Case Materials and News

A trilogy of legislative 'wins' for domestic animals

The last 12 months has seen a significant strengthening of laws protecting domestic animals. The Animal Welfare (Sentencing) Bill (HC Bill 410) follows recent enactment of Finn's Law (strengthening legal protection for animals in public service) and Lucy's Law (banning the sale of puppies and kittens by persons other than the breeder). This trilogy of legislation has been wholeheartedly welcomed by animal protection and campaign groups.

1. Animal Welfare (Sentencing) Bill

The Animal Welfare (Sentencing) Bill proposes an increase in the maximum penalty for an offence under sections 4, 5, 6(1) and (2), 7 and 8 of the Animal Welfare Act 2006 from six months to five years imprisonment. The offences include causing unnecessary suffering to an animal (section 4), mutilation (section 5), docking a dogs' tail (section 6), poisoning (section 7) and animal fighting offences (section 8).

The new sentencing powers will not apply to offences under section 9 (failure to meet an animal's welfare needs), nor to offences against animals not protected under the Animal Welfare Act. For example, invertebrates and non-domesticated, wild animals.

This Act will extend to England and Wales only and will come into force within two months of the day on which it is passed.

A-law has historically raised concerns about the inadequacy of sentencing powers for cases of deliberate animal cruelty. Submissions were made to the EFRA Sub-Committee on animal welfare: domestic pets (2016) and to the EFRA Inquiry on the Animal Welfare (Sentencing and Recognition of Sentience) Bill (2018), highlighting the disparity between the sentencing powers available in the United Kingdom and other jurisdictions within the international community.

A-law's Chairperson, Paula Sparks comments: "Increasing maximum sentencing powers will send a clear public policy message that abhorrent acts of cruelty, whether to humans or non-human animals, will not be tolerated in our society."

2. Animal Welfare (Licensing of Activities Involving Animals) (England) (Amendment) Regulations 2019 – aka Lucy's Law

The Animal Welfare (Licensing of Activities Involving Animals) (England) (Amendment) Regulations 2019 amend the Animal Welfare (Licensing of Activities Involving Animals) (England) 2018 Regulations, which require a licence in order to sell pets in the course of business in England.

The instrument amends Schedule 3 to the 2018 Regulations (selling animals as pets) and prohibits licence holders selling as pets, kittens or puppies which were bred by someone other than the licence holder, i.e. a third party. The effect is that the public will be only be able to lawfully purchase pet puppies and kittens from a breeder or via a rescue and rehoming organisation.

As the Explanatory Memorandum to the Statutory Instrument explains:

'This instrument will further enhance the protections in the 2018 Regulations by prohibiting the sale of puppies and kittens aged under 6 months, which were not bred by the licence holder. The decision to amend the 2018 Regulations follows a Call for Evidence and a public consultation on this topic, which brought to light stakeholder concern about the welfare of puppies and kittens kept and sold by third parties, and widespread public support for prohibiting such sales.

The Call for Evidence was launched in response to an e-petition, known as "Lucy's Law", which called for a ban

on the sale of puppies by pet shops and third parties. The e-petition received 148,248 signatures.

Evidence suggests that commercial third party sales are linked to a range of poor welfare practices including the early separation of puppies and kittens from their mothers and littermates, which in turn prevents young animals from expressing natural behaviours and disrupts appropriate socialisation; all of which influences the animal's long term behaviour. Third party sales also typically require travel from place of birth to place of sale which can induce stress and expose puppies and kittens to an increased risk of disease. There is also an association between third party sales and impulse purchases of puppies and kittens. Such sales are believed to facilitate illegal and low-welfare breeders. This instrument will address these concerns by prohibiting those who hold a licence to sell pets from selling puppies and kittens aged under 6 months, that they have not bred themselves.'

3. Animal Welfare (Service Animals) Act 2019 - aka Finn's Law by Tiffany Mitchell

On October 5th in 2016, both PC Dave Wardell and his partner, Finn, a German Sheppard, were in pursuit of a robbery suspect when the suspect turned on them both. PC Dave Wardell escaped almost uninjured, sustaining a stab wound to the hand. However, as a result of protecting his handler, Finn sustained life threatening stab injuries to both his head and his chest. Injured, Finn still managed to restrain the suspect until the other officers arrived. Finn, fortunately, survived after a four-hour emergency surgery and after an 11-week recovery he was permitted to return to his duties prior to his retirement in March 2017.[1]

The suspect avoided harsh penalties for these crimes; he was charged with ABH for the injuries to PC Dave Wardell, and a mere criminal damage charge for injuries sustained by Finn, which subsequently resulted in no further penalty.[2] Finn's case, like many others, identified the difficulties of securing a conviction in cases where service animals are harmed. Prior to the implementation of the Animal Welfare (Service Animal) Act 2019, or Finn's Law, the only eligible charges for harming or killing a service animal would come from successful application of Section 4 of the Animal Welfare Act 2006, "Unnecessary Suffering", which carries a mere six-month sentence which can result in a fine. The alternative is the application of the Criminal Damage Act 1971, as the dog is property of the policing unit. There are several concerns with securing a conviction under the Animal Welfare Act 2006 under Section 4 as there are multiple stipulations to adhere to when ascertaining the nature of the conduct to determine if unnecessary. Section 4(3)(c), questions whether the conduct was for a legitimate purpose and section 4(3)(c)(ii) provides a defence for the purpose of protecting a person, property or another animal. However, this law does not account for the nature of a police dog's role; they have been trained to intimidate and create fear, consequently allowing suspects to plead self-defence.

