting or share such characteristics. The latter two breads were added by the DD (Designated Types) Order 1991 SI 1743

11 Section 1(4) & (7)

12 Includes cross-breading

13 Any form of advertisement offer, sale or exchange or

14 In this case a pit bull terrier type

15 This requires the owner to adduce sufficient evidence to discharge the more likely(probable) than not standard of proof, It is not for the prosecution to prove beyond doubt that the dog is a prohibited bread, but for the owner to establish this-see.

16 See Bates v UK 1996 App No: 26280/95, in which the UCHR rules that the imposition of a presumption was a proportionate response.

17 Designated Dog Legislation Officer

18 See DEFRA-Guidelines for Enforcers 2009 PB 13225

19 RSPCA-"Breed Specific Legislation-A Dogs Dinner" 2016 Report

20 Dog Control Bill-HL Hansard 24 April 2009 Col 1689

(PETA Foundation) takes an opposing view, rather than discriminating, s.1 protects the breed from over breeding, abandonment, harm and abuse, either as part of the dog fighting scene or as a status (Weapon dog). Indeed, the Charity goes further and believes the Staffordshire bull terrier should be a listed breed[21].

Notwithstanding these concerns, the Government, in its latest response to EFRA Committee Ninth Report[22], whilst recognising that any dog is capable of causing injury also recognises that there is a "disproportionately high number of attacks on people, including fatalities" inflicted by a prohibited breed that are often "illicitly moved" and "that the prohibition on possession of such dogs should remain for reasons of maintaining public safety"[23]. The shocking case of the fatal wounding of 9-year old Frankie Macritchie by the family's pit bull cross whilst left alone in the holiday caravan in Devon in April 2019, is a vivid illustration. Accordingly, s.1 of the DDA has the narrow but specific purpose to protect the public from serious attack by giving the police the necessary powers to intervene, especially against the problematic and growing influence that such breeds are being conditioned to be used either as a lethal weapon in criminal activity, or in illegally organised dog fighting[24], or purely for image or status[25].

A more wide-ranging set of measures have been implemented to address the impact caused by irresponsible breeders[26] and owners[27] along with other initiatives such as LEAD (Local Environment Awareness on Dogs)[28]. In addition, DEFRA has asked Middlesex University to undertake an extensive research review, not only into the causes of dog attacks, but how to prevent them and the effectiveness of current dog control measures and addressing dog ownership[29].

Dangerously out of Control: The Section 3 Offence

Whilst s.1 deals with specific breeds that are considered potentially dangerous, s.3 on the other hand does not distinguish dog type and creates two offences. Firstly if a dog is dangerously out of control in any place (either private or public)[30] in England & Wales, then either the owner (if under 16, then "head of the household" is substituted) or a person in charge at the time (unless a "householder case" or a s.3(2) statutory defence arises) is guilty of a summary offence (the primary offence) and liable to a fine and/or 6 months imprisonment.

If the dog injures someone or an assistance dog[31], then a second more serious indictable either-way offence is committed (the aggravated offence). If convicted on indictment then, dependent on the consequences, there are three possible levels of sentence. The maximum is 14 years for a fatal injury case, 5 years for non-fatal injury on a person, or if injury is to an assistance dog (whether fatal or otherwise) a maximum of 3 years imprisonment.

Voluntariness, Causation & Strict Liability

Regardless of their state of mind, the owner or person in charge of a dog will attract criminal liability if the dog is established to be danger-

21 See www.petra.org.uk, June 15 2018. PETRA is a UK based charity that seeks to protect the rights of animal

22 Environment, Food & Rural Affairs Committee "Controlling dangerous dogs) 9th Report 2017-19 HC 1040

23 Govt Response HC 1892 published on 28 Jan 2019,

24 League Against Cruel Sports-"Tackling Dog Fighting in the Community" Report & Dog Fighting & Serious Crime: The Facts & the Way Forward report, see also Milroy *et al* "Reporting of suspected dog fighting to the police, RSPCA & equivalents by veterinary professionals in the UK" 2018 Veterinary Record 1

25 See the illuminating insight into such dogs in Simon Harding's excellent research book "Unleashed: The Phenomena of Status Dogs & Weapon Dogs" 2012 Policy Press, see also the findings by Stephanie Monks Senior Policy & Projects Officer (Community Safety Unit of Greater London Authority) "Weapon Dogs: The Situation in London" Nov 2009

26 See Breeding & Sale of Dogs (Welfare) Act 1999, & Animal Welfare (Licensing of Activities Involving Animals(Regs 2018 SI/486 as amended by SI 2019/2093 which came into effect on 6 April 2020 to implement "Lucy's Law"

27 Gang violence injunction under s.34 of the Policing & Crime Act 2009, Criminal Behaviour orders under part 2 and Community Protection measures under part 4 of the Anti-Social Behaviour, Crime & Policing Act 2014

28 See DEFRA "Guidance on Dog Control & Welfare for Police & Local Authorities" Jan 2018, see also "Dealing with irresponsible dog ownership" Oct 2014

29 The research team have £70,000 worth of funding, to date the final report has yet to be published, see Hansard 7 March 2019 vol 655

30 Amendment to extend to any place inserted by s.106 of the ABCAct 20014, in consequence of the Jade Anderson case fatally wounded when attacked by 4 dogs whilst visiting a friend's house.

31 Applies to a dog trained to give assistance to a blind or deaf person and other specified disabilities, see s.173 of the Equality Act 2010

ous[32]. Under s.10 this based on whether "on any occasion" there exists objective grounds for a reasonable apprehension of fear of injury (to another person, or an assistance dog, regardless if this materialises or not), unless the dog is being used for a lawful purpose by the police or Crown servant.

Whether or not a police dog handler falls within the scope of the exemption was considered by the Court of Appeal in *R v PY* [2019] EWCA Crim 17. Lord Burnett in giving the leading judgement ruled that as a matter of ordinary language, the meaning of being used in its statutory context "suggests the active engagement of the dog in a directed task or in support of the person concerned for an identifiable purpose." Critically for a dog handler this must form "part of a policing activity" as a question of fact and degree. Allowing a prosecution s.58 appeal against an adverse ruling, the Court ruled that whilst recreationally exercising his dog, the respondent officer was not engaged in a police activity when it injured a runner. The paramount importance of s.3 is to protect the public, not to give police dog handlers a blanket immunity from prosecution in all circumstances claiming "on duty" status. Whilst any genuinely held belief as to the dog's good nature, care and control may provide mitigating circumstances, they offer no excuse or valid defence. Nor, as observed by the LCJ Lord Burnett in *R v PY* [2019] EWCA Crim 17, will "an ability to avoid the statutory harm" exonerate the owner.

Clearly s.3 creates a form of strict liability[33] which relieves the prosecution of having to prove any culpable mental state on the part of the offender was first established in *R v Bezzina & Others* [1994] 1 WLR 1057. Rejecting the appellant's appeal against an adverse ruling of the trial Judge, applying the well served guidelines in *Sweat v Parsley* [1970] AC 132[34], the Court of Appeal ruled that whilst the presumption of mens rea was always very strong for truly criminal offences, Parliament in enacting s.3 had justifiably displaced the presumption by necessary implication, given the importance of the social concern and public safely surrounding dog attacks.

On a point of law, the appellant in *Rafiq v DPP* [1997] JP 161, had contended that crucially there must be present some apprehension of fear immediately before any liability arises for any resultant injury[35] was rightly rejected by the Court of Appeal as unsustainable. For Auld LJ, no such pre-condition arises on a straightforward application of s.10, whilst some cases will have an obvious factual time variance between an appreciable risk and the actual injury, equally in other cases the timing will "for practical purposes to be non-existent" and that in such circumstances it is "the act of the dog causing injury, a bite or otherwise, is itself capable of being conduct giving grounds for reasonable apprehension of injury." To have agreed with the appellant would have artificially strained the statutory language. Popplewell J on the other hand took a slightly different view to the same outcome, ruling instead that the expression "any occasion" was sufficiently wide to include any apprehended fear objectively arising from witnessing an attack.

Equally, in *R v Gedminintaite & Collier* [2008] EWCA Crim 814 the Court of Appeal, although mindful of the decision in Rafiq, ruled that s.10 is not exegetic to proving the s.3 offence. If the dog poses a threat or causes injury then it is acting dangerously within the meaning of the Act from which the handler could not escape liability. In the instance case given that the appellant's rottweiler, despite being on lead when it uncharacteristically bit an innocent passer-by causing a nasty injury, the trial Judge was right to conclude that this amounted to being dangerous sufficient to expose the appellant to conviction.

Similarly, in *R v Singh* [2011] EWCA Crim 1756, there was ample evidence that the appellant was still in charge of his dogs when they became dangerously out of control and caused injury. The conflict of evidence was the circumstances around the loss of control. The prosecution contended he deliberately released them, whereas the appellant claimed he had been attacked by the victim. Rejecting his appeal against conviction, the Court of Appeal ruled that there is a legal

32 Whether or not a person is in charge is a question of fact and degree, see L v CPS [2010] EWHC 341

33 See Lord Burnett in para 37 in R v PY [2019] EWCA Crim 17

34 In R v Lane & Letts [2018] 1 WLR 3647, Lord Hughes endorsed this as an "authoritative statement" of law, see also Gammon v Att-Gen [1985] AC 1

35 The appellant's German Sheppard dog had without warning bite the complainant from behind the shop counter.

distinction between being in charge and out of control and that "under s.3 one can be in charge of the dogs even when they are out of control" which, according to the Court, is consistent with the ruling in *Bezzina*. His Lordship averred "The Act imposes strict liability on a person who is either the owner or in charge of the dogs[36]. The whole point of the Act is to penalise those who allow dogs to get dangerously out of control."

