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TRADE

Considering the link between animal welfare and sustainable development

FUR FARMING

Can the UK ban the import of fur from other countries?

GROUSE

Is it the right time for driven grouse moor shooting reform in Scotland?

PERSONHOOD

Read this year's winning entry to our Annual Student Essay Competition



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CONTENTS

Editor's note

Animal Welfare, Bilateral Trade Agreements, and Sustainable Development Goal Two	1-6
Last One Standing – Now Fallen: The Extinction of Sudan	7-11
Explain the Potential Significance of Granting Legal Personhood to Animals in the UK	12-15
Case Materials and News	16-29
Scottish Driven Grouse Moor Shooting: A Case for Reform?	30-35
What can Lawyers do for Animals? Education in and Practice of Animal Law in Scotland – Event Report	36-41
For Fur's Sake: Can the UK Ban Imports of Fur from Other Countries?	42-49

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EDITOR'S NOTE

It has been a busy year to date, which is reflected in the Cases and Materials section which includes updates on the challenge to the General licenses by Wild Justice, Finn's Law, Lucy's Law and the proposed increase in the maximum penalty from six months to five years imprisonment for an offence under sections 4, 5, 6(1) and (2), 7 and 8 of the Animal Welfare Act 2006.

A-law's annual student essay competition always attracts high-calibre work. This year's winner's Sam Groom essay by Sam Groom is no exception with its nuanced consideration of granting legal personhood to animals.

Two new joint senior editors have been appointed: Gareth Spark and Simon Brooman. Their expertise, together with that of our consultant editors, will support the ongoing development and relevance of the Journal. The aim of the Journal is on the back cover page and we welcome contributions that support it.

Jill Williams
Editor-in-Chief

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Animal Welfare, Bilateral Trade Agreements, and Sustainable Development Goal Two

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Abstract

Animal welfare is integral to a number of the Sustainable Development Goals set out in the UN 2030 Agenda for Sustainable Development. This article sets out the ways in which animal welfare is closely linked to sustainable development with particular regard to sustainable agriculture, climate change, environmental protection, biodiversity protection, conservation, and social and ethical considerations. This essay further explores how international trade and investment policy can contribute significantly to the achievement of the Sustainable Development Goal two (eradication of world hunger) by pursuing animal welfare protection through trade policy. Specifically, bilateral free trade agreements between developed and developing countries.

Keywords

sustainable development, trade, agriculture, animal welfare, animal health, food security, biodiversity, climate change

Introduction

We, the human species, are fortunate to share our planet with a rich and diverse range of non-human animal species. These animals act as sources of food and clothing. They are put to work on farms and in industry. They are our companions in the home. They are absolutely essential to the sustainable

development of humankind. The value of animal life to the earth, its ecosystems, and humankind, is immeasurably significant and extends far beyond mere economic value.

This essay will first explore the close association between safeguarding animal welfare and sustainable development. The intrinsic value of protecting individual animal welfare as opposed to animal species conservation has been neglected in the policy and literature on sustainable development. Animal welfare protection is vital to the successful implementation of many of the United Nation's Sustainable Development Goals (SDGs), particularly the goals to eradicate hunger (two) and to, inter alia, halt biodiversity loss (15).

Then, this essay will move on to explore how bilateral trade agreements between developed and developing countries can contribute to the achievement of sustainable development goal two to eradicate world hunger by addressing animal welfare issues.

The Sustainable Development Goals and Animal Welfare

Sustainable development is an open-term with no single legal interpretation. However, it is generally thought that there are two themes in public international law that are "specific and recurrent enough to act as definitions".¹ First the Brundtland report emphasises inter-generational equity in stating sustainable development "meets the needs of the

¹ Emily Barrett Lydgate, 'Sustainable development in the WTO: from mutual supportiveness to balancing' (2012) 11:4 World Trade Review 621, 627.

present without compromising the ability of future generations to meet their own needs.”² Second, a three-pillared interpretation of sustainable development consists of: economic development, social welfare and environmental protection.³

The complications were exacerbated by a range of exemptions in the legislation, benefitting those selling pedigrees, the offspring of pet animals and animals unsuitable for showing or breeding, with the net result that the commercial sale of animals from private dwellings became so difficult to monitor that it was, in effect, largely unregulated.

The recent and ambitious United Nations 2030 Agenda for Sustainable Development is capable of encompassing animal welfare in a number of the SDGs and associated targets.⁴ Some international organisations recognise the significance of the 2030 Agenda’s language for animals.⁵ However, there is a measure of discontent amongst civil society because the Sustainable Development Goals do not explicitly reference animal welfare or recognise the sentience of animals.⁶

The link between animal welfare and sustainable development is multi-faceted and well-documented. The Farm Animal Welfare Council⁷ has set out how farm animal welfare might be influenced by (and

impact upon) sustainable development.⁸ It notes that “sustainable agriculture cannot truly be achieved without ... key farm animal welfare principles.”⁹ This is centrally due to the impact of animal welfare on animal health and climate change.¹⁰ The economic and ethical importance society has placed on animal welfare is also significant in this regard.

...there is a measure of discontent amongst civil society because the Sustainable Development Goals do not explicitly reference animal welfare or recognise the sentience of animals.

On the latter point, Michael Bowman, Peter Davies, and Catherine Redgwell posit that a general principle of law on animal welfare now exists because animal welfare pervades almost every legal system in the world as well as cultural and religious traditions.¹¹ There is a wealth of literature on the ethics surrounding animal welfare protection and the World Trade Organization’s (WTO) Dispute Settlement Body has now accepted animal welfare as an issue of public morality.¹²

² United Nations (UN), Report of the World Commission on Environment and Development: Our Common Future, Annex to General Assembly document A/42/427, 2 August 1987, <<http://www.un-documents.net/wced-ocf.htm>> accessed 07/06/2019 (Brundtland Report).