While the application of criminal damage charges to an injured animal carries difficulty in ascertaining the extent of 'damage' and the 'cost' of said damage or worth of the 'property', in this case, the dog. It also encompasses this problematic concept that service animals are property. As previously mentioned, as a result of these problematic prosecutions, the courts did not lay down any additional penalties for Finn's injuries.[3] Finn's case is not one of isolation, and accordingly there were 1,920 police dog incidents in England and Wales, between April 2017 and March 2018. These incidents all support the notion brought forward by Finn's case; the available pre-existing offences did not provide for the criminality.[4]

Shortly after the incident, a campaign was launched in support of Finn's Law; to create a specific offence for service animals. The e-petition gained 100,000 signatures, but on the 5th of December 2017, when Sir Oliver Heald introduced a Ten-Minute Bill; the Service Animals (Offences) Bill, it was objected in the second reading. The bill would have created a separate criminality suited offence. However, on June 13th of

[1] 'Finn's Law' 2017 <https://www.finnslaw.com> accessed 21 June 2019
[2] Animal Welfare (Service Animals) Bill (n1) cols 4-6
[3] House of Lords Briefing
[4] Bill Stages – Animal Welfare (Service Animals) Act 2019 <https://services.parliament.uk/Bills/2017-19/animalwelfareserviceanimals/stages.html>

2018, the bill was reintroduced, with slight modifications whereby amending the already in force Animal Welfare Act 2006. With tremendous support, on April 8th 2019 the new law was enacted and given royal assent, and it came into force on June 9th, 2019.[5] The objective of this new law is to secure a conviction, as previously explained, the pre-existing legal penalties were ill suited to the offence. The new law amending the Animal Welfare Act 2006, applies to section 4 titled "Unnecessary Suffering", subsection (3)(c)(ii). Requirements under this section, as mentioned, states that if the conduct was for the protection of a person, another animal or property, it conduct could be justified and this section would provide a defence.[6]

The amendment disregards this defence under certain conditions, being that the service animal must be accompanied by a relevant officer, whom is acting in the line of duty and circumstances are reasonable, additionally, the officer cannot be the defendant.[7] The amendments, or the Animal Welfare (Service Animal) Act 2019, will, essentially, afford the service animal, officer status. This law will apply in England and Wales, however there are campaigns at present in Isle of Man, Scotland and Ireland to see this become law in the devolved nations as well.

A Win for Welfare: Live Exporters' Judicial Review Claim Seeking Longer Journeys Dismissed by High Court by Danielle Duffield

In a decision of the High Court dated 4 February 2019, Morris J dismissed a judicial review brought by live exporters challenging DEFRA's policy regarding the live export of livestock from the UK to continental Europe. In this case, *The Queen (on the application of Mas Group Holdings Limited & ors) v Secretary of State for Environment, Food and Rural Affairs and the Animal and Plant Health Agency* [2019] WEHC 158 (Admin), the Claimants were part of a company group that exported sheep from the UK to continental Europe for fattening or slaughter. They applied for judicial review of the Animal and Plant Health Agency's ("APHA") refusal to approve a journey for the export of a single truck of sheep from England to Germany via Rosslare Harbour in Ireland in November 2017 ("Decision"), as well as DEFRA's policy underlying the refusal whereby it would not authorise such journeys via Ireland if a shorter route is available on the date of departure or within 7 days thereafter ("Policy"). Morris J held that the policy was not disproportionate, had not hindered trade, and was consistent with, and furthered compliance with, the primary objective of Regulation (EC) No 1(2005) to protect animal welfare during transport and the obligation under the Regulation to minimise journeys in advance.

Background

The case centred on the UK's application of Council Regulation (EC) No 1(2005) of 22 December 2004 on the protection of animals during transport and related operations ("the Regulation"), which governs the transport of farm animals within the EU. The Regulation requires exporters to prepare a journey log in advance of any journey setting out the proposed route. This log must be approved by the APHA prior to the journey. In order to approve the journey, APHA is required to check that the proposed journey indicates compliance with the Regulation, which includes a requirement contained in Article 3(a) of the Regulation that "all necessary arrangements have been made in advance to minimise the length of the journey." The Regulation requires that for most animal species, there is a maximum journey time of 8 hours, unless certain additional requirements are met.

As Morris J observed, despite the ethical controversy, long distance transport of live animals for slaughter is lawful, provided it complies with various Regulations concerning animal welfare: *Barco de Vapor BV and others v Thanet District Council* [2015] Bus. L.R. 593. Yet, as Morris J noted, the practice has been the object of protest on animal welfare grounds for many years. As a result of these protests and/or for reasons of commercial viability, today there is only one vessel willing to transport livestock direct from England to Continental Europe for fattening or slaughter: the MV Joline, which sails from the port of Ramsgate in the South East of England, to Calais, in Northern France. The vessel is operated by Barco De Vapor B.V. ("BDV")

[5] Animal Welfare Act 2006, s.4
[6] Animal Welfare (Service Animals) Act 2019, s.1
[7] 'Finn's Law' (n2)

and Mr Johannes Onderwater, the First and Second Interested Parties in this case. The journey takes approximately 20 hours.