Whilst creating a strict liability offence in s.3 potentially denies a defendant the ability to argue an "innocent mind" lacking any knowledge or awareness that the dog would bite in the circumstances, this does not make the trial unfair. In *R v G* [2008] 1 WLR 1379, the House of Lords ruled that whilst a defendant has a right to a fair trial under art 6 including being presumed innocent, it does not apply to the substantive criminal law. It is concerned with ensuring the criminal procedure is fair, not the offence itself fair, and that the burden and standard of proof still remain with the prosecution ensuring therefore a fair trial is maintained.

In *R v Lane & Letts* [2018] 1 WLR 3647, the Supreme Court in a detailed judgment recognised the importance of the presumption of mens rea being applied to all criminal liability as a principle of statutory construction, but equally it does not give the court an overriding power to ignore the principle of sovereignty and legality[37] vested in Parliament. This is significant if the statute is silent to mens rea, but the plain meaning of the words and policy unquestionably "demonstrate what was intended", then the presumption can be displaced by expressed or necessary implication. Even if the offence is one that is "truly criminal" in nature, seriousness and severity of punishment as opposed to being quasi-criminal, the imposition of strict liability applies if demanded by the Legislature (see *B(A minor v DPP* [2000] 2 AC 428, *R v G* [2008] 1 AC 821 *R v Brown* [2013] UKSC 43).

As a general rule for a defendant to be criminally liable he must, from his act or omission, have caused the harmful consequence, especially for serious homicide offences[38]. Whilst it is entirely possible for Parliament to impose absolute liability for any involuntary consequence, this must be unequivocally expressed[39]. Otherwise, to criminalise the act of mere presence for a consequence that was entirely the fault or cause of another would be a serious erosion of long-established principles of criminal liability.

In *R v Robinson-Pierre* [2014] 1 WLR 2638, the Court of Appeal had to specifically address whether the s.3 offence is still committed even if the defendant in charge of the dog did not voluntary create the situation in which the dog was dangerously out of control. In this case the police had sought to execute a search warrant on the appellant's premises by forcing the front door. This resulted in several police officers being attacked by the appellant's dog. In allowing the appeal against conviction, whilst confirming s.3 is an offence of strict liability, the Court of Appeal nonetheless ruled that Parliament had not intended to criminalise simple owner/possession of a dog, under s.3. The prosecution still had to prove the appellant was at least in charge of the dog at the material time and therefore able to control it. The offence does not create a form of absolute liability and the court in *Greener v DPP* (1996) (unreported) was wrong to conclude otherwise.

Accordingly, it is a necessary ingredient to the offence that there is some more than minimal causal/contributary connection between the act or omission in the charge of the dog and it becoming dangerously out of control (prohibited state of affairs). The trial Judge had therefore misconstrued the legislative intent by directing the jury to the contrary.

To have imposed criminal liability on a defendant dog owner for his dog being dangerously out of control, not as a consequence of his act or omission but the direct fault/responsibility/actions of another, would have extended the ambit of the offence beyond its permitted statutory language.

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36 See statutory defences below for a wider appraisal of being in charge.

37 R v PWR [2020] EWCA Crim 798

38 See the recent Judgment in R v Broughton [2020] EWCA Crim 1093,

39 See opinion of Lord Hughes in R v Hughes [2013] 1 WLR 2462 para whilst Parliament can create harsh offences "it is not to be assumed to have done so unless that interpretation of its statute is compelled, and compelled by the language of the statute itself" and in "unequivocal language", see also Larsonneur [1933] 24 CrAppR 74

In cases of this nature, the degree of control the defendant is able to exercise will be critical to the determination of guilt, especially if it is in defiance of a control order under the Dogs Act 1871. If the intervention of a 3rd party is the sole reason for the dog being dangerously out of control, then no liability can arise. Nevertheless, Pitchford LJ giving the leading Judgment of the Court observed that, if subsequently the defendant fails to take reasonable steps (an act or omission) to assert control of the dog, it is sufficient evidence to establish that he contributed to the harmful consequences and liability is imposed not for the initial voluntary act of another, but the subsequent failure to act reasonably in the circumstances[40].

Whilst the Court referred to the Supreme Court ruling in *R v Hughes* 2013] 1 WLR 2461, Pitchford LJ took a different approach by concluding that the act or omission on the part of the defendant can be with or without fault. However, this must now be considered in light of the s.3 offence subsequently becoming a homicide offence in the case of a fatal dog wounding with a 14-year sentence imposed and the Supreme Court Judgment in *R v Taylor* [2013] 1 WLR 2461 in which an identical change was made to the Aggravated Vehicle Taking Act 1991. Having overruled the decision in *R v March* [1997] 1 CrAppR 67, Lord Sumpton endorsed the legal test derived from *R v Hughes* [2013] 1 WLR 2461 concluding that it is incumbent on the prosecution to prove some element of fault on the part of the offender in the control (act or omission) of the vehicle which contributes to a death as strong authority that the same test equally applies to the s.3 offence.

Statutory Defences: Not in Charge & Householder Cases

In order to ameliorate any potential unfairness arising from the imposition of strict liability, there are two possible statutory defences available to the defendant. Firstly, under s.3(2) a defendant can escape liability, provided he can prove that another person he reasonably believed to be a fit and proper person was in charge of the dog(s) at the offending time.

Given the issue of public safety, it is both justified and proportionate for the defendant to shoulder a persuasive burden of factually establishing a reliable and realistic defence beyond that of the disingenuous (*Adam v HMA* [2013] HCJAC 14, & *R v Harter* [1988] Crim LR 336). The crucial element to defence is based on the defendant's actual knowledge and state of mind. It does not compel him to prove an essential element to the offence, but a particular fact in his defence and therefore perfectly reasonable to expect the defence to adduce sufficiently reliable evidence in support, rather than simply put the prosecution to strict proof.

Whether or not the defendant has delegated charge responsibly is a question of fact and degree to be determined by the tribunal of fact[41]. However, whilst a court should be slow in rejecting any defence evidence and then only if it is perverse or outrageous (see *R v Harter* [1997] (unreported)[42] & *R v Wang* [2005] 1 WLR & *Dunleavey* [2021] EWCA Crim 39), this does not prevent the trial Judge from withdrawing the defence or directing that the evidence does not support a finding which could reasonably be inferred that there had been a change of charge.

In *R v Huddart* [1998] EWCA Crim 3342, the Court of Appeal refused to interfere with the decision of the trial Judge that a transitory change of the person in charge between family members whilst at home and within close proximity does not come within the scope of the defence. In this case the defendant's his wife opened the back door to allow the dog out, only for it to escape and cause injury. The defendant was at all times still in charge and it would simply be "artificial and contrary to the purpose of the subsection" to rule otherwise. Likewise, in *L v CPS* [2010] EWHC 341, the High Court dismissing the appellant's appeal against a s.3 conviction, ruled that it is perfectly possible for two people to be in charge and that whilst there was a temporary change of physical control, this "did not prevent the appellant from remaining in charge. He had the right and the power to take the dog back at any time and was able to control the dog"[43].

40 See para 35-46

41 See **L v CPS** [2010] EHWC 341

42 the appellant's appeal was allowed on the basis a failure to give a specific direction amounted to a material irregularity.

43 For the meaning of in charge in the context of the RTA 1988 see **Bate** [2004] EWHC 2811 & **Jaman** [2004] EWHC 101

The householder defence in s.3(B) was inserted by the Crime & Anti-Social Behaviour Act 2014 and partially incorporates s.76(5A) of the Criminal Justice & Immigration Act 2008[44] in the use of force in self-defence. The defence specifically gives additional protection against any intruder who is subsequently attacked by a resident dog provided the statutory conditions are satisfied. To be a householder case, the injured party when confronted by the dog must either be in a building or part of it, that is a dwelling or forces accommodation[45], or is entering it or part of it as a trespasser in the civil context.

Equally, regardless of whether not the injured party is a trespasser, the defence applies if the defendant is present at the time and subjectively believed him to be a trespasser, even if mistaken in that belief. This is based solely on the defendant's state of mind and whether or not they honestly and genuinely believed them to be a trespasser, even if objectively that belief was unreasonable, provided such a mistake is not as a consequence of voluntary intoxication (see *R v Hatton* [2008] 1 CrAppR 16 & *R v O'Grady* 1987] All ER 420). However, this rule of public policy does not extend to a subjective mistaken belief, caused by a mental disorder, that they are acting in self-defence and it will be interesting to see whether this would apply to dangerous dogs. Especially if there is some voluntary aspect to the manifestation of the mental condition, such as the abuse of cannabis (see R v Oye [2013] EWCA Crim 1725, & *R v Coley* [2013] EWCA). The statutory expression used are similar to those relating to the offence of burglary in s.9 of the Theft Act 1968, the very offence the intruder is likely to be committing. There is no definition of a building within the provision and therefore it is a question of fact and degree in the circumstances. For helpful guidance in a different context the offence of squatting and s.144(2) of the Legal Aid, Sentencing & Punishment of Offenders Act 2021 provides that a building includes "any structure or part of a structure (including a temporary or moveable structure)."