³ United Nations, Plan of Implementation of the World Summit on Sustainable Development A/Conf.199/L.7, 4 September 2002, <https://www.un.org/ga/search/view_doc.asp?symbol=A/CONF.199/L.7&Lang=E> accessed 07/06/2019.

⁴ United Nations, Resolution adopted by the General Assembly: Transforming our world: the 2030 Agenda for Sustainable Development (2015) A/RES/70/1 <http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E> accessed 07/06/2019 (2030 Agenda).

⁵ World Animal Protection, ‘UN incorporate animal protection into 2030 Agenda for Sustainable Development’ (25 September 2015, World Animal Protection) <<https://www.worldanimalprotection.org/news/un-include-animal-protection-2030-agenda-sustainable-development>> accessed 07/06/2019.

⁶ Janet Cox, ‘Sustainable Development Goals and Animal Issues: Preparing for the UN’s High Level Political Forum’ (10 May 2017, World Animal Net) <<http://worldanimal.net/world-animal-net->

[blog/item/439-sustainable-development-goals-and-animal-issues-preparing-for-the-un-s-high-level-political-forum](http://worldanimal.net/world-animal-net-blog/item/439-sustainable-development-goals-and-animal-issues-preparing-for-the-un-s-high-level-political-forum)> accessed 07/06/2019.

⁷ Now called the Farm Animal Welfare Committee. This body advises the UK Government Department for Environment, Food & Rural Affairs (DEFRA).

⁸ Farm Animal Welfare Council, ‘Sustainable agriculture and farm animal welfare’ (2016) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/593479/Advice_about_sustainable_agriculture_and_farm_animal_welfare_-_final_2016.pdf> accessed 07/06/2019

⁹ *Supra*, 3.

¹⁰ Farm Animal Welfare Council, ‘Farm Animal Welfare: Health and Disease’ (2012) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/324616/FAWC_report_on_farm_animal_welfare_-_health_and_disease.pdf> accessed 07/06/2019.

¹¹ Micheal Bowman, Peter Davies and Catherine Redgwell, *Lyster’s International Wildlife Law* (2nd edn, Cambridge University Press, 2010), 678-682.

¹² Appellate Body Report, European Communities - Measures Prohibiting the Importation and Marketing of Seal Products (2014) WT/DS400/AB/R, WT/DS/401/AB/R (EC - Seal Products).

One of the most famous accounts of the impact of livestock on the environment is the report “Livestock’s Long Shadow” by the UN Food and Agriculture Organization.¹³ This report sets out the contribution of livestock farming to land degradation. It also explores the consequences for climate change of carbon and nitrogen emissions from livestock farming, livestock’s impact on water depletion and pollution, and livestock’s significant role in biodiversity loss.

Generally, extremely high productivity in livestock systems is associated with poorer welfare. This is *not*, however, a solution to world hunger.

In order to eradicate world hunger, the 2030 Agenda sets out a target to double the agricultural productivity of small-scale food producers by 2030. This will be particularly significant and impactful in the developing world where the use of intensive livestock farming methods is on the rise.¹⁴ The 2030 Agenda also includes a target to, by 2030, “ensure sustainable food production systems and implement resilient agricultural practices that increase productivity and production, that help maintain ecosystems, that strengthen capacity for adaptation to climate change [etc] ...”

These targets can only be achieved simultaneously if animal welfare-friendly farming techniques are adopted (and promoted through trade and investment policy to tackle a lack of resources in the developing world). If livestock farming progresses in a way concerned only with productivity of the animal, disregarding detrimental welfare impacts associated

with high-intensity farming, production systems could collapse as animals are pushed beyond their biological limits.¹⁵

Further, relying heavily on livestock production in order to tackle food demand is not sustainable. This is because 36 percent of the world’s crop calories are fed to animals but only 12 percent of those calories are returned to humans as meat or milk.¹⁶

Generally, extremely high productivity in livestock systems is associated with poorer welfare. This is *not*, however, a solution to world hunger. High intensity livestock farming cannot be used to achieve the SDGs because of its environmental impacts.

Poor animal welfare does not directly cause environmental harm. Rather, many unsustainable agricultural practices are also damaging to animal welfare. Therefore, pursuing welfare-friendly systems is consistent with pursuing sustainable agriculture.

Failing to protect animal welfare can also be intrinsically unsustainable in itself when one considers the social and ethical implications this entails.¹⁷ It is increasingly recognised that endangering animal welfare is not ethically acceptable and societies across the globe are becoming more vocal in their opposition to this. Unethical development cannot be sustained if it is not deemed acceptable by sizeable groups of consumers and investors. Animal welfare, with its own non-anthropocentric merit, is not yet recognised as essential by sustainable development regimes. Thus, animal welfare must be anchored to other targets in the 2030 Agenda to ensure the benefits of protecting animal welfare for sustainable development will materialise.

¹³ Livestock, Environment and Development (LEAD) Initiative and the UN Food and Agriculture Organization (FAO), ‘Livestock’s Long Shadow: Environmental Issues and Options’ (2006) <<http://www.fao.org/docrep/010/a0701e/a0701e00.HTM>> accessed 07/06/2019.