The alternative route through Ireland is over four times longer. It involves a ferry journey from Cairnryan in Scotland to Larne in Northern Ireland and then a drive down to Dublin to catch a 19-hour ferry from Dublin to Cherbourg—amounting to a 90-hour journey in total. Neither of these journey times incorporates the additional time taken to transport animals from the ports at which they arrive to the slaughterhouses or feedlots.

DEFRA's opinion, underlying its policy to only approve the Irish route when the MV Joline route was unavailable, was that the much shorter route was more desirable from an animal welfare perspective. In support of its view, it relied on a report from the European Food Safety Authority in 2004 concluding that animal welfare tends to become poorer as journey length increases and that journey lengths should be as short as possible.

The Claimant's Challenge

The Claimants alleged that the Policy allowed BDV and Mr Onderwater to have a monopoly over live animal exports and that they had exploited this by charging excessive transport prices. They challenged the Decision and Policy on the basis that they are unlawful both as a matter of EU law and as a matter of domestic law. They relied on six grounds: (1) that the Policy and Decision are disproportionate; (2) that the Policy and Decision misinterpreted or misapplied Article 3(a) of the Regulation, which requires that steps be taken in advance to minimise the length of the journey; (3) that the Policy and Decision are at least capable of hindering intra-Community trade, in breach of Article 35 of the Treaty on the Functioning of the European Union (TFEU); (4) that in taking the Decision and in respect of the Policy generally, the Defendants intentionally disregarded "commercial factors", and therefore failed to have regard to relevant considerations; (5) that the Policy constitutes an unlawful fetter on APHA's discretion whether to approve a journey log under the Regulation, contrary to domestic law; and that (6) the Policy and Decision are irrational under domestic law.

Morris J's Findings

In his evidentiary findings, Morris J found that throughout the relevant period and right up until the present time, there has been a steady flow of trucks carried on behalf of other exporters on the MV Joline. Accordingly, Morris J rejected the Claimants' claim that the decline in the number of trucks exported by others between 2011 and 2017 was because of the uncommercial prices charged by the BDV and Mr Onderwater. Further, on the evidence Morris J was not satisfied that export via the MV Joline was or would have been unprofitable (or indeed only marginally profitable) for the Claimants. In fact, in 2016, when the MV Joline freight costs were the same as in 2017, the Claimants themselves exported via that route on at least 8 occasions and for 22 truck loads, and they accepted that those exports generated profit.

Morris J went on to consider the Claimants' proportionality challenge. This was the principal ground of challenge. Morris J found that firstly, the protection of animal welfare is the main and primary objective of the regulation; the trade objectives are secondary. Morris J held that contrary to the effect of the Claimants' submissions, the trade objectives are not of equal importance to the animal welfare objective, and accordingly that the trade objectives cannot trump or override the achievement of the primary objective. Furthermore, Morris J noted that the Regulation imposes a distinct obligation to minimise the length of journeys, and that the veterinary evidence establishes that the length of the journey may have a substantially adverse effect on animal welfare. Morris J held at [157] that Article 3(a) of the Regulation specifically adds to the protection of animal welfare, and that it is distinct from the other obligations in Article 3: "Animal welfare is not protected merely by the technical rules (found largely in the Annexes) applicable to long journeys".

Secondly, Morris J held that on the evidence before Morris J, neither the Policy nor the Decision has hindered trade in the export of livestock. Morris J rejected the Claimants' claim that their ability to export sheep (or the ability of others) has been restricted by the Policy. It therefore held that there was no relevant

restriction of trade, and that the proportionality principle was not engaged.

Thirdly, Morris J found that even if the absence of an actual effect on trade did not take the Policy out of the application of the proportionality principle, neither the Policy nor the way in which it has been implemented is disproportionate. Applying Case C-316/10 *Danske Svineproducenter v Justitsministeriet [2011] ECR 1-13274*, whereby the Court of Justice of the European Union considered the compatibility of the Regulation with Danish national legislation imposing certain standards in relation to the transport of pigs, Morris J found (at [159]) that:

> *"(1) Proportionality requires a balancing to be carried out. Where an operator applies for a journey that is not significantly longer than the shortest route, but the commercial balance for the operator is in favour of that slightly longer route, the balance might shift in favour of allowing the slightly longer route. This is the case in relation to the Harwich-Hook of Holland route. On the other hand, where the route applied for is significantly longer than the shorter route (with commensurately greater risks for animal welfare) and the shorter route is more expensive, but not unprofitable, the balance falls firmly in favour of the shorter journey. That is the position in relation to the Irish route, which is up to four times longer and where any additional cost of the MV Joline is not prohibitive. Where there is a very substantial difference in the length of the journey, it is not disproportionate to insist on the shorter route, where, as here, that route is merely less profitable or only marginally profitable.*
>
> *(2) The facts that there is no established actual effect on trade and that any potential effect appears to be slight means that, on the "trade" side of the balance, the adverse effect is slight, at most. In the present case, the balance comes down clearly in favour of the protection of animal welfare sought to be promoted by the Policy."*

Morris J went on to dismiss the Claimants' challenge based on relevant considerations, finding that this ground was not well founded. Despite finding that the Defendants had been inconsistent in their *expression* of the Policy insofar as the relevance of commercial factors was concerned, Morris J found that it was clear that the Defendants had taken into account commercial factors—indeed, the 7-day rule is itself a manifestation of the taking account of the commercial interests of the exporter. Further, the Claimants had failed to provide the Defendants with "cogent evidence supporting the alleged effect of the Policy in preventing exports and driving the Claimants out of the export trade, let alone out of business."