As to a building being a dwelling, (s.78(8B)) states that this includes a building which is partially a dwelling and partially a place of work, provided there is a means of internal access. This will therefore give protection to shop owners who live on the business premises. Less obvious dwelling places can include a vehicle or vessel[46]. In *R v Coleman* [2013] EWCA Crim 544, the Court of Appeal ruled that a narrow boat clearly came within the ordinary meaning of a vessel and therefore constituted a dwelling. Whilst in all other circumstances, it is to be given its ordinary meaning which in *Hudson v CPS* [2017] EWHC 841 is based on fact and degree, not law, and can therefore include a dwelling as a building which is not being occupied at the time, but is treated and remains a dwelling with a purpose of being lived in The more habitable the building, the more it becomes a dwelling.

Unlike self-defence, the appropriate use of force does not apply and therefore a difficult issue that may arise in any householder case is whether the dog acted instinctively to protect the property, or whether the owner or person in charge encouraged the dog to attack. In such a case where no offence is committed under the Act, other more serious offences are likely to be considered, such as assault. In this situation the defence becomes one of self-defence if deemed a householder case under s.76, subsection (5A), based on the force being objectively reasonable, even if disproportionate overall[47]. If the dog is specifically used to protect property, then the Guard Dogs Act 1975 will apply in such a situation.

Exemption and Destruction Orders

The termination of a dog is undoubtedly a draconian step, necessitated only by protecting the public from harm and therefore subject to strict judicial determination on a case by case basis. There are two distinct destruction schemes under the Act. However, these are encased in a web of conditions and qualifications that are often contradictory, confusing to apply and difficult to navigate. Nevertheless, the High Court in *Webb v CC of Somerset* [2017] EWHC 3311, set the compass point to the legislative aim which is

44 Inserted by s.45 of the Crime & Courts Act 20013

45 Defined in s.96 of the Armed Forces Act 2006

46 In a different context s.8 of the Protection of Harassment Act 1997 provides that a dwelling includes a tent and caravan.

47 For detailed guidance see R v Cheeseman [2019] EWCA Crim 149, R v Ray [2017] EWCA Crim 1391 & Collins [2016] EWHC 33

"to protect the public by destroying dangerous dogs, while sparing those dogs which, subject to the specific requirements of the legislation, can be shown not to be dangerous."

If the dog comes before court due to criminal proceedings under s.1 or 3, then s.4 applies (a s.4 & 4A conviction case), whereas s.4(B) specifically deals with unlawful dogs prohibited in s.1 that have been seized by the police (a s.4(B) case) and cannot be returned to the owner, or there is no prosecution (for instance the owner cannot be located). Prior to 1997, all s.1 prohibited dogs had to be destroyed, regardless of whether or not the dog is a physical danger to the public. Such an arbitrary rule was considered inhumane and a gross injustice, especially to pit bull terriers. As a result, this unfortunate situation led to an increase in seized dogs, inordinate delay and prolonged periods in custody with increased costs and appeals, making the legislation almost unworkable[48].

This directly led to the passing of the Dangerous Dogs (Amendment) Act 1997 and the insertion of a new contingent destruction order into s.4 (as amended by s.107 of the ASBCP Act 2014). A prohibited dog usually comes to the attention of the police either on report of a s.1(3) offence or concern of residents or general seizure of the dog under s.5. In this instance, if the police decide not to charge or report the alleged offence, but the dog is nonetheless determined to be a s.1 dog, then disposal of the dog must be considered under the statutory framework contained in s.4B.

Section 4B Non-Conviction Destruction & Exemption Regulations

Section 4B comes into effect through seizure of a prohibited dog and cannot be returned to the owner without incurring liability under s.1 (s.4B(1b) case), or a lack of prosecution involving any dog seized by the police (s.4B(1a) case). If the dog is not of a banned breed, then the court has an unfettered discretion whether or not to order destruction, subject to the risk the dog would pose to the public, or impose a control order under the Dogs Act 1871.

If the dog is prohibited then the "default assumption" as stated in *Beth v Maidstone CC* [2019] EWHC 2019 under s.4(B) is mandatory destruction unless and only if the dog does not constitute a danger by satisfying the strict criteria under s.4(B)(2) & (2A) in rebuttal. To avoid incurring liability under s.1 and the immediate mandatory destruction of a prohibited dog under s.4B(1b), the owner[49] must ensure that the dog is exempt by applying for an exemption certificate in accordance with the Dangerous Dogs Exemptions Schemes (England & Wales) Order 2015 SI 138 (reg 9). Crucially, exemption status is subject to the Court being satisfied that that the dog does not pose a "danger to public safety"[50] (s.4B(2) condition) and the making of a CDO under s.4B(3) in order to give time for the applicant to apply for an exemption certificate.

This requires the court to not only assess the broader behaviour of the dog, but also consider whether the owner or person in charge is deemed a "fit and proper person" capable of managing the dog and any other relevant circumstances (s.4B(2A)). Any exemption is then subject to a contingent destruction order being in place and satisfactory fulfilment of certain specified mandatory conditions within a two-month period(reg4(3)). These include that the dog being neutered, insured and microchipped. The exemption certificate itself must contain nine specified compliance requirements listed in regulation 10, including any additional requirements the courts deems necessary for the proper management of the dog. Any breach will result in the revocation of the certificate and potential criminal liability[51].

Part 3 of the Regulation in effect reverses the decision in *R (Sandhu) v Isleworth Crown Court* [2012] EWHC 1658, in which the High Court had ruled that a 3rd party could be granted the certificate in the absence of the owner. Any substituted person must themselves be a fit and proper person and that the owner has either died or is longer capable of managing the dog due to ill health (reg 12). The regulations also allow the court to grant an interim order which is a form

48 See Lords Hansard 20 Jan 1993 vol 541 col 933-56

49 Must be a natural person, not a charity or business and the application is to the magistrates and a two week notice period given to the police (Reg 13)

50 See reg 4 &s.4B(2)

51 See regulation 19

of dog type bail including, if a dog is seized by the police. According to DEFRA who administer the exemption scheme the cost of running the scheme increased by a further £8,000 from 2016 to £62,699 in 2018, at the same time 3,574 dogs were currently registered, with all but 12 of these being of the pit bull type[52].

In *Garrett v CC of West Midlands Police* [2020] EWHC 1866, the High Court emphasised that s.4(B) is "not offence based, nor is it incident based", it governs disposal of a dog that has been seized and a potential risk to the public. Accordingly, an application under s.4(B) "is freestanding of any offence" being committed, and does not necessarily relate to any specific incident(s) arising, only the pre-condition of seizure. Recognising the 6-month time limit to bring proceedings under s.127 of the Magistrates Court Act 1980 is an important safeguard, it cannot be said that s.4(B) involves a formal complaint to a specific incident, rather it administratively seeks to invoke the court's power of disposal of a seized dog in police custody by the Chief Constable. Whilst the seizure of a dog under s.5 itself may have been a response to a reported incident, it is the seizure that forms part of the "matter of complaint" under s.4(B), not the earlier incident that led to it.

For this reason, the High Court ruled that for the purposes of s.127, the date of seizure is "the earliest point in time" from which the time limit commences and not the date of the reported incident as contended by the appellant. To have adopted such a narrow construction of s.127 would potentially undermine "the strong public interest purpose of the 1991 Act, namely to protect the public from dogs deemed to be dangerous" by necessitating prompt reporting of the incident to the police. Referring to *RSPCA v Webb* [2015] EWHC 3802 on a similar point under the Animal Welfare Act 2006, the High Court observed that, whilst both criminal and civil jurisdiction fall within the 1991 Act, they are both "different and separate in nature" including the imposition of relevant time limits under s.127.

Section 4 Destruction on Conviction Order

On the other hand, in dealing with a dog following a conviction for a s.1 & 3 offence, s.4 obligates the court to make a destruction order for a s.3 aggravated offence unless satisfied that the dog is not a danger to the public under s.4(1)(A) & (B). In the case of a non-aggravated offence the Court has the discretion to only order destruction if it is necessary to do so[53]. In *R(Kileen) v Birmingham Crown Court* [2018] EWHC 174, Hickinbottom LJ neatly summarised the correct approach to be taken by the court in the case of an aggravated s.3 offence in line with the guidance found in R v Flack [2008] EWCA Crim 204. It follows that the court must order the destruction of the dog unless "by adducing expert evidence or lay evidence, relating to such matters as the dog's behaviour, demeanour and general past behaviour" the applicant can, on a balance of probabilities establish that the dog no longer poses any risk, or if it does, that this can be appropriately controlled under a contingent destruction order fulfilling the statutory objective. Both in Flack & Kileen the court emphasized that, before reaching a decision on a mandatory destruction order they had considered the criteria for a contingency order.

Crucially, at the same time as making a destruction order, the court can also disqualify the owner from having custody of a dog for any period it thinks fit. Once a destruction order is made and subject to any right appeal to the Crown Court by the owner (provided they are not the offender) against a destruction order the dog must then be handed to the police otherwise they commit a specific offence (s.4(8)).

Contingent Destruction Order under s.4A: A form of "Death Row"

A contingent destruction Order (CDO) is an alternative to the mandatory destruction of the dog in circumstances that would make it unjust and arbitrary. The court must under s.4A(4) be satisfied that the dog will be kept under proper control sufficient to reduce the risk to the public and if necessary, impose strict conditions. A form of supervision or "death row" with the risk of impending death and subject to a duty of care on the owner. Each case will be fact specific and whilst the Judge in *R v Hill* [2010] EWCA Crim 2999 was wrong not to consider the imposition

52 Obtained under a Freedom of Information Request dated 17 April 2019. (www.gov.uk/defra)

53 See the Judgment in Kelleher v DPP [2012] EWCA Crim 2978

of a contingency order, given the importance to allow the applicant every opportunity to show the dog can be properly controlled, without the evidence destruction is inevitable.