¹⁴ Danielle Nierenberg, ‘Factory Farming in the Developing World’ (2003) 16(3) World Watch Magazine <<http://www.worldwatch.org/node/534>> accessed 07/06/2019.

¹⁵ John McInerney, ‘Animal Welfare, Economics and Policy: Report on a study undertaken for the Farm & Animal Health

Economics Division of Defra’ (2004, DEFRA) <http://webarchive.nationalarchives.gov.uk/20110318142209/http://www.defra.gov.uk/evidence/economics/foodfarm/reports/documents/animalwelfare.pdf> accessed 07/06/2019, 18.

¹⁶ Cassidy E.M et al, ‘Redefining agricultural yields: from tonnes to people nourished per hectare’ (2013) University of Minnesota Environ Res Lett 8, 1

¹⁷ For more information on this, see Werner Scholtz, ‘Injecting compassion into International Wildlife Law via a Welfare-Centric Ethic. From Compassion to Conservation?’ (2017) 6(3) Transnational Environmental Law 463.

The Sustainable Development Goals and Trade

From 2000 to 2011 the share of (non-least developed) developing countries in global agricultural exports increased from 34 percent to 45 percent.¹⁸ Thus, agriculture's impact on sustainable development is increasingly being determined by farming practices in developing states that do not have the resources, expertise, or (in some cases) motivation to safeguard animal welfare. Animal welfare protection may be improved through cooperation with developed nations through bilateral or regional free trade agreements.

Such agreements must be enacted in compliance with WTO rules. The WTO's founding treaty refers to sustainable development in its preamble.¹⁹ Animal welfare, however, is not explicitly mentioned in any of the WTO agreements. Instead, the WTO's Dispute Settlement Body has set out the parameters for animal welfare protection in trade policy. A number of cases have been decided concerning conservation measures with impacts on animal welfare.²⁰ Only the *EC – Seal Products* case has directly tackled the issue of animal welfare. This case permits trade restrictions based on public moral concern for animal welfare.²¹

Developed countries may use access to their markets as leverage to encourage improvement of animal welfare in a developing country. This would ultimately benefit the developing country by increasing the attractiveness of their exports to countries that value

animal welfare. It also allows the developing country to receive technical assistance from developed countries that have established effective animal welfare regulations, thus enabling sustainable and animal welfare-conscious development.

There is merit in other approaches, but they have associated problems: WTO agreements between all 164 members (negotiations are stalled), unilateral measures (less cooperative), and international or private standards (non-binding).

Developed countries may use access to their markets as leverage to encourage improvement of animal welfare in a developing country.

The Association Agreement between the EU and Chile²² proves the potential effectiveness of the bilateral approach.²³ Amongst other things, the agreement sets up a Joint Management Committee to oversee harmonisation of animal welfare measures applicable to trade between the parties. The unit coordinator for the Chilean Ministry of Agriculture has said that this was an example of a “successful modus operandi” and that this has helped to highlight the

¹⁸ International Centre for Trade and Sustainable Development and World Economic Forum, 'Agriculture and Food Security: New Challenges and Options for International Policy' (2016) <https://www.ictsd.org/sites/default/files/research/WEF_Agriculture_and_Food_Security_POP.pdf>, 10.

¹⁹ Marrakesh Agreement Establishing the World Trade Organization (15 April 1994) LT/UR/A/2 <<http://docsonline.wto.org>> (WTO Agreement).

²⁰ Panel Report, United States - Import Prohibition of Certain Shrimp and Shrimp Products (1998) WT/DS58/R (US - Shrimp) Appellate Body Report, United States - Import Prohibition of Certain Shrimp and Shrimp Products (1998) WT/DS58/AB/R (US - Shrimp)

Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia (2001) WT/DS58/AB/R (US - Shrimp (Article 21.5 - Malaysia))

Panel Report, United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (2011) WT/DS381/R

Appellate Body Report, United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (2012) WT/DS381/AB/R

GATT Panel Report, United States - Restrictions on Imports of Tuna (unadopted, 1992) GATT BISD 39S

GATT Panel Report, United States - Restrictions on Imports of Tuna (unadopted, 1994) DS 29/R

²¹ For more information regarding the bounds of what is possible under WTO law, Iyan I.H. Offor and Jan Walter, 'GATT Article XX(a) Permits Otherwise Trade-Restrictive Animal Welfare Measures' (2017) 12(4) *Global Trade and Customs Journal* 158.

²² Chile was classed as a developing country when this agreement was first implemented but has now been promoted to developed country status.

²³ Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part (30 December 2002) OJ L 352/3.



“added value of animal welfare to livestock production.”²⁴

However, bilateral agreements can also cause problems for animal welfare if low welfare imports undermine domestic animal welfare standards. The availability of imports that do not safeguard animal welfare can also cause a chilling effect on domestic legislation, thus harming sustainable development.²⁵

For example, the EU has banned non-enriched battery cage egg farming since 2012.²⁶ However, the EU has now significantly increased imports of battery-farmed

eggs from Ukraine.²⁷ Shockingly, the EU has exported old battery cages to Ukraine to be used in battery-farming of laying hens.²⁸ For these reasons, it may be appropriate to restrict trade in certain circumstances to ensure effective animal welfare protection in pursuit of sustainable development.²⁹

Conclusion

Trade is essential to the implementation of the Sustainable Development Goals and it should be thoughtfully regulated with regard to animal welfare. This will prove particularly beneficial in overcoming a

²⁴ Cédric Cabanne, ‘The EU-Chile association agreement: A booster for animal welfare’ (2013, BioRes 7(1)) <<https://www.ictsd.org/bridges-news/biores/news/the-eu-chile-association-agreement-a-booster-for-animal-welfare>> accessed 07/06/2019.