Morris J also rejected the Claimants' argument that the Policy and Decision misinterpreted or misapplied Article 3(a) of the Regulation, which requires that steps be taken in advance to minimise the length of the journey. Morris J noted that Article 3(a) of the Regulation does impose a distinct obligation to minimise the length of the journey, and that it gives the competent authority power to take measures to ensure the compliance with that obligation. Thus, he emphasised that while there is no express obligation to authorise only the shortest journey, where the Defendants indicated that the shortest available route should generally be taken, that was consistent, and furthered compliance, with the obligation to take steps to minimise journey length.

Morris J also rejected the Claimants' argument that the Policy and Decision were at least capable of hindering intra-Community trade, in breach of Article 35 of the TFEU, as they had not established that the Decision and Policy had an effect on trade. Further, even if there was such an effect on trade, it would be justified because the Policy and the Decision are proportionate to the objectives of the Regulation.

Morris J further dismissed the Claimants' argument that the Policy constitutes an unlawful fetter on APHA's discretion whether or not to approve a journey log under the Regulation. He held that the true question is whether in practice the Defendants had shown themselves willing to consider exceptions from the Policy for commercial reasons. On the evidence, Morris J found that the Defendants were so willing. Finally,

Morris J rejected the Claimants' argument based on irrationality, as the Policy was a rational response to the main purpose of the Regulation, which is to protect animals during transport.

Comment

Animal welfare advocates will welcome this decision. The balancing of animal welfare and commercial objectives under animal welfare legislation and policy often sees the animals losing out, but in this case, the Court properly prioritised animal welfare, in accordance with the Regulation. Having said that, the outcome sought by the Claimants in this case could be considered somewhat extreme. As noted in a recent briefing paper by Elena Ares dated 18 June 2019 prepared for the UK Parliament on live animal exports, the live export trade raises a number of different animal welfare concerns including distress, injuries due to unsuitable transport arrangements, hunger and dehydration, and heat stress. Accordingly, even a 20-hour journey has immense animal welfare implications and should be considered highly problematic, particularly in light of the Regulation's definition of a 'long journey' being one that exceeds 8 hours, and its requirement to limit the transport of animals over long journeys as far as possible. Indeed, in the context of the Regulation and modern animal welfare science, the journey sought by the Claimants of approximately 90 hours was quite extraordinary. Indeed, the Claimants were ultimately seeking approval for a journey more than four times longer than the alternative in circumstances where they had failed to proffer any evidence of the detrimental economic impact claimed.

The case also highlights the government's recognition of the need for policy action in relation to live exports. This was noted by Morris J as he set out the background to the case, noting at [19] that:

> *"As a matter of policy the UK government is committed to improving the welfare of all animals. It would prefer to see animals slaughtered as near as possible to their point of production and thus trade in meat is preferable to a trade based on the transport of live animals. Whilst it recognises the United Kingdom's responsibilities whilst remaining a member of the EU, it will be looking to take early steps to control the export of live animals*

for slaughter as the UK moves towards a new relationship with Europe."

Such policy action would be timely. The global movement against live exports continues to build momentum: in June, the New Zealand government announced that it was considering a ban on the live export of cattle, and pressure continues to mount in Australia to ban the practice. With the Farm Animal Welfare Committee currently reviewing the submissions made last year in response to DEFRA's "call for evidence on controlling live exports for slaughter and to improve animal welfare during transport after the UK leaves the EU", it will be important to watch this space.

The Bill was introduced on the 3rd July 2018 by Ross Thomson MP and is a result of a petition signed by over 100,000 members of the public, asking for the theft of pets to be made a criminal offence. The petition was started by Dr David Allen and the issue has been supported by the Stolen and Missing Pets Alliance and

Wild Justice and the General Licences by Carol Day

Introduction

Earlier this year, fledgling organisation Wild Justice[8] sent Natural England (NE) a Pre Action Protocol letter arguing that General Licences GL04-06 issued on New Year's Day authorising the killing of 16 bird species were unlawful. In a nutshell, the basis for the signalling of legal proceedings was that these General Licences did not allow NE to ensure that individual birds of the species listed were only killed after non-lethal means had been tried and/or properly assessed nor ensure that birds were only killed for the limited set of purposes set out in law.

Following a Without Prejudice meeting in March, and a somewhat ambiguous response to the PAP letter from NE (which neither conceded the legal argument, nor provided evidence for the legality of current system), a claim for JR was issued later that month. In the meantime, a crowd funder for the case reached its target of £36,000 in just 10 days.

On 23 April, the day before NE was due to respond to the claim, it conceded and announced that GL04-06 would be revoked on 25 April[9]. In the interim, anyone wanting to kill any of the species formerly listed on those General Licences was required to apply for, and receive, a licence from NE.