Importantly, distinguishing the decision in *Davies* [2010] EWCA Crim 1923 on the facts, the court in **Kileen** noted that any failure to refer to the statutory criteria or relevant authorities, does not automatically render any destruction order unlawful as contended by the applicant, since "the question is one of substance not form," the critical aspect is the approach taken on the facts "not whether they recited the sources from which the obligation to do so arose"[54]. Similarly, the Court of Appeal in *R v Baballa* [2010] EWCA Crim 1950 noted that the same criteria in *Flack* equally applied to possession of a prohibited dog under s.1(3), in this case American pit bull type. Before a CDO can be granted, the owner must apply for a certificate of exemption within two months (see above), otherwise the dog must be destroyed. The court clearly has a wide discretion under s.4A(5) to attach strict control conditions as is necessary to ensure public safety. This provides a fair solution in the right circumstances. The onus is then on the person in charge to ensure compliance.

In *CC of Merseyside v Doyle* [2018] EWHC 2180, the High Court ruled that a contingent destruction order is not a criminal sanction or punishment, but a civil measure to ensure that the dog is kept under proper control. If breached, the Court in the explicit wording of the s.4A(4)[55] can order the dog's destruction under s.4(4) which can be made at any time. To insist that an s.4(4) direction be made at the same time as the order as contended by the respondent would unnecessarily tie the hands of the court and be ineffectual, procedurally something Parliament could not have intended. Alternatively, s.63 of the Magistrates Court Act 1980 can be invoked which gives the court wide discretion under its civil jurisdiction by allowing the court to make "any necessary orders under s.4(4) or whether it should be varied, suspended or revoked".

54 See also the Judgment in **R v Kierman** [2019] EWCA Crim 574 **R v Wharton** [2019] EWCA Crim 2188 & **Hooker v Ipswich Crown Court** [2013] EWHC 2899,

55 "unless the owner of the dog keeps it under proper control, the dog shall be destroyed"

Reconciling the operation of the two Schemes

However, in *Grant v Sheffield Crown Court* [2017] EWHC 1678, the High Court felt that s.4(B) is "more prescriptive" than s.4 & s.4(A). There exists no legitimate bases to include or incorporate the extended power in s.4A into s.4B. Both schemes are self- governing. Accordingly, under s.4B, there are "two sequential steps". Firstly, the Court must decide whether, on the evidence, the dog is to be destroyed. If no, then and only then, it must consider the second step of exemption and a stay of execution. Unlike, a s.4 case, a court applying s.4B does not have the benefit or option of suspending destruction, before deciding whether the dog must be destroyed for public safety.

The court has a stark choice to make, if the dog is inherently dangerous it must be destroyed, unless there is strong evidence to the contrary, only then can a court offer the option of formal exemption and a contingent destruction under s.4B(3). However, this potentially creates an inconsistency when dealing with a s.1 dog such as a pit-bull terrier being treated differently. Under s.4B it is at greater risk of destruction due to its status and inherent dangerousness, whereas under s.4 despite having caused injury it can be given reprieve under the supervision of a contingent destruction order.

Acknowledging this potential inconsistency, the High Court in *Beth v Maidstone Crown Court* [2019] EWHC 2029, nevertheless ruled that this does not undermine the underlying purpose of s.4B and the intention of Parliament which is to "outlaw certain breeds" deemed to "represent a danger to public safety and should be destroyed," unless proved otherwise. Accordingly, neither in *Webb v CC of Somerset* [2017] EWHC 3311, nor in *Henderson v Met Police* [2018] EWHC 666, did the court oppose the principle that the merit of any control measures only arises "after the individual pit bull has been assessed as not being a danger to the public" and not before.

For this reason, "the approach to s.4B" in "*Grant* was correct" and that whilst *Flack* has been approved by the Court of Appeal in subsequent cases and binding on court, this was in the context of offences under s.3 and therefore has no bearing on the operation of s.4B orders. Further

support can be found in ***Dodsworth v CC of West Yorkshire*** [2019] EWHC 330, in which the court ruled that the Crown Court Judge had correctly applied the decision in **Grant** to the facts.

Assessing whether the dog constitutes a danger to the public safety is therefore subject to s.4B(2A) which as the Court stated in **Beth** "is aimed at matters touching on the dangerousness of the dog itself, not on matters which might control or minimise the risk it presents." Such control mechanisms are "conceptually distinct" to addressing the proclivities of the type of dog[56]. Each case will be dependent on its own particular background facts and the findings of any expert evidence.

Meaning of a "Fit & Proper Person for the time being in Charge"

The critical aspect under either scheme is whether the dog "constitutes a danger to public safety," This requires the court to not only consider the characteristics of the dog, but also whether the owner or person in charge is deemed to be a fit and proper person to manage the dog (s.4(1A & B & s.4B(2A)) in all the circumstances. If the owner fulfils their responsibilities under both the Act and the exemption regulations, then the dog can be properly managed and controlled to protect the public and no issue arises.

However, whether or not the statutory language in s.4(B) permits a change of keeper for a s.1 exempt dog was resolved in the High Court in ***Webb v CC of Somerset & DFRA*** [2017] EWHC 3311. The appellant had moved abroad and left his pit-bull terrier in kennels breaching the exemption certificate by failing to keep the dog at his home address, but wished to transfer responsibility to another (a 3rd party)[57]. In an extensive and detailed Judgment Beatson LJ firstly rejected the narrow contention of the Chief Constable that once a s.1 dog has been or is currently subject of an exemption order, then, unless the narrow exception in article 12 on substitution applies, the dog must be destroyed, regardless of whether another can offer adequate care and protection.

Such an approach would however mean an owner who had never taken steps to exempt their dog being able to apply for a CDO and allowing a person in charge to then apply for exemption, yet such a remedy being denied to a dog that had been exempted who seeks a new keeper, but is prevented by s.1(3) & article 12.

Equally, the Appeal Court rejected the contention of the appellant, that a broader understanding can be found in order to avoid a draconian destruction of a dog not deemed a risk to public safety by construing any other relevant circumstances in s.4B(2A) to include another person who is not otherwise, for the time being, in charge of the dog to take responsibility. To adopt this approach would leave exempted dogs without an owner at the mercy of regulation 12, whilst dogs that are not exempted and therefore illegal being potentially under the control of a new keeper.

Mindful of the statutory reversal of the decision in **Sandu** and ensuring the police must be able to strictly monitor and control ownership of s.1 dogs by limiting the class of eligibility, the High Court ruled that the legislative purpose of the Act contradistinguishes the control of exempt dogs which must be dealt with under the 2015 regulations scheme (and therefore article 12-18 substitution), and that non-exempt dogs should be separately dealt with under s,4B . It is also entirely consistent with the policy aims of the legislation, that only the owner or a fit and proper person who for the time being is in charge of a dog is able to apply for exemption & CDO to the exclusion of all others, including persons in the future. This rightly ensures a change of keeper/owner is not an administrative procedure.

Whilst the expression being in charge at the time is used in a different context in s.3 to s.4, as a matter of construction the phrase should nonetheless be applied consistently and not constrained to an unnecessary narrow application. They "are ordinary words which are capable of applying to a range of situations" in which "the language of the statute is broad enough to encompass anyone who, for whatever reason and in whatever way, is in charge of the dog for the time being", including a volunteer or someone who walked the dog. Accordingly, "for the time being" sufficiently covers evidence of past or present contact with the dog, but cannot as

56 A point raised and discussed in **Hunter v Procurator Fiscal** [2019] HCJAC 19

57 The appellant also allowed the insurance to lapse.

a matter of ordinary language extend to future contact. Ultimately each case will be dependent on its own individual assessment of the facts and the degree of responsibility that can be ascertained.

In *Henderson v Met Police* [2018] EWHC 666, the High Court agreed with the decision in Webb that only the owner or a person in charge for the time being has standing to challenge a destruction order on the grounds that this interferes with their article 8 right to a family and private life. To have ruled, as the defence had contended, that those with a "legitimate interest" have article 8 standing, would have meant extending such rights "to a wider class of individuals" including those who take a laudable interest in caring for the dog, which is well beyond the scope of the legislation. The Court was fortified in its ruling by reference to a s.1 or 3 prosecution case, in which only the accused can challenge the prohibited status of the dog, and that it would be surprising indeed if "a much wider category of individuals has such standing" as opposed to a criminal case under the Act. Equally, the fact that only the owner can appeal against a destruction order (s.4(2)) further strengthens this position.

Significantly, in *Stronge v Met Police* [2021] EWCA Crim 766, the High Court, despite the attractive arguments of the claimant to the contrary, ruled that given the DDA 1991 was "intentionally restrictive", any transfer of ownership to a 3rd party, even with good cause, would be unlawful unless the strict statutory conditions are met and confirmed in both the decisions of Webb & Henderson. Equally, as in this case, it would be an "unlawful exercise of any discretion on the part" of the police to facilitate a transfer of ownership of a dog lawfully seized of which they are responsible and accountable for under the legislation, to support an appeal against a destruction order in circumstances that the law does not permit. Whilst the Dog Trust was willing to care for the s.1 dog called Bleu initially, the future location of the dog and any strict control measures could not be assured.

As the court noted at para 34 the "restrictive nature of these provisions is controversial and strong views are held about them" and that perfectly healthy dogs maybe destroyed solely because of their owner not being a fit and proper person to care for them. However, the logic of re-homing s.1 dogs cannot influence police operational policy under the current legislation but is a matter for both Government and Parliament.