²⁵ See Iyan Ofor, ‘The Chilling Effect of the World Trade Organisation on European Union Animal Welfare Protection’ (LLM Thesis, The University of Aberdeen 2017) and Iyan Ofor, ‘Chilling Effect of Trade on Animal Welfare’ (2017, Eurogroup for Animals) <<http://www.eurogroupforanimals.org/chilling-effect-trade-animal-welfare>> accessed 15/10/2017.

²⁶ Council Directive 99/74/EC of 19 July 1999 laying down minimum standards for the protection of laying hens [1999] OJ L203/53 (Laying Hens Directive), Art 5(2).

²⁷ This is in part due to the trade liberalisation entailed in the Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part (29 May 2014) OJ L 161/3.

²⁸ Iyan Ofor, ‘EU-Ukraine Trade and Animal Welfare’ (2017, Eurogroup for Animals) <<http://www.eurogroupforanimals.org/wp-content/uploads/EU-Ukraine-Trade-Animal-Welfare-Report-1.pdf>> accessed 07/06/2019.

²⁹ This must be done in accordance with the appropriate trade liberalisation and non-discrimination rules of the WTO, primarily found in the General Agreement on Tariffs and Trade (15 April 1994) LT/UR/A-1A/1/GATT/1 <<http://docsonline.wto.org>> (GATT), Arts I, III, XI, XX and XXIV.

lack of resources to protect animal welfare in developing countries. Especially as developing countries become increasingly significant in efforts to improve sustainable agriculture.

Last One Standing – Now Fallen: The Extinction of Sudan

Julie Boyd, Manchester Metropolitan University

“It is with great sadness that Ol Pejeta Conservancy and the Dvůr Králové Zoo announce that Sudan, the world’s last male northern white rhino, age 45, died at Ol Pejeta Conservancy in Kenya on March 19th, 2018”¹

‘Sudan, the Last Male Northern White Rhino, Has Died’ – that was the statement issued by the Ol Pejeta Conservancy in March 2018.²

It is now over a year ago since the death of Sudan. He died on 19th March 2018 at the Ol Pejeta Conservancy in Kenya, where he had spent his last years, before a decision was finally made by officials and his veterinary team from Dvůr Králové Zoo, Ol Pejeta and Kenya Wildlife Service to euthanize the 45-year-old rhinoceros, due to his failing health. Sudan was the last male northern white rhino on Earth, the rest of his species had been poached to extinction in the wild.

Sudan was born around 1973 or 1974 in South Sudan and was only about a year old when he was captured from the wild and taken to the Dvůr Králové Zoo in the former Czechoslovakia. In 2009, he was trans-located to the Ol Pejeta Wildlife Conservancy in Kenya.

Sudan’s death leaves only two of the northern white rhino subspecies alive on the planet, both of these being females. Najin, Sudan’s daughter born in 1989,

and Fatu, Najin’s daughter born in 2000, reside in the Ol Pejeta Conservancy in Laikipia County, Kenya protected by 24 hour armed guards. The death of Sudan was, or should have been a wake-up call, as his death no doubt has larger implications for rhinos and other wildlife species across the globe. Sudan symbolises a reminder that it was systematic poaching for rhino horn that led to the demise of the northern white rhino, which continues to decimate rhinos across the African continent.³

The poaching crisis of the 1970s and 80s, fuelled by demand for rhino horn in traditional Chinese medicine in Asia and dagger handles in Yemen, wiped out the northern white rhino populations in Uganda, Central African Republic, Sudan and Chad. The last remaining wild population made up of 20-30 rhinos in Garamba National Park in the Democratic Republic of Congo succumbed during fighting in the region during the 1990s and early 2000s.

By 2008, the northern white rhino was considered by most experts to be extinct in the wild.⁴ Subsequently, by the 1990s, there were only a few dozen northern white rhinos that had survived in the Garamba National Park in the Democratic Republic of Congo.⁵ The International Rhino Foundation began intensive

¹Elodie Sampere, Press Release: Ol Pejeta Conservancy, Nanyuki, Kenya, (20 March 2018) <https://www.olpejetaconservancy.org/the-last-male-northern-white-rhino-dies/> accessed 20 March 2018

² Lynsey Chutel, ‘Sudan, the Last Male Northern White Rhino, Has Died’ (*Quartz Africa*, 20 March 2018) <https://qz.com/africa/1233133/the-last-male-northern-white-rhino-has-died/> accessed 20 March 2018

³ World Wildlife Organisation, White Rhino, Facts <https://www.worldwildlife.org/species/white-rhino> accessed on

⁴ Olivia Bailey, Fauna and Flora International, Rhino Near Extinction: How Did We Get To This Point? (20 March 2018) <https://www.fauna-flora.org/species/northern-white-rhino> accessed on 08 April 2018

⁵ Stephanie Pappas, ‘Sudan, the Last Male Northern White Rhino, Has Died’, (*Live Science* 20 March 2018) <<https://www.livescience.com/62068-sudan-last-northern-white-rhino-dies.html>> accessed 20 March 2018

involvement with northern white rhino conservation in 1995, investing millions of dollars in an attempt to save the subspecies with more of a decade of intensive engagement in Garamba National Park.⁶

However, the Second Congo War in the late 1990s and early 2000s caused massive instability and human suffering in the country. The plight of rhinos and the need for rhino conservation was not considered a priority and as a result of increasing conflict, instability and lack of protection for rhinos, this last stronghold for wild northern white rhinos deteriorated into a major conflict zone. As a result, the Garamba Park suffered from repeated incursions from various militias, who took advantage of the rhinos with large scale poaching of rhinos and elephants to feed the illegal market in Asia and to raise funds for their fighting. In 2005, the program had to be terminated due to the risk to the lives of the park staff.⁷

The rhino-poaching crisis rapidly escalated between 2007 and 2015 when there was more than a 9000% increase in poaching in South Africa...