The fallout from the case was (and continues to be) explosive and vitriolic, with representatives of the farming and shooting community arguing the challenge could not have come at a worst time. It has been so controversial that the responsibility for issuing the licences has been temporarily transferred from NE to Defra, coinciding with a short-term consultation to enable the Secretary of State to consider urgent action to resolve the situation[10], the publication of interim licences for three species[11] and a longer-term commitment to review the system of General Licensing.

The Environment, Food and Rural Affairs (EFRA) Committee also initiated an inquiry into the issue with evidence from NE on 21st May, focusing on the series of events that led to the decision being taken, the handling of the media fallout, the issuing and effectiveness of new general licences and the subsequent action taken by the Secretary of State. It became apparent during the course of that inquiry that NE had received categorical advice from a QC that Wild Justice's case was "unarguably correct" on 21st February 2019, prompting questions as to why a further two months elapsed (during which NE requested a WP prejudice meeting and responded to the PAP letter) before conceding the case.

General Licences

Both the EU Wild Birds Directive and the Wildlife and Countryside Act 1981 (WCA 1981) establish a system of

[8] Wild Justice was incorporated in 2018 in order to further nature conservation in the UK, encourage public participation in nature conservation issues and ensure that UK laws, policies and practices protect wildlife. The directors of Wild Justice are Dr Ruth Tingay, Chris Packham, CBE and Dr Mark Avery. The General Licence JR was its first case.

[9] See here

[10] See here

[11] See interim licences for the Carrion Crow (here) and Wood Pigeon and Canada Goose (here).

protection for all wild birds. However, within both instruments, provision is made for the need, in limited and carefully prescribed circumstances, to take lethal measures against birds for a variety of reasons.

Sections 1 to 8 of the WCA 1981 provide for the protection of birds and prevention of poaching. In particular, section 1 provides that intentionally killing, injuring or taking a wild bird will be a criminal offence (section 1(1)) as is possession of a wild bird or eggs (section 1 (2)). Section 5 prohibits certain methods of killing or taking wild birds. Section 6 prohibits the sale of dead wild birds or eggs.

Wild Justice's concern was focused on three of the General Licences (GL04, GL05 and GL06) issued by NE (by virtue of authority delegated by the Secretary of State through a section 78 agreement under the Natural Environment and Rural Communities Act 2006). These licences authorise the killing of sixteen otherwise protected birds including the Carrion Crow, Collared Dove, Lesser Black-backed Gull, Jackdaw, Jay, Magpie, Feral Pigeon, Rook, Woodpigeon, Canada Goose, Monk Parakeet and Ring- necked Parakeet.

GLO4 and GL06 permit: "*landowners, occupiers and other Authorised Persons to carry out a range of otherwise prohibited activities against the species of wild birds listed on the licence. This licence may only be relied upon where the activities are carried out for the purposes specified, and users must comply with licence terms and conditions. These conditions include the requirement that the user must be satisfied that legal (including non-lethal) methods of resolving the problem are ineffective or impracticable.*"

GL05 is phrased in similar terms and relates to activities carried out for the purpose of preserving public health or public safety.

Wild Justice argued that the 2019 General Licences GL04-6 were unlawful in that NE has no power under the WCA 1981 to issue the licences because it failed to comply with the condition precedent under section 16 (1A)(1) WCA 1981 for exercise of the power to grant such licences that the appropriate authority " *…shall not grant a licence for any purpose mentioned in subsection (1) unless it is satisfied that, as regards that purpose, there is no other satisfactory solution*". As such, in order to exercise the power, NE (as opposed to any other body or individual) must be satisfied that there are no suitable alternative solutions to killing wild birds. In issuing the 2019 General Licences GL04-6 NE did not satisfy that condition. Instead it is for licence users to make the decision as to whether alternative solutions are ineffective or impracticable. NE does not have the power to issue licences by such means.

A failure to fulfil the condition under section 16(1A) (1) WCA 1981 and delegating the assessment to licence users has serious practical consequences. Firstly, NE cannot lawfully assume that licence users will, in fact, carry out such an assessment of alternate solutions, meaning that there is a real risk of wild birds being killed unnecessarily and contrary to the WCA 1981. Secondly, if licence users do carry out such an assessment, there will inevitably be instances where the licence user will make a different judgment on alternatives to that which NE would have made. There will be cases in which killing takes place despite there having been things which, had it considered the circumstances, Natural England would have considered to be alternatives. Accordingly, even if NE's lack of power to issue the 2019 General Licences GL04-6 is overlooked, the consequence of the current arrangement is that there will be cases where NE would consider alternatives to killing wild birds to have been available, when the WCA 1981 is specifically designed to preclude such cases.

The Scale of the Problem

The scale of killing of birds under the General Licenses is not well known – by its very nature it is not recorded. The available figures for the UK as a whole derived from the shooting community are set out below[12].

- Woodpigeon, 3.6 million deaths;
- Rook, 130,000 deaths;
- Carrion Crow, 100,000 deaths;

[12] The source of this information is the Game and Wildlife Conservation Trust Annual Review 2017, Page 43, Table 1:

- Jackdaw 75,000 deaths;
- Magpie, 50,000 deaths; and
- Jay, 10,000 deaths.

These figures as highly likely to be significant underestimates for each of those specified and only cover 6 of the 15 bird species killed under the General Licences. The perception in the farming and shooting communities would appear to be that any killing of species on the General Licences is legal and not that such killing is only legal for certain purposes and only if non-lethal means have been tried or deemed ineffective.