Deciding whether or not a person is a "fit and proper person" was reviewed in *Dodsworth v CC of West Yorkshire* [2019] EHWC 330, in which the High Court considered this is to be a "mixed question of law and fact" following the observations made in *Grant v Sheffield CC* [2017] EWHC 1678. Essentially the words carry their ordinary meaning within the statutory context that the court must be satisfied that the dog does not pose a danger.

The focal point "is at the time of the hearing" which includes not just the characteristics and past behaviour of the person, but also their suitability and capability across a range of situations, such as environment, health, general responsibilities, work and other demands. All these circumstances amount to a "value Judgment" and whether the person would not only be proactive in keeping dog under proper control, but also react to any unforeseen eventualities.

The court also made it clear that whilst an aggrieved party can challenge an adverse ruling by way of case stated or Judicial Review, the appeal court would be slow to interfere with the findings of the lower court who is obviously better placed to carefully assess the evidence and all the circumstances, and then only if there is a misapplication of the statutory provisions or the decision "was plainly and obviously wrong." Provided the evidence has been carefully considered and evaluated and both parties have been given an opportunity to test and probe the credibility and reliability of the evidence, then as ruled in Burrell v CPS [2019] EHWC 667 it cannot be argued that there was procedural unfairness.

Jurisdiction & Sentencing

Both s.1 possession of prohibited breeds and s.3(1) dangerously out of control without injury amount to summary only offences punishable by fine (£5,000) and or 6 months imprisonment. If aggravated by injury, then this becomes an either-way offence with a maximum sentence of 5 years on indictment. In the case of a fatal injury this is classified as an indictable only offence

with a maximum sentence of 14 years imprisonment and must therefore be dealt with in the Crown Court. This creates a homicide offence in the same form as that under the Aggravated Vehicle Taking Act 1991.

However, for the purposes of s.40 of the Criminal Justice Act 1988, a non-aggravated offence is not a specified link summary offence and cannot therefore be joined in the same indictment or be added at a later date under s.6(3) of the Criminal Justice Act 1988, to the aggravated offence, despite the two offences potentially arising out of the same facts. Without careful consideration it is easy to misconstrue the jurisdictional power of the court, a point highlighted in *R v Hill* [2010] EWCA Crim 2999, in which the Court of Appeal had no option but to quash the appellant's conviction for a non-aggravated offence wrongly added to the indictment. In terms of sentencing, the court must apply the revised definitive guidance issued by the Sentencing Council which came into effect in July 2016 in terms of level of sentence, including discretionary disqualification from owning a dog under s.4(1)(b).

The SC has recently conducted an assessment of the guidelines publishing its findings on the 21 October 2020[58]. In terms of sentencing of a s.3 aggravated (non- fatal injury), it found overwhelmingly that the most common sentence outcome was non-custody, mainly a fine but also a community order. The report did note a slight decrease in the use of conditional discharge for this offence and a small increase in other sentences following the amendments to the legislation.

The report did note that custody was rarely used (only 2-3% of cases) and then usually a year or less in length. In respect of fatal injury, court data was limited to 2018 & 19 with only three offences. Of the three, one resulted in a 10-year sentence, another was suspended and the third resulted in a fine. For the offence of injuring an assistant dog, the SC noted that less than 20 offences were recorded each year with sentencing ranging from absolute discharge to immediate custody, but again no trends could be established given the low conviction rate. For an s.1 prohibited dog offence between 2011-17, there was an average of between 130 to 260 offenders, with a fine being the common punishment. Overall, the SC felt there was "no immediate need to revisit the guidelines" but instead decided to monitor any sentencing trends.

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58 www.sentencingcouncil.org.uk

Cases, Updates & Materials

Case Comment: *Centraal Israëlitisch Consistorie van België and Others*

Introduction

Championed as necessary to reduce animal suffering by their defenders and denounced as discriminatory restrictions on religious liberty by their opponents; there are few issues as contentious in animal welfare law as non-stun slaughter bans. Recently the European Court of Justice (ECJ) has adjudicated this delicate matter, concluding that Member States can mandate blanket pre-stunning requirements for all slaughter without contravening EU law.

1. The Facts

In 2017 the Flemish regional Parliament in Belgium issued a decree prohibiting all slaughter of animals without prior stunning. Before the decree came into effect, religious slaughter was exempted from the general requirement of pre-stunning due to the beliefs of observant Jews and many Muslims that the consumption of pre-stunned meat is incompatible with their religious beliefs. To strike a balance between protecting animal welfare and religious freedom, the decree permits the use of reversible, non-lethal stunning for religious slaughter.

Several Jewish and Muslim associations brought proceedings before Belgium's Constitutional Court, seeking to get the Flemish decree annulled on the ground that, **inter alia**, it infringes parts of EU Council Regulation on the protection of animals at the time of killing ('the Regulation').[1] According to article 4(1) of the Regulation, 'animals shall only be killed after stunning'. However, article 4(4) creates a derogation from this obligation for 'particular methods of slaughter prescribed by religious rites'. Article 26(2)(c) permits Member States to adopt more extensive protection of animals than those mandated by the Regulation, including in relation to religious slaughter.

The applicants argued that article 4(4) would be rendered meaningless if Member States could rely on article 26(2)(c) to mandate pre-stunning for all slaughter practices. Conversely, the intervening Flemish and Walloon Governments argued that article 26(2)(c) empowers Member States to depart from Article 4(4).

Belgium's Constitutional Court decided to stay the proceedings and refer three questions to the ECJ for a preliminary ruling:

> (1) Does article 26(2)(c) of the Regulation permit Member States to prohibit non-stun slaughter in the way that the Flemish decree did?
>
> (2) If the answer to (1) is 'yes', does article 26(2)(c) infringe the right to manifest religious beliefs under article 10(1) of the EU Charter of Fundamental Freedoms ('The Charter')?
>
> (3) If the answer to (1) is 'yes', does article 26(2)(c) infringe the principles of equality, non-discrimination and religious diversity, guaranteed in Articles 20, 21 and 22 of the Charter respectively?

2. The Ruling

(a) Does Article 26(2)(c) permit non-stun slaughter bans?

On the first question, the ECJ affirmed that article 26(2)(c) does permit non-stun slaughter bans such as the Flemish decree. In arriving at this decision, the ECJ notes that the general require-

1 Council Regulation (EC) NO 1099/2009, L 303/1.

ment for pre-stunning contained in article 4(1) is based on scientific evidence that this technique least compromises animal welfare at the time of killing (para.41). Prior stunning therefore satisfies 'the primary objective' of the regulation, which is the promotion of animal welfare (para.42). The derogation authorised by article 4(4) functions 'solely in order to ensure observance of freedom of religion' (para.43).

The article 4(4) derogation is understood by the court in light of recital 15 of the Regulation which stresses the need to respect Member States' 'legislative or administrative provisions' and 'customs… relating, in particular, to religious rites, cultural traditions and regional heritage' in their formulation and implementation of EU policies. Furthermore, recital 18 states that 'it is important that derogation from stunning animals prior to slaughter should be maintained, leaving, however, a certain level of subsidiarity to each Member State'. Finally, Article 26(2)(c) permits Member States to adopt more extensive protections for animals in 'slaughtering and related operations'. Related operations are defined under article 2(b) as including 'stunning' (paras.44-46).

Reading these provisions as a whole, and in light of Article 13 of the Treaty on the Functioning of the EU and article 10(1) of the Charter, the ECJ held that article 26(2)(c) grants a certain level of subsidiarity to Member States to determine how they transpose the Regulation into domestic law. In other words, the Regulation does not dictate how Member States should balance competing considerations of animal welfare and religious freedom, it merely provides a framework in which Member States can achieve a reconciliation between these two values (para.47). The imposition of a total ban on non-stun slaughter is within the permissible range of options under the Regulation, provided that it respects the fundamental rights enshrined in the Charter. It is that issue we turn to next.

(b) Does Article 26(2)(c) Infringe Freedom to Manifest Religion?

In finding that the Flemish regional government in Belgium had not breached EU law by man-

dating reversable pre-stunning for religious slaughter, the Court then addressed the issue of whether the Regulation – and article 26(2)(c) in particular – infringes article 10(1) of the Charter by permitting such bans.

The Court acknowledged that prohibitions on non-stun slaughter do entail a limitation on the exercise of religious freedom (para.55). It next considered whether this limitation is permitted under the Charter. For a limitation on a Charter right to be permitted, it must satisfy four requirements. First, it must be provided by law. Second, the restriction must respect the essence of the right being limited. The Court found that the essence of freedom of religion is respected by non-stun slaughter bans because such bans only limit one aspect of the specific ritual act of slaughter – i.e. the non-stunning component - and not ritual slaughter altogether. Third, the limitation of the right must genuinely meet an objective of general interest. The Court found that non-stun slaughter bans, such as the Flemish decree, exist to protect animal welfare, a general interest recognised by the European Union (paras.60-63).

Fourth, limitations on rights must satisfy the principle of proportionality. This requires that the limitation on the right is appropriate, necessary to attain the objective, the least onerous interference with the right and that the disadvantage to the rights holders is not disproportionate to the aims pursued. The court stated that the scientific evidence shows that prior stunning is the optimal means of reducing animal suffering at the time of killing, meaning a requirement for pre-stunning is an appropriate and necessary means to achieve the objective and no lessor measure could have achieved the objective as well (paras.64-74).