Despite the International Rhino Foundation investing a significant amount of funding to protect the Northern white rhino in Garamba National Park the species was lost when the Park became a conflict zone and

⁶ Dr Susie Ellis, IRF's History With Northern White Rhinos, International Rhino Foundation, <<https://rhinos.org/tough-issues/northern-white-rhino/>> accessed 04 March 2019

⁷ Dr Susie Ellis, IRF's History With Northern White Rhinos, International Rhino Foundation, <https://rhinos.org/tough-issues/northern-white-rhino/> accessed on 04 March 2019

⁸ Save the Rhino, Can We Save The Northern White Rhino, The Path To Extinction, (1 March 2017), <https://www.savetherhino.org/thorny-issues/can-we-save-the-northern-white-rhino/> accessed on 19 April 2019

⁹ Stephanie Pappas, Live Science Contributor, Sudan, the Last Male Northern White Rhino, Has Died, 20 March 2018. <https://www.livescience.com/62068-sudan-last-northern-white-rhino-dies.html> accessed on 20 April 2019

¹⁰ African Rhino Conservation Collaboration (ARCC), Statistics and Current Crisis <https://www.arcc.org.za/crisis/statistics-and-current-status> accessed on 28 April 2018

¹¹ Garamba National Park, State of Conservation, Analysis and Conclusion by World Heritage Centre and the Advisory Bodies

consequently the last rhino conservation programme in Garamba National Park effectively closed in 2006.⁸ In fact, the last documented sightings of northern white rhinoceroses in the wild were in 2006.⁹

The rhino-poaching crisis rapidly escalated between 2007 and 2015 when there was more than a 9000% increase in poaching in South Africa, according to the Kruger National Park poaching statistics.¹⁰ Tragically, the northern white rhino must now be considered extinct in the wild.¹¹

The survival of the world's rhinos is being seriously threatened by poaching driven by the demand for their horn in Vietnam, China and other countries of East Asia and the Arabian Peninsula.¹² Horn trafficking is undertaken by transnational organised crime networks, many of which are involved in other large-scale criminal activities, including trade in ivory, pangolins and big cats.¹³

In February 2019 the South African Department of Environmental Affairs, released the 2018 poaching numbers. Despite these numbers showing a decrease of 259, (1,028 rhino being poached during 2017), this should not necessarily indicate that rhinos are safe. It only highlights the fact that at least two rhinos were killed each day in 2018.¹⁴

The increasingly high prices fetched for rhino horn on the black market mean that ruthless criminal syndicates are heavily involved in rhino poaching. Unfortunately, this means that it is becoming

in 2016 <https://whc.unesco.org/en/soc/3365> accessed on 28 April 2019

¹² Paula Kahumbu, 'Rhino horn sales: banking on extinction' *The Guardian* (London 25 August 2017) <https://www.theguardian.com/environment/africa-wild/2017/aug/25/rhino-horn-sales-banking-on-extinction> accessed on

¹³ Environmental Investigation Agency Trust, *Illegal Trade Seizures: Rhino Horn Mapping the Crimes*, <https://eia-international.org/illegal-trade-seizures-rhino-horn/> accessed on 22 April 2019

¹⁴ Department of Environmental Affairs, South Africa, *Minister of Environmental Affairs Highlights Progress on the Implementation of the Integrated Strategic Management of Rhinoceros*, <https://www.environment.gov.za/progressonimplementatoinofintegratedstrategicmanagementofrhinoceros> accessed on 12 April 2019



increasingly expensive for both state and private landowners to protect their rhinos from poaching; huge sums of money are needed for intensive anti-poaching and monitoring patrols, including ranger salaries, technology such as micro-chips and drones and transport such as helicopters and vehicles. In fact, several private landowners in South Africa are considering disinvesting in rhinos, as they can no longer afford the cost of protecting them.

Over the past few years, it emerged that Vietnamese criminal gangs were taking advantage of South Africa's legal loopholes in trophy hunting, by recruiting individuals with no hunting background to pose as trophy hunters. The proxy hunters then bring back the legally obtained rhino horn to Vietnam where it is then destined to illegal markets. Overall Vietnamese citizens have hunted more than 400 rhino legally on privately-owned properties in South Africa since 2003. In April

2012, South Africa formally suspended the issue of hunting permits to Vietnamese citizens, which has led to a marked decline in rhino hunting applications from South-East Asian citizens.

Some have argued that – given the high numbers of rhinos which are being poached every year in South Africa – trophy hunting should be suspended, in order to prevent further (legal) depletion of overall rhino numbers.