In responding to the subsequent Defra consultation, Wild Justice pointed out that there is no good scientific evidence that Jackdaw, Rook, Jay or Magpie cause a long-term sustained decline in population levels of their prey species and there is therefore no justification for issuing general licences which would allow for their control on the grounds of protecting wild birds. To illustrate how it should work, WJ examined the rationale for two species of corvid: the Jay and the Carrion Crow.

A paper by Newson et al[13,14] provides little evidence that predation by Jays affects the population levels of a large suite of potential prey species (mostly songbirds but also pigeons and Lapwing) and where there was any relationship, it was often positive rather than negative. Wild Justice is unaware of any land-owning conservation organisation that kills Jays regularly or in any numbers under the revoked General Licences[15]. It recognises there may be circumstances under which Jays cause problems for species of conservation concern but if there are, it believes these should be dealt with under the existing specific licensing system. Certainly, no General Licence should be issued for the purposes of killing Jays to protect fauna or flora or because of serious damage to crops or livestock.

In contrast, there is evidence that Carrion Crows can cause problems for some species of conservation concern[16] and WJ recognises that, as a last resort, lethal control is allowed by the law and is sometimes warranted for nature conservation purposes. Several conservation organisations carry out lethal control of Carrion Crows on their land and receive criticism from many sides for doing so[17]. However, the species on which Carrion Crows have a population-level impact are few in number and in all these cases the evidence points to Foxes being a larger problem than Carrion Crows[18]. The evidence suggests that songbirds are not seriously affected by Carrion Crows; their impact seems particularly manifest with ground-nesting birds, but not all ground-nesting birds.

The main species of ground-nesting bird where some control of Carrion Crows appears to be justified, on conservation terms, by the science, are Curlew, Lapwing and Grey Partridge. These three species do not occur in all parts of England or in all habitats. Killing Carrion Crows in Cornwall, for example, is of no value to the conservation of Curlew, Lapwing or Grey Partridge and such a general licence would be disproportionate. Moreover, it should be recognised that Carrion Crow numbers (and Fox numbers, for similar reasons) are much higher in the UK than in most European countries. Our populations of generalist predators are noticeably out of step with those in other EU countries.

Wild Justice asserts that there is no good scientific evidence that four corvid species (Magpie, Jay, Jackdaw and Rook) cause any population-level problems for nature conservation. There is therefore no scientific justification for issuing open general licences for their lethal control in order to protect wild birds. For the Carrion Crow there is scientific evidence of a problem in specific circumstances but lethal control of Carrion Crows is addressing the symptoms of mismanagement of the countryside rather than their causes.

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13 BTO Press release. 2010. Are predators to blame for songbird declines? See here

14 Lead Ammunition Group – report to Defra. See here

15 See, for example, Harper, M (RSPB), 2018. *The conservationist's dilemma: an update on the science, policy and practice of the impact of predators on wild birds* – see here

16 See Madden, CF, Arroya, A and Ama, A. 2015. *A review of the impacts of corvids on bird productivity and abundance*. Ibis 157: 1–16 here

17 *Supra*, n.9

18 *Supra*, n.10

Misconceptions and Ramifications

Far from abating, the fallout from this case continues to explosive, vitriolic and ongoing, with the media frenzy increasingly polarised into an country Vs urban divide. A good deal of venom is directed at Wild Justice and Chris Packham in particular (manifesting itself in death threats, suspect packages and dead crows being hung from his garden gate) but much of the malice has also been directed at NE for taking such "draconian measures" at very short notice. The farming and shooting community argued that the revocation of the licences could not have come at a worse time for ground-nesting birds and lambs in the fields.

However, Wild Justice could not choose when to bring the case. A claim for Judicial Review must be filed promptly and, in any event, not later than three months after the grounds to make the claim first arose[19]. Moreover, Wild Justice didn't actually ask NE to revoke the licences. The remedies sought were a declaration that NE accepts the 2019 General Licences GL04-6 as unlawful and a commitment that it would not issue future licences on the same unlawful basis after their expiry in 2019. It was never Wild Justice's aim to change the law - simply to ensure that NE acts lawfully and that a reformed system of licensing ensures that.

In April, Wild Justice wrote to NE's counterparts in Scotland, Northern Ireland and Wales inviting them to review their own systems of licensing and responded to the urgent Defra consultation. Most recently, Wild Justice has sent NE a PAP letter in relation to General Licence GL26 (to kill or take Carrion Crows to prevent serious damage to livestock including poultry and reared gamebirds), issued by NE on 26 April 2019 and it is considering three further licences issued by Defra on 14 June - GL34 (to conserve wild birds and flora or fauna, GL35 (to preserve public health or public safety and GL36 (to prevent serious damage to livestock, foodstuffs for livestock, crops, vegetables, fruit, growing timber, fisheries or inland waters).

One of the points Wild Justice may make in response to any longer-term review is that if the General Licences

[19] Civil Procedure Rules, 54.5

were to be replaced by specific licences, NE could consider charging licence applicants a fee for considering and issuing a licence to allow killing of wild birds. A recent comparative review commissioned by Scottish Natural Heritage explores how game bird hunting is regulated (including through licensing) in fourteen countries across Europe. Case studies analyse in detail the situation in five Member States (Germany, Sweden, Norway, France and Spain)[20]. In all fourteen countries, a failure to comply with hunting law can result in revocation of the individual's licence and in most of them, a serious breach can lead to other penalties. The licence fee covers the administrative cost of the system.