Turning last to the issue of whether the disadvantages caused by the limitation were proportionate the aim of protecting animal welfare, the Court made three points. First, it noted the Flemish decree requires a reversible method of stunning for religious slaughter, ensuring both that the stun does not kill the animal, to address religious concerns, whilst also protecting animal welfare (paras.75-76). Second, they noted, drawing on the jurisprudence of the EHCR, that the Charter is a 'living instrument' which must be interpreted in the light of present-day conditions. Animal welfare has been attached increasing importance for a number of years. In the light of this change, animal welfare may be taken into account to a greater extent in the context of ritual slaughter (para.77). Finally, non-stun slaughter bans such as the Flemish one do not prevent Muslims and Jews residing there from consuming imported meat that has been slaughtered in accordance with their religious requirements (para.78). Taking these factors into account, the court concluded that measures such as the Flemish decree allow 'a fair balance to be struck between the importance attached to animal welfare and the freedom of Jewish and Muslim believers to manifest their religion' (para.80).

Accordingly, article 26(2)(c) does not infringe article 10(1) of the Charter by virtue of it permitting non-stun slaughter bans such as the one in Belgium.

(c) Does Article 26(2)(c) infringe the principles of equality, non-discrimination and cultural, religious and linguistic diversity in the Charter?

The last issue the court considered was whether article 26(2)(c) was compatible with the rights to equality, non-discrimination and cultural, religious and linguistic diversity in the EU Charter. The issue raised by the referring court was that the Regulation provides only a conditional exception for religious slaughter from the requirements of prior stunning whilst it excludes the killing of animals during hunting, recreational fishing, and sporting and cultural events from its scope entirely.

The Court held that this is not unlawful discrimination. The purpose of the Regulation is to lay down rules for the killing of animals bred or kept for food or clothing. Hunting, recreational fishing and cultural or sporting events either don't involve breeding or keeping animals for food or clothing or only marginally do, which justifies the Regulation treating them differently (paras.82-95).

3. Comment

The Regulation has been in effect for over a decade. In that period there has been considerable divergence in how Member States have trans-

posed it into domestic law, with most derogating from the requirement to pre-stun animals for religious slaughter, but a sizeable minority either prohibiting or limiting non-stun slaughter.[2] We now have a ruling that affirms that non-stun slaughter bans are compatible with the Regulation and do not necessarily contravene the Charter.

On the compatibility of non-stun slaughter bans with the Regulation, the ECJ offers a plausible construction of an ambiguous set of norms. It arrived at the opposite conclusion from Advocate General (AG) Hogan in his earlier advisory opinion, which held that such a construal of article 26(2)(c) would undermine the entire rationale of the derogation in article 4(4), i.e. to ensure freedom of religion.[3] Instead, AG Hogan opined, article 26(2)(c) should be read as permitting Member States in introduce stricter controls on religious non-stun slaughter, for example requiring the presence of a qualified veterinarian at all times during the slaughter.[4] The AG's interpretation of the Regulation is equally valid. However, given the Regulation's underdetermination on the permissibility of religious slaughter bans, the Court's decision to afford Member States a fairly wide margin of appreciation in achieving the balance between animal welfare and religious freedom is the better view, especially given the lack of consensus on the subject amongst Member States.

In respect of the ruling that non-stun slaughter bans can be compatible with religious freedom, the Court took a middle path between two earlier approaches. The first was that of the European Court of Human Rights (ECtHR), which concluded in 2000 that denying individuals the ability to certify and practice religious slaughter did not interfere with the freedom to manifest religious beliefs under the European Convention.[5] The second was that of the Polish Constitutional Court, which ruled in 2014 that the domestic non-stun slaughter ban was contrary to the constitutional guarantee of freedom of religion and Article 9 of the European Convention.[6] In between these two positions, the ECJ ruled that non-stun slaughter bans do limit religious rights, but do not necessarily infringe them, a view that this author has defended elsewhere.[7]

From an animal welfare perspective, the case is significant not only for affirming the permissibility of non-stun slaughter bans under EU law, but also for holding that animal welfare can justify placing limits on fundamental human rights. Also of note, the ECJ recognises that the increased importance afforded to animal welfare in recent years means it is now easier to justify restrictions on human rights on animal welfare grounds than in the past. Whilst this is symbolically significant, the immediate impact of the judgement is more questionable, as individuals living in the Flemish region can still import non-stunned meat from other jurisdictions (and indeed are not permitted, per article 26(4) of the Regulation, to restrict such imports from other EU countries).

The ruling will also undoubtedly raise alarm bells for sections of the Muslim and Jewish communities for whom non-stun slaughter bans feel like an attack on their way of life and an unfair singling out of minority groups.[8] This is the third case concerning non-stun slaughter that has been heard before the ECJ in as many years.[9] It is hard to shake off the worry that much of the political fixation with non-stun slaughter in Europe might be motivated by things other than animal welfare concerns, especially given the magnitude of other forms of animal suffering within the EU.[10]

2 See Law Library of Congress, 'Legal Restrictions on Religious Slaughter in Europe' (2018) https://www.loc.gov/law/help/religious-slaughter/religious-slaughter-europe.pdf.

3 Opinion of Advocate General Hogan on **Centraal Israëlitisch Consistorie van België and Others**, Case C-336/19, para.75.

4 ibid, para.69.

5 **Cha'are Shalom Ve Tsedek v France** Application No. 27417/95.

6 Judgment of 10 Dec. 2014, Ref. No. K52/13.

7 Joe Wills, 'The Legal Regulation of Non-stun Slaughter: Balancing Religious Freedom, Non-discrimination and Animal Welfare' (2020) 41 Liverpool Law Review 145.

8 See e.g. James Mendesohn, 'A Looming Threat? A Survey of Anti-Shechita Agitation in Contemporary Britain' (2020) 3(2) Journal of Contemporary Antisemitism 39.

9 **Liga van Moskeeën en Islamitsche Organisaties Provincie Antwerpen VZW and Others v Vlaams Gewest**, Case C-426/16 (all non-stun slaughter must take place in a slaughterhouse); **Œuvre d'assistance aux bêtes d'abattoirs (OABA) v Ministre de l'Agriculture et de l'Alimentation, Bionoor, Ecocert France, Institut national de l'origine et de la qualité** Case C-497/17 (denying the possibility of placing the EU Organic logo on products derived from non-stun slaughter).

10 See e.g. 'EU revealed to be world's biggest live animal exporter' (**The Guardian**, 27 January 2021) https://www.theguardian.com/environment/2021/jan/27/eu-revealed-to-be-worlds-biggest-live-animal-exporter; 'Cattle stranded at sea for two months are likely dead or 'suffering hell' (**The Guard-**

Compounding this concern, both the ECtHR and the ECJ have in recent years upheld policies that have disproportionately adversely affected Muslims and other religious minorities, for example, prohibitions on religious dress at work and in the public sphere.[11] It is understandable that some will regard the ECJ's permissive stance towards non-stun slaughter bans as just one further example of Europe's human rights regime not taking religious discrimination seriously. This highlights a challenging terrain for animal lawyers who situate animal protection within a broader framework of social justice.[12]

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ian, 24 February 2021) https://www.theguardian.com/environment/2021/feb/24/cattle-stranded-at-sea-for-two-months-are-likely-dead-or-suffering-hell?CMP=share_btn_tw.

11 See e.g. S.A.S v France, Application no. 43824/11; Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV Case C-157/15; Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA Case C-188/15.

12 Joe Wills, 'The Troubling Case of Non-Stun Slaughter: A Comment on the Opinion of Advocate General Hogan in Centraal Israëlitisch Consistorie van België and Others. (UK Centre for Animal Law, 18 September, 2020) https://www.alaw.org.uk/2020/09/the-troubling-case-of-non-stun-slaughter-a-comment-on-the-opinion-of-advocate-general-hogan-in-centraal-israelitisch-consistorie-van-belgie-and-others/

Case Comment: *Lubrizol and others v European Chemicals Agency*

Facts

These were 14 joined appeals brought by companies manufacturing chemicals known as ZDDP, which are used in hydraulic fluids.

The European Chemicals Agency (ECHA) is the principal regulator of chemical safety in the European Union under Regulation (EC) No 1907/2006 (known as 'REACH'). Under REACH, companies wishing to manufacture in or import into the EU chemicals ('substances') in quantities over one tonne a year have to register them with ECHA.

They must provide a significant amount of data relating to the potentially hazardous nature of the substances. The precise nature of the data depends on the tonnage at which a substance is marketed in the EU (there are bands between one and 10 tones, 10 and 100 tonnes, 100 and 1000 tonnes and over 1000 tonnes). At Annex IX and X levels, registrants have to make a testing proposal if they wish to use animals. That applied here. ECHA can run a compliance check at all tonnages.

Many of the 'endpoints', as they are called, involve animal tests. However, there is a key principle under REACH that animal tests must only be carried out as a last resort and registrants have a duty to provide equivalent data via non-animal approaches (or approaches which involve fewer animals or less suffering than the stipulated test).

One of these approaches is known as read-across: where the registered substance has a similar chemical structure to another substance and is expected to have a similar toxicological profile, one can read across data from the other substance to the registered substance and thereby avoid having to carry out another animal test. Animal protection organisations believe that ECHA places the similarity bar too high.

The animal tests in the present appeal were (i) a subchronic toxicity study (90 days) in rats; and

(ii) a pre-natal developmental study in either rats or rabbits. The first study could involve around 1400 animals and the second around 11,200 (with a further 37,000 animals in additional tests which could be indicated by the initial studies). Considerable suffering was to be expected given the nature of the tests and the substances the animals would be forced to ingest over considerable periods.

The history of the present appeals was long and complicated. In essence, however, the lead registrants in the ZDDP group argued that they should be allowed to carry out the animal tests on four of the substances and then read across the results to nine of the others (the final substance was in a special category). They made testing proposals accordingly.