On 13th April this year, the 5th Global March for Elephants and Rhinos (GMFER) 2019 took place in cities around the world, from London to Johannesburg joining in a huge Day of Action for endangered wildlife.¹⁵ The GMFER2019 was intentionally timed to take place before the Convention on International Trade in Endangered Species (CITES) Conference of the Parties (CoP18) in Colombo, Sri Lanka on 23 May to 3 June.¹⁶ The mission of the GMFER is to demand that

¹⁵ Global March for Elephants and Rhinos, GMFER's CoP18 Demands, (13 April 2019) <https://march4elephantsandrhinosaurs.org/> accessed on 15 April 2019

¹⁶World Wildlife Conference - the 18th meeting of the Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES #CoP18), to be held from 23 May to 3 June 2019 in Colombo, Sri

world leaders take action to stop the poaching of elephants and rhinos and to end the trade in ivory and rhino horn. One of the key tasks for GMFER2019 will be to urge CITES delegates to vote at CoP18 for maximum protections for endangered species. These will include:

1. Exempt all animals listed on Appendix I and II from trophy hunting and trade in their body parts and live animals.
2. Demand that Japan and the EU close down their domestic ivory trade.
3. Ban animals with Appendix I and II status from captive breeding; their body parts/bones fuel the illegal wildlife trade and the demand for endangered species.
4. Vote in favour of proposals to up list elephants to Appendix I and giraffes to Appendix II.
5. Reject proposals by certain SADC¹⁷ countries to re-open trade in ivory and other elephant body parts and in rhino horn.
6. Establish greater transparency in CITES' issuing of permits, specifically permits for hunting trophies and export of live endangered species.

Conclusion

Unfortunately, there is no simple solution to solve the current rhino crisis. A combination of approaches and incentives is essential if there is to be any success in conservation of the remaining species. It is a multi-faceted problem, which requires multi-faceted approaches. The immediate priority must be increased security for rhino populations, whether in the wild or within the National Parks but this has substantial financial costs. In addition, there must be more engagement with the local human communities that live in the key rhino areas to ensure that they can benefit from education, employment, and training.

There has to be also proactive translocations to establish new breeding groups and maintain genetic diversity for the health of future rhino populations. There is also the need to for efforts to build capacity in

Lanka. PRESS RELEASE CITES CoP18 will be held in Colombo, Sri Lanka in May 2019
https://cites.org/eng/news/pr/CITES_CoP18_will_be_held_in_Colombo_Sri_Lanka_in_May_2019_14122017 accessed on 15 April 2019

African and Asian countries so that any conservation programmes can be employed efficiently and effectively. It is imperative that stronger and more robust political pressure is established to enforce international agreements and implementation of stronger legislation regarding wildlife trafficking which needs to be followed by proper deterrent sentencing for those convicted of rhino poaching and horn smuggling; and demand-reduction programmes in user countries, primarily Vietnam and China.

It is imperative that stronger and more robust political pressure is established to enforce international agreements and implementation of stronger legislation regarding wildlife trafficking...

The northern white rhino subspecies is now functionally extinct from this planet. Whether or not the remaining other rhino species can avoid extinction is hard to determine. The standard response that 'lessons will be learnt' is an empty mantra unless action is actively taken. The greatest lesson is that we can never let this happen again with any other rhino species and we have to prevent this happening with the rest of the animal species that share our planet.

"We on Ol Pejeta are all saddened by Sudan's death. He was a great ambassador for his species and will be remembered for the work he did to raise awareness globally of the plight facing not only rhinos, but also the many thousands of other species facing extinction as a result of unsustainable human activity. One day, his demise will hopefully be seen as a seminal moment for

¹⁷ SADC, The Southern African Development Community is an inter-governmental organization headquartered in Gaborone, Botswana. Its goal is to further socio-economic cooperation and integration as well as political and security cooperation among 16 southern African states.

conservationists world-wide," Richard Vigne, Ol Pejeta's CEO, in a statement on Facebook.¹⁸

Sudan did not die as a result of poaching or trophy hunting, but the fact is that his species was so threatened by poaching and trophy hunting that his demise must serve as a hallmark to remind us of other species who are threatened and face extinction due to poaching or trophy hunting such as the iconic Cecil the Lion who was killed in July 2015.¹⁹

¹⁸Matthew Taylor and Hannah Ellis-Peterson, Last male northern white rhino's death highlights 'huge extinction crisis', March 20 2018 Guardian Online <https://www.theguardian.com/environment/2018/mar/20/last-male-northern-white-rhinos-death-highlights-huge-extinction-crisis> accessed on 28 April 2019

¹⁹ Paula French, Zimbabwe's 'iconic' lion Cecil killed by hunter (BBC News Africa 27 July 2015) <https://www.bbc.co.uk/news/world-africa-33674087> accessed on 28 April 2019

Ashifa Kassam and Jessica Glenza, Killer of Cecil the Lion was Dentist from Minnesota, claim Zimbabwe Officials: Zimbabwe Conservation Task Force alleges trophy hunter shot one of Africa's most famous lions near Hwange national park The Guardian 28 July 2015 <https://www.theguardian.com/environment/2015/jul/28/killer-of-cecil-the-lion-was-american-zimbabwe-officials-claim> accessed 28/04/2018

Explain the potential significance of granting legal personhood to animals in the UK

Sam Groom, Annual Student Essay Competition Winner 2019

Introduction

In recent years, the achievement of legal personhood for nonhuman animals (“animals”) has been the ‘holy grail’ for lawyers seeking to secure for animals the legal protections they deserve.¹ The Nonhuman Rights Project is the most prominent organisation working towards this goal, in the United States and, increasingly, abroad, describing animals’ legal thinghood as ‘the single most important factor preventing humans from vindicating their interests.’² It is easy to understand why legal personhood is considered so important. As Will Kymlicka writes, ‘Bills of rights typically take the form of stating that “all persons have a right to X,” and so the most secure way to ensure animals have rights is to recognize animals as persons.’³

The granting of legal personhood to natural entities such as Te Urewera and the Whanganui River in New Zealand has further highlighted this means of endowing what is threatened with protective rights. Less clear are the consequences that granting legal personhood to animals would have in the United Kingdom, where there is no bill of rights. This scenario can be brought into focus by addressing two questions. First, what is legal personhood? Second, in light of this, what would animal personhood mean in the context of

the UK? Although these questions have diffuse answers, they help to establish whether the quest for animal personhood should be a priority for animal advocate lawyers in the UK.