The General Licences case has shone a spotlight on how certain sectors view the killing of wildlife and how vehemently they react when provoked. Removing some bird species from the system of General Licensing and giving consideration to a wider system of licensing for hunting would be incendiary, but it would not be unusual and in light of the continuing disappearance of raptors in known UK hot-spots and unprecedented declines in nature globally[21], it is timely.

Case Comment: The Queen (on the application of RSPB) v Natural England & Ors [2019] EWHC 585 (Admin) by Matthew Wyard

This case concerns a judicial review challenge brought by various claimants (hereinafter all claimants are referred to jointly as the "RSPB") to a licence granted by Natural England ("NE") on 16 January 2019, pursuant to s16(1)(a) of the Wildlife and Countryside Act 1981 ("the 1981 Act") to allow the conduct of a trial into the brood management of hen harriers ("the Scheme").

Brood management involves removing hen harrier chicks from their habitat, rearing them in captivity and then releasing them, when fledged, into a suitable habitat away from grouse moors.

The reason for the scheme is that Hen Harriers and other birds of prey (including protected species under the Wildlife and Countryside Act 1981) are at very low numbers or absent on grouse moors due to illegal killing and disturbance. Hen harriers are killed by grouse hunters as they feed grouse chicks to their own young.

The RSPB's broad contention is that the Scheme is unlawful due to the unnecessary disturbance and harm it would cause to hen harriers and that there is an alternative and less invasive way in which to conserve and protect the species. There is wider public concern that the Brood Management scheme implicitly accepts that illegality is bound to continue and that it is therefore the wrong approach. It would be preferable that existing legislation is properly enforced and offenders are prosecuted so as to adequately deter landowners and gamekeepers from killing birds of prey.

The specific arguments raised and the court's response are set out below prior to commenting on the same and putting this decision into context.

Circumventing the statutory purpose / no other satisfactory solution

The RSPB submitted that NE erred in granting the licence on the basis that:

a) it was solely for the purpose of scientific research as the licence was, in fact, being granted for the purpose of *"conserving wild birds",* meaning that the justification for granting the licence was incorrect. By limiting its considerations to just scientific research purposes, the NE was circumventing the statutory purpose by only considering s16(1)(a) of the 1981 Act; and

b) pursuant to s16(1A) of the 1981 Act the licence could only be granted if NE was satisfied that there was *"no other satisfactory solution"* to conserving hen harriers[22]. Diversionary feeding was an

[20] Pillai, A. and Turner, A. (2017). A review of game bird law and licensing in selected European countries. Scottish Natural Heritage commissioned report No. 942.

[21] Global Assessment Report on Biodiversity and Ecosystem Services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) (May 2019). See here

[22] This reflects the provisions of Article 9(1) of the Birds Directive (2009/147/EC).

alternative satisfactory solution as recommended within the RSPB's Joint Action Plan for the conservation of hen harriers.

The court found that NE had interpreted s16 of the 1981 Act correctly. NE had only been required to consider whether there was no other satisfactory solution to the proposed scientific purpose and not with respect to any other purpose, as it was a scientific purpose for which the Scheme had been proposed. NE were correct to ask itself two questions: firstly, whether the proposed trial was capable of delivering against its scientific purpose and, secondly, whether there were any other satisfactory alternative means of obtaining that evidence. It was clearly evidenced that it was the advice of various bodies and DEFRA's policy that there should be a scientific trial to establish evidence and the application was made on that basis. Accordingly, the correct test was applied. There was no evidence to suggest otherwise.

Scotland

Despite it being common ground between the parties that NE and DEFRA had no power to licence an equivalent of the Scheme in Scotland, it was submitted that NE erred in law by irrationally and/or unreasonably deciding to run the brood management scheme in England, an area in which the hen harrier population was already very low, instead of Scotland where the population is higher and less vulnerable.

The court found on the evidence that the alternative of Scotland had been considered and rejected by NE. Accordingly, NE had exercised its powers lawfully, had considered the options open to it and reached a rational conclusion.

Inchoate purpose

It was submitted by the RSPB that *"the licence had been granted at a point where the aims, methods, monitoring and evaluation of the research were inchoate and therefore the grant of the licence was not justified. The balancing of risks, aims, benefits and assessment of alternatives and possible outcomes had to be assessed prior to the grant of the licence, not afterwards*[23]*."* In defence, NE submitted that the RSPB had not fairly characterised the content of the licence application or NE's assessment of it.

The court accepted NE's defence to this limb of the RSPB's challenge. The Scheme's proposers submitted a detailed plan containing a full methodology and its aims. NE conducted a rigorous assessment of that application, rejecting it once outright for being insufficiently details and, upon the second application recommended conditions to be met which were duly incorporated prior to NE's approval. Therefore, RSPB's allegations could not be sustained as NE's consideration had been thorough to the point of imposing conditions as additional safeguards.

Licence conditions do not achieve the stated purpose

It was argued by the RSPB that there was no mechanism for enforcing compliance with the terms of the licence resulting in hen harriers not actually being protected at all and thereby failing to meet the purpose of the licence.