ECHA disagreed. Hence the appeal to the Board of Appeal which is attached to ECHA. The companies complained about the process ECHA had undertaken, its assessment of the read-across and the fact that ECHA had only addressed its decisions to the lead registrants, not also the other registrants of the substances who assented in the testing proposals.

Advocates for Animals' client Cruelty Free Europe was given permission to intervene in the appeal.

Held

The Board of Appeal allowed all the appeals (save with regard to the final substance).

The Board rejected most of the companies' arguments. In particular, it said that ECHA had not followed an unfair process and had not prematurely moved from informal discussions to the formal parts of the process. ECHA had been entitled to reject the read-across based on its scientific assessment.

However, the Board decided that the decisions should indeed have been addressed to all the registrants. The other registrants had been deprived of the benefit of Article 53, which sets out data and cost-sharing rules.

Under Article 93(3) of REACH, the Board of Appeal, if it allows an appeal, can either remit the case to ECHA (with guidance about how it should approach its reassessment) or make a decision afresh. The Board will only remit a case if there is doubt about the eventual outcome.

In the present case, the Board said that the outcome might have been different had the other registrants had a chance of contributing to the assessment of the substances.

Commentary

In one sense, this was a standard Board of Appeal decision, in that it accorded ECHA considerable deference in its assessment of the read-across and the testing strategy the ZDDP group had proposed.

The decision to remit is interesting, however. Having ruled firmly that ECHA was entitled to reject the read-across, it might be thought unlikely that the other registrants could have achieved a different outcome. In addition, the Board only said that ECHA's decision should have been addressed to all registrants, not its draft decision and it is therefore not obvious what the other registrants could have contributed.

As it is, all the registrants now have another opportunity of improving the read-across argument, and thereby avoid at least some animal tests. The Board may have been influenced by the recent decision of the Court of Justice of the European Union in *Federal Republic of Germany v Esso Raffinage and others C-471/18 P* (21 January 2021) (Esso Raffinage), in which Advocates for Animals also acted. The Court emphasised that the last resort principle had to be applied even after ECHA had made a decision that a registrant must carry out animal tests.

The Board rejected CFE's argument that Article 77(2)(j) of REACH, which requires ECHA to 'provid[e] advice and assistance to manufacturers and importers registering a substance ... ', imposed a duty on the Agency to provide assistance at all stages, in particular so as to avoid unnecessary animal tests. The Board said that the wording indicated that the duty to assist was limited to providing technical assistance for the submission of registration dossiers.

With respect, this is a misreading of Article 77(2)(j) and out of step with the CJEU's ruling in Esso Raffinage. Registration is not simply a one-off process and there seems no policy reason why ECHA's duty should be limited in this way.

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David Thomas, Solicitor & Co-founder at Advocates for Animals

North Carolina's 'Ag-Gag Law' Declared Unconstitutional

In 2016, eight American organisations, including the Animal Legal Defense Fund (ALDF) and People for the Ethical Treatment of Animals (PETA), challenged North Carolina's controversial 'ag-gag law' as a major violation of free speech in the United States. In June of 2020, after their case was first dismissed and reversed by a district and appeals court, and after gaining the support of a variety of news organizations, the environmental groups won the case in federal court. The presiding judge, Thomas D. Schroeder, found much of North Carolina's ag-gag law to be unconstitutional, exceeding the limits of free speech protected by the First Amendment.

In an effort to protect factory farms and industrial agriculture from the public eye, seven American states (in consecutive order: Kansas, Iowa, Utah, Missouri, Idaho, Wyoming, and North Carolina) have passed a variety of ag-gag laws over the past 30 years, although five of these laws have subsequently been declared unconstitutional. As Alicia Prygoski from Michigan State University College of Law describes, ag-gag laws exist in three categories, all of which aim to punish whistleblowers that oftentimes expose horrific industry practices: (1) agricultural interference laws, which ban recording images and sounds without consent, (2) agricultural fraud laws, which ban applying for employment with false pretense, and (3) rapid recording laws, which require anyone who records images or sounds to turn these recordings in to authorities within 48 hours.

North Carolina's ag-gag law, a hybrid of the three types, was passed in 2015 as the Property Protection Act and was in response to leaked footage of factory farm workers mistreating turkeys and chickens. In an effort to create a permissible law unique to the failed ones of other states, North Carolina opted in the Property Protection Act to allow employers to sue employees for recordings, interferences, or employment fraud, rather than criminalize the actions themselves. One supporter of the law, Republican Congressman Chuck McGrady, defended it by claiming of factory farms, and thus all practices that take place within, "It's personal property, folks. It's something that's protected in our Constitution." Judge Schroeder, however, disagreed. In his 2020 ruling, Schroeder stated many parts of the 2015 law clearly violated the First Amendment and were unconstitutional, while certain aspects of the law were sound, such as employers suing employees for knowingly opening a gate to free livestock.

As one of the attorney's representing the environmental organizations David Muraskin noted, the ruling comes at a pivotal time. The COVID-19 pandemic has highlighted sanitary and ethical issues surrounding working conditions in American factory farms, and the ruling against this ag-gag law offers greater potential protection and freedom for factory farm employees, and allows for greater insight and public accountability into factory farms. Although its original existence in seven American states is alarming, ag-gag laws, and thus the attempt to silence whistleblowers and protect factory farms' inhumane practices, continues on the downward trend thanks to Judge Schroeder's recent ruling. North Carolina has become the fifth state to pass an ag-gag law that has subsequently been determined unconstitutional, and seventeen states have rejected ag-gag legislation proposed by industrial agriculture interests. Recently, however, governments outside the United States, including the Canadian provinces of Alberta and Ontario, have adopted American-style ag-gag legislation, and it becomes pressing that this attempt to suppress public awareness, investigative journalism, and free speech does not propagate around the world.

Addison Luck, Earth Law Manager for Earth Law Center (*Addison is writing in a personal capacity*)

Case Report: *R v Bellway Homes*

The end of 2020 saw the English criminal court penalise a housing developer with the highest recorded penalty fine for a crime committed against wildlife. The decision should be welcomed by wildlife welfare advocates as an exemplary case of successful collaboration between environmental authorities, police and the crown prosecution service. However, the decision leaves an echoing concern; are fines a sufficient deterrent for deliberate acts of violence against wildlife?

Factual background

Bellway Homes is a UK housing developer which was contracted to undertake demolition work at Artillery Place, Greenwich, South East London. The site was host to a roost of soprano pipistrelles, a species of small bat. Prior to carrying out the demolition work, the local planning authority had notified Bellway that it would need to apply for and receive a licence from Natural England, the environmental authority granting these licences. The local planning authority was acutely aware that soprano pipistrelles roost in deserted sites, and this was no exception. Bellway was informed that they would need to apply and receive a licence from Natural England in order to carry out the demolition work, as well as undertaking to take appropriate mitigation to compensate for any damage to the bats' habitat. Notwithstanding the fact that Bellway were aware that they needed to obtain a licence and carry out mitigation, they failed to do either and carried out the demolition work between 17 March – 18 August 2018 resulting in the destruction of the roost.

On 3 December 2018 the Royal Borough of Greenwich's planning department notified the police that Bellway Homes was going to carry out demolition work. After making enquiries with Natural England, it was confirmed that Bellway Homes did not apply for a licence for that specific development.

Bats in the UK

Bats are a crucial keystone species and account for a quarter of all species in the UK. Notwithstanding bats' importance the first official IUCN Red List for British Mammals, produced by the Mammal Society for Natural England, Natural Resources Wales, Scottish Natural Heritage (NatureScot) and the Joint Nature Conservation Committee, shows that four of the 11 mammal species native to Britain classified as being at imminent risk of extinction are in fact bats.

Populations of pipistrelles have particularly declined in the last few decades due to the modernisation of our society including changes to agricultural practices reducing their food supply along with the species' reliance on desolate buildings for roosting, making them vulnerable to the growing trend of building renovation and demolition works. This is particularly harmful where toxic remedial timber treatment chemicals are used. The destruction of the bats' roosts has a significant impact on this species as they are long lived, slow-breeding mammals who take a long time to recover from population decline.

As bats typically emerge after hibernation between March and April, their breeding season begins in June and continues over the summer. This means that the roost destruction by Bellway continued into the bats' breeding season preventing the ability for that community of bats to reproduce thus restricting their population growth of a species already in decline.

The Law surrounding bats

Bats receive protection from two pieces of English legislation. The first, the Wildlife and Countryside Act 1981 (the WCA) lists bats as a "protected animal" under schedule 5 meaning bats receive protection under section 9 WCA. Section 9(1) provides that a person who intentionally kills, injures or takes any wild bat shall be guilty of a criminal offence. Section 9(4) provides protection to bats' habitat by criminalising intentional or reckless damage or destruction to a structure bats are using for shelter or protection and the disturbance of any bat occupying such a structure. Notwithstanding the prohibition of section 9, section16(3) means that any actions which would otherwise contravene section 9 shall not do so where a person acts in accordance with the terms of a licence granted to them by the

appropriate authority, as long as such actions pursue one (or more) sets of specific sections.

The second piece of legislation protecting bats is the Conservation of Habitats and Species Regulations 2017 (as amended from time to time, the CHSR) which is the piece of legislation which retains the UK's implementation of the Habitats Directive (92/34/EEC) from when the UK remained part of the European Union. The CHSR offers protection to bats as a "European protected species" as all species of bats are listed in schedule 2 CHSR. Regulation 43(1) means any person who deliberately captures, injures or kills any wild bat or damages or destroys a bat breeding site or resting place shall be commit a criminal offence.