There is consensus among animal law scholars that animal personhood would come about at the end of a long journey. The situation is called ‘unlikely,’⁴ ‘wildly utopian,’⁵ and a decade ago even Steven Wise, director of the Nonhuman Rights Project, writes that the time is not yet ripe for it.⁶ But a distant hope can and should be analysed and evaluated. The following is based upon the premise that a court decision declares that animals (for the sake of argument, those animals protected by the Animal Welfare Act,⁷ which is to say vertebrates other than man) are legal persons. Legislature or decrees establishing animals’ legal personhood are not considered, since these tend to be symbolic, as in the Swiss and European cases.⁸

What is Legal Personhood?

Although, or because, it is a fundamental particle of UK law, the legal person is a slippery concept without a standard definition. Theories compete to pin it down, and many of these theories themselves posit imprecise models of personhood. In order to determine the significance of granting legal personhood to animals,

¹ Richard Cupp (2007), ‘A Dubious Grail: Seeking Tort Law Expansion and Limited Personhood as Stepping Stones Toward Abolishing Animals’ Property Status’, 60:1 Southern Methodist U. L. Rev. 3, 3.

² Steven M. Wise, ‘Litigation’ (*Nonhuman Rights Project*) <www.nonhumanrights.org/litigation>, accessed 24 January 2019.

³ Will Kymlicka (2017), ‘Social Membership: Animal Law beyond the Property/Personhood Impasse’ 40 Dalhousie L. J. 123, 130.

⁴ Erica A. Tatom (2015), ‘Animals in the Law: Occupying a Space Between Legal Personhood and Personal Property’, 31 Journal of Environmental Law and Litigation 147, 166.

⁵ Kymlicka, *supra*, 131.

⁶ Steven M. Wise (1999), ‘Animal Thing to Animal Person—Thoughts on Time, Place and Theories’, 5 Animal L. 61, 66.

⁷ Animal Welfare Act 2006, s. 1.

⁸ Bundesverfassung [Constitution] 18 April 1999, SR 101, art. 120, para. 2 (Switz.); Consolidated Version of the Treaty on the Functioning of the European Union, art. 13, 2008 O. J. C115/47.

we must determine exactly what legal personhood connotes, and notably whether it necessarily includes any fundamental rights.

The legal personhood of corporations, the locus of most discussion and explicit developments in the law relating to personhood, presents an attractive analogy for personhood as a whole. It has meant different things at different times in history. John Dewey wrote of corporate personhood that “‘person’ might legally mean whatever the law makes it mean.”⁹ The concession theory, contract or aggregate theory, and real entity theory of corporate personhood have each imported different treatment of corporations by the US courts, and have been motivated at least in part by policy more than ontological concerns. Real entity theory, for example, has given corporations powerful Bill of Rights and Fourteenth Amendment protections in an age where corporate voices often speak the loudest in courtrooms and legislatures. Elizabeth Pollman sees in this series of developments an emptiness in the concept of corporate personhood: ‘the concept alone does not speak to whether corporations should have a particular right; it only provides a starting point of analysis.’¹⁰

Wise’s characterisation of legal personhood is similar to Pollman’s view of corporate personhood in this respect. In his Animal Rights Pyramid, legal personhood occupies Level 1, the lowest common denominator of all animals that are considered as more than things.¹¹ He writes that ‘legal personhood is the capacity to possess at least one legal right,’ without necessarily including any legal rights. (A legal right would raise the animal to Level 2.) While this at first seems to contradict the common assumption that a legal person is synonymous with a ‘rights-bearing subject’ (Kymlicka) or a ‘rights-holder’ (Gwendolyn J. Gordon),^{12,13} there is no practical difference. While Level 1 and Level 2 of Wise’s Pyramid may be conceptually distinct, there is no case in which a court could recognise an animal’s personhood without simultaneously recognising a legal right that animal possesses. Empty personhood without rights does not have any legal consequences, so it would not arise in the scenario under investigation. So any significant

granting of personhood to animals in the UK would need to be accompanied by the recognition of certain rights owed to those animals.

What would personhood mean for animals in the UK?

An answer to the second question must therefore take account of two things. What would be the impact of personhood itself for animals, and what would be the impact of any rights accorded simultaneously with personhood for animals?

...any significant granting of personhood to animals in the UK would need to be accompanied by the recognition of certain rights owed to those animals.

If it is correct that personhood is simply the capacity to have a legal right, the mere title of person would not assist animals under UK law. There is no bill of rights or analogous document explicitly according rights to all persons. The closest thing to that is the Human Rights Act, which, although not containing explicit reference to the human species in the Articles themselves, applies only to human beings by the strong indication of its title.¹⁴ Any benefit accorded to animals would be by virtue of the rights found by the court alongside personhood.

It is difficult to imagine that the court would find very important rights belonging to all animals upon the first occasion where they are recognised as having any rights at all. It is more likely that a right to some minimum level of protection would first be discovered, such as a right not to be gratuitously harmed, and that the law would develop incrementally from that point. Of course, a particularly sympathetic or open-minded judge could conceivably completely overturn the legal basis for the animal-industrial complex in one

⁹ John Dewey (1926), ‘The Historic Background of Corporate Legal Personality’, 35 Yale L. J. 655, 656.

¹⁰ Gwendolyn J. Gordon (2018), ‘Environmental Personhood’, 43 Colum. J. Envtl. L. 49, 69.

¹¹ Steven M. Wise (2010), ‘Legal Personhood and The Nonhuman Rights Project’, 17 Animal L. 1, 2.

¹² Kymlicka, *supra*, 130.

¹³ Gordon, *supra*, 50.

¹⁴ Human Rights Act 1998, sched. 1.



judgment, taking inspiration from Lord Mansfield in *Somerset v Stewart* (1772).¹⁵ However, the more sudden and stark the judicial diversion from the status quo, the more likely that Parliament would step in and remove the judge-made rights by legislation. The supremacy of Parliament over the courts is a significant difference between the UK and countries such as the USA whose judges can base their decisions upon constitutional rights. Incremental advances in legal animal rights might therefore be desirable for sustainable progress. As Wise writes in this connection, ‘Like some knots, the law can either loosen, or tighten, under pressure.’¹⁶ Whether loosening or tightening would depend upon political and social conditions rather than upon strictly legal considerations. Gordon makes this point with regard to environmental personhood.¹⁷ It would be difficult for animal advocates to recover from the position of having a favourable judgment cancelled out by democratically-elected legislators.

Instead of considering a declaration of animal personhood as merely vulnerable to public opinion, advocates could view it, and use it, as a shaping force. A judgment granting legal personhood to animals could have more symbolic than practical benefit in the campaign to improve animals’ lives, feeding into the legal and other challenges to the status quo. It has been noted that treating corporations as “people” strikes one, outside of a legal context, as odd.¹⁸ This sentiment nourishes the opinion that the law treats corporations in an unjustifiably favourable matter. With animals, it is the opposite situation, with more and more humans considering animals naturally as “people”. A judicial ruling to this effect could strengthen the popular desire to treat animals better. Further, the courts are connected in the popular imagination with justice. Legal changes sometimes come ahead of social changes, anticipating them or hastening their arrival. Public support for the death penalty for murder dipped below 50% for the first time fifty years after its

¹⁵ *Somerset v Stewart* [1772] 98 ER 499.

¹⁶ Wise (1999), *supra*, 62.

¹⁷ Gordon, *supra*, 88.

¹⁸ *ibid*, 70.

abolition by statute.¹⁹ Legal recognition of animal personhood and rights, however few, could constitute a significant milestone on the way to more complete protections.

Conclusion

The opportunities and limitations posed by the granting of legal personhood to animals in the UK make the battle for it a high-risk but high-potential endeavour. The obstacles to achieving it, and the best ways to overcome them, are for another discussion at greater length. It is clear, however, that the campaign for animal personhood best seen and waged as part of the broader struggle against abusively anthropocentric societies. Within the law, incremental welfarist reforms must be won while this greater prize is sought; beyond the law, political pressure, education and developments in cellular agriculture will all help to turn the tide against the assumption that animals are ours to use. If they take their place as one among the many missions launched by human beings who care about animals, attempts to have legal personhood granted to animals in the UK will be a valuable means by which legal protection can be granted to all who deserve it.

¹⁹ 'Support for death penalty drops below 50% for the first time' (*BBC News*, 26 March 2015) <www.bbc.co.uk/news/uk-32061822>, accessed 24 January 2019.

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/animalwelfare-serviceanimals/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, its 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 I-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,

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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 Justice⁸ 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

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.

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 April⁹. 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 situation¹⁰, the publication of interim licences for three species¹¹ 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

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.

GL04 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 Licences 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 below¹².

- 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 are 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 Licences¹⁵. 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

concern¹⁶ 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 so¹⁷. 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 Crows¹⁸. 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.

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 arose¹⁹. 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 globally²¹, 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.

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

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 harriers²². Diversionary feeding was an

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 detailed 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 Regulation²⁵.”* 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 any 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 Scheme²⁶".

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.

Scottish Driven Grouse Moor Shooting: A Case for Reform?

Scott Blair, Advocate at Terra Firma Chambers

Introduction

Driven grouse moor shooting is a topical issue. In November 2018, the Royal Society of Edinburgh saw the public launch of a campaign by a coalition groups drawn from the spheres of animal welfare (Raptor Persecution UK; OneKind; League Against Cruel Sports); environmental activism (Friends of the Earth Scotland) and social reform (Commonweal).

The campaign, titled 'REVIVE: The Coalition for Grouse Moor Reform' was introduced in a keynote speech by none other than Chris Packham. He stressed that in the view of the coalition, what is happening on, and to Scottish grouse moors calls for reform. REVIVE argues that the limited current legal controls are not properly enforced but also that legislation may be needed.

Whilst one can readily understand that there is an animal welfare case to be made in relation to an activity which involves the killing of birds, there are wider issues about the environment in which those birds and other animals, such as the mountain hare, dwell. To quote from the Foreword to the case made by REVIVE:

But what of that landscape? Grouse moors have only been with us since Victorian times. It's too easy to look out over expanses of barren, depopulated and exposed moors and think that's what the uplands naturally look like. But they look that way because misguided human intervention has made them look that way. And they've been made that way to ensure that there are as many red grouse as possible to shoot for recreation. They are an amazing national resource which is being

squandered, one of Scotland's biggest failures of potential and an economic loss to us all¹.

The Moorlands and Driven Grouse Shooting