The court dismissed this challenge on the basis that:

a) Evidence before it demonstrated that thought had been given to the issue and a witness statement had been filed accordingly;

b) A plan of research aims and methods had been submitted and approved by NE. Had the plan been inadequate it would not have been approved by NE;

c) Compliance will be secured through NE's monitoring of the plan; and

d) In any event, as a last resort, NE has the statutory power to amend or revoke the licence to secure compliance with the plan, both of which are effective sanctions.

5-year study

It was submitted that a licence under s16(1)(a) was limited to 2 years however, the proposed research was required to be undertaken for at least 5 years. It was

[23] Para 68.

argued therefore, that the licence was contrary to the statutory purpose. The court rejected this submission on the basis that nothing in the 1981 Act limits a research project to 2 years – the statutory restriction is on the duration of a licence, not a project. There was nothing to stop the licence being renewed to allow the continuation of the project when the licence lapsed.

Improper / unlawful purpose in Special Protection Areas ("SPAs")

It was argued that the Scheme would displace hen harriers from parts of SPAs designated for their conservation as grouse moors make up a high proportion of the same, on the basis that the hen harriers predation of grouse chicks needed to be managed. This was contrary to the purpose of SPAs which was to protect and conserve hen harriers, not grouse chicks or the moor industry.

The court dismissed this argument on the basis that, from the evidence before it, it was clear to the court that the purpose of the Scheme was *"to seek to further the conservation of hen harriers through research not to protect grouse chicks or the grouse moor industry. Thus it was not inconsistent with the [purpose of the SPAs]*[24]*."*

Failure to comply with Regulation 3 of the Habitats Regulation

NE's conclusions that there was no adverse effect on the integrity of the two relevant SPAs was challenged on the basis that NE had misdirected itself on the appropriate applicable tests and failed to conduct the required assessment to reach its conclusions. In particular, it failed to take account of the displacement of hen harriers from the SPAs.

The court found that the RSPB's criticisms of the Habitat Regulations Assessment ("HRA") conducted by NE fell *"well short of establishing any breach of regulation 63 of the Habitats Regulation*[25]*."* Further, that the *"impact on both SPAs was considered in sufficient detail in the HRA to meet the statutory requirements. [It] assessed risks and possible potential adverse effects, together with potential mitigation measures…The RSPB has not been able to identify any material information which was not available to the assessors, and appears to have misread the conclusions reached in the report…[the] reasoning reflected the staged approach typically adopted under the Habitats Regulations 2017, namely (1) whether the project as proposed could potentially have an adverse effect; followed by (2) whether the project would adversely affect the integrity of the European suite, taking into account ant further mitigation measures imposed or agreed by the assessing authority…The displacement of hen harriers from SPAs was not assessed because displacement was neither the purpose, nor the effect, of the trial."* Accordingly, the HRA was found to be appropriate, its conclusions lawfully reached and its conduct carried out in line with the statutory requirements.

Brood management scheme is disproportionate

Criticism was also rendered at how the Scheme would be administered. The Scheme proposed that it would only be used where two hen harrier nests were within 10km of each other whereas, a wider roll out of the Scheme would allegedly not be statutorily permitted until the hen harrier population increased to a level where there were two nests within 7km or less. There was no evidence that the hen harrier population would increase to this level and therefore the trial was irrational and disproportionate. Further, that the Scheme was disproportionate as the benefits of the Scheme were doubtful and did not outweigh the risks to the hen harrier population (as the population is so low it was submitted that even the loss of a single chick could be a significant proportion of that season's productivity).

The court were critical of this ground on the basis that it was speculative. Further, that *"the authors [of the Scheme] recommended that any trial should start from a low density to allow for uncertainties in the modelling and because grouse managers were more likely to favour building up from low densities of hen harriers. Thus the proposed intervention level for the trial followed the recommendation arising from the research…NE had not reached any firm conclusions*

[24] Para 89.

[25] Para 100.

either as to the density of hen harriers or level of damage to grouse which would justify the wider roll out of the Scheme[26]".

The court also dismissed the argument that there was no evidence that the hen harrier would ever reach the level required to roll out the Scheme. This argument itself was speculative – the population of hen harriers in 5 years' time was unknown – regardless, the higher threshold (should it be used) did not need to be met nationwide. In any event, the weight of evidence and opinion was against the RSPB and NE had satisfied itself that the Scheme would contribute to providing evidence and knowledge to underpin a future Scheme.

The risks to hen harriers was appropriate considered by NE.

Accordingly, this ground was dismissed.

Comment

This decision will be welcomed by those public bodies charged with making licencing decisions in relation to the environment and wildlife. It reiterates the long understood public law mantra that simply disagreeing with a decision made will not render it unlawful. The court is content to give deference to the expertise of NE in considering the evidence and applications for a licence before it.

That being said, the decision serves as a reminder for those intending to seek licences from NE, that they must be heavily evidenced, be clear in their aims and methodologies and even then still be rigorous in their drafting in order to get across the hurdles set by NE. Helpfully for such applicants, an indication of the tests that will be applied by NE were reiterated by the court.

The decision is unlikely to resolve tensions between those who support the status quo and those who believe that the scheme fails to address weaknesses in the legal protection of hen harriers from shooting on moorland being managed for grouse shooting.

It is understood that permission is being sought to appeal.

[26] Para 117 – 118.