As for the WCA, regulation 55 CHSR provides that a person won't be in contravention for breach of regulation 43 where that person obtains a licence from the relevant licensing body (Natural England in England) and carries out actions for specific stated purposes (which can include construction). Under the CHSR where a person is unable to avoid disturbing bats or their roosts, they are required to apply for a licence via completing form A13 (application form for a bat mitigation licence) and carry out certain mitigation measures. These may include:

i) Altering work methods or timing to avoid bats;
ii) Creating or improving roosts;
iii) Creating or improving foraging or commuting habitat; and/or
iv) Monitoring the roost sites after development.

Once Natural England have received the application, they may choose to grant the licence, refuse to grant or grant subject to the licensee complying with certain specific conditions. Once a licence is granted, provided the licensee acts in accordance with the terms of the licence, they will not be criminally liable for any damage or disturbance to the relevant bat population or its habitat.

Outcome

Bellway was prosecuted for contravention of regulation 43 CHSR. Upon pleading guilty Woolwich Crown Court ordered Bellway to pay a fine of £600,000 in addition to £31,000 of legal costs. This fine is understood to be the largest fine ever issued by an English court in relation to a wildlife crime. This is a welcome recognition from the courts that a stricter and more punitive regime must be put in place for crimes against wildlife. Bellway subsequently stated that it intends to make a £20,000 donation to the Bat Conservation Trust in light of the case.

Analysis

The case demonstrates that when environmental authorities work cooperatively with the police and the CPS, huge strides can be made in successfully holding persons and organisations to account for wildlife crimes which cause both loss of animal life, suffering and sometimes irreparable loss to biodiversity. As stressed by the Wildlife and Countryside Link in their report, Wildlife Crime in 2019: a report on the scale of wildlife crime in England and Wales, it is absolutely critical that environmental authorities and police wildlife crime units receive sufficient funding and training in order for successful collaborations like the Bellway case to become the norm in the face of wildlife crime.

Notwithstanding the successful collaboration between the various enforcement authorities, detection and lack of case evidence remain the principal barriers against successful prosecution of wildlife crime, as many instances of deliberate wildlife crime go unreported or even when brought before the police, are not pursued due to lack of evidence. It is noted that in the Bellway case that Bellway tried to remove the need for them to attain a licence to carry out the works in question, putting the authorities on notice of their actions. It is uncertain whether the offence would have been detected and therefore prosecuted had the authorities not received such notice.

Finally, whilst the size of the fine should be applauded, whether the mere fining of corporations is sufficient to deter commercial entities from deliberately damaging the environment is still questionable. £600,000 may be a large sum of money to smaller organisations, however it represents just 0.18% of Bellway's net operating profit for 2020 . The fine pales in light of

such large profit, and with only fines threatening large corporations, there is a substantial risk that many organisations simply "price in" the costs of being convicted for wildlife habitat destruction into their operating model.

If wildlife advocates are convinced that fines are satisfactory, then larger sums should be available to and used by judges when sentencing. It is noted that the UK GDPR provides for maximum fines of £17.5 million or 4% of annual global (whichever is greater), for abuses of personal data committed by organisations, yet we choose not to afford the same punishment for destruction of our natural habitats. If fines are insufficient, there are custodial sentences available under both the WCA and the CHSR and decision-making level management at organisations should perhaps face the risk of penalty fines and, in severe cases, custodial sentences, where they knowingly commit wildlife crime under the guise of their corporations. This would act as a greater deterrent against corporate management supervising wildlife offences from behind the safety of the corporate veil, and could already be brought against company officers, as both the WCA and the CHSR provide that prosecution can be brought against such officers were wildlife crime is committed with the consent, convenience or due to the neglect of company directors .

Rob Espin, A-law Wildlife Law Working Group Co-chair
Francesca Nicholls, A-law Wildlife Working Group Research Associate & BPTC Student

Judicial review of wild bird culling in Wales

The High Court of England and Wales recently handed down its decision on Wild Justice's judicial review of the Welsh Government's lethal control regime of wild birds in *Wild Justice v Natural Resources Wales* [2021] EWHC 35 (Admin). Whilst Wild Justice were unsuccessful their challenge, the decision nevertheless contains some positive silver linings for wildlife welfare advocates.

Facts

Natural Resources Wales (NRW) is the Welsh public authority with delegated responsibility for various public functions, including the licensing of management activities in respect of wild birds pursuant to the Wildlife and Countryside Act 1981 (WCA). Section 1(1) WCA provides that, unless authorised by a relevant authority, it is a criminal offence for a person to intentionally kill, injure or take a wild bird or take, damage or destroy any wild bird nest or egg.

NRW had used its powers under section 16 WCA to issue several licences which amounted to a derogation to the protections of section 1. These licences permitted authorised persons (being certain land owners) to take or kill six species of wild bird as specified in the licence (namely carrion crow, magpie, jackdaw, feral pigeon, wood pigeon and Canada goose). Under section 16 WCA, activity under the licences had to be for a specified purpose. The stated purpose of the licences varied from protecting land, crops and property from serious risk of damage to conservation other species wild birds. NRW stated the latter purpose was required to protect birds including curlew, as bird such as carrion crow can prey upon curlew eggs and chicks and there are thought to be less than 400 pairs of curlew left in Wales.

Challenge

Wild Justice (WJ) brought judicial review challenging the issue of the three general licences on three separate grounds:

1. Each licence must specify the particular circumstances in which it can be used to permit culling of wild birds;
2. NRW must first itself that there are no other satisfactory alternatives to address the relevant problem each time a licence is used to justify killing wild birds; and
3. Positive evidence was required to justify us of the licences to kill birds instead of mere absence of evidence pointing to another satisfactory solution.

Ground one – Specified Circumstances

WJ cited section 16(5)(A) WCA which requires that the licence shall specify both the circumstances in which action may be taken against wild birds and conditions which must be fulfilled before action can be taken. WJ argued that merely setting out the purpose of the licence wasn't sufficient as NRW must go further to prescribe which particular species can be culled based upon what threat they posed. WJ used crows and magpies as an example as such birds didn't pose a threat to every species of threatened bird set out in the licence, therefore it would be wrong to permit culling of crows and/or magpies on the basis of protecting a species they do not threaten. NRW countered by arguing that section16(5)(A) WCA was met because each licence set out the birds against which the licence may be used, permitted actions and methods, authorised persons and unauthorised locations.

HH Judge Jarman QC, presiding over the case, agreed with NRW. The High Court found that it would be difficult for the wording of each licence to be sufficiently drawn to cover every circumstance in which the statutory purpose for culling birds would be satisfied and that NRW had satisfied the test in section 16(5)(A) WCA by requiring that the action was for the statutory purposes and complied with the other limitations NRW had highlighted. The court cited *RSPCA v Cundey* to state that the better approach to ensure that lethal control was being used for proper purposes stipulated by the licence was to prosecute persons who were caught killing birds not in pursuit of a licenced purpose on a case by

case basis.

Ground Two – No Satisfactory Alternatives

WJ argued that pursuant to section 16(1A)(a) WCA, NRW could not issue a licence permitting lethal control of birds unless it was first established that there was no satisfactory alternative to taking such measure. WJ argued that the wording of the licences effectively permitted lethal control as first resort and the licences should instead require authorised persons first exhaust other solutions satisfactory to resolve the stated problem before resorting to lethal control. NRW adduced a wealth of evidence demonstrating proper consideration of whether, for each problem addressed by the licences, the issue could be resolved without utilising lethal control. NRW further argued that the meaning of section 16(1A)(a) WCA was that it must be satisfied that it is appropriate to grant a licence allowing for lethal control generally, not whether it is necessary to use such control in every case where a risk of harm arises.

The High Court again agreed with NRW, finding that the wording in section 16(1A)(a) does not require general licences to determine whether lethal control is appropriate for every case where a risk arises as such an interpretation would lead to general licences becoming "unworkable'. The High Court did stress the need for NRW to rationally act on substantive evidence before it in deciding that there was no satisfactory alterative less harmful than lethal control when deciding what derogations are required to resolve the issue addressed by the licence, however that NRW had done this on the facts before it.

Ground Three – Requirement for Positive Evidence

WJ's final argument asserted that the WCA required NRW to have positive evidence that all other less harmful solutions are not satisfactory to resolve the problem addressed by the licence, instead of relying on the mere lack of any evidence of another solution which properly addresses the problem. NRW argued that they had properly assessed that the evidence and found there was weak or marginal proof that non-lethal control measures were effective and proportionate to the risk. The High Court agreed with NRW's assessment on the fact, deciding that it has not been made out on the facts that NW decision was irrational.

Conclusion and outcomes

Notwithstanding the Court upholding the licences, the decision contained several positive points for both WJ and wildlife welfare advocates more generally. Firstly, the High Court suggested that in future, NRW should consider imposing conditions on its licences requiring authorised persons to use reasonable efforts to achieve the relevant purpose using lawful methods not covered by the licence unless their use would be impractical, before resorting to lethal control.

Secondly the High Court confirmed that the licences could only be used to take or kill birds where the birds posed a present danger to the issue at hand. This restricts the ambit in which wild birds could be killed instead of justifying birds to be culled in all circumstances. Thirdly and finally, NRW were successful in defending the judicial review largely due to the comprehensive and robust evidence forming the basis for their decision making. This point was noted by both WJ and the Court, and indicates that authorities must base their decision making on substantial evidence and the Court will scrutinise the robustness of such evidence when determining whether lethal control has been properly licenced.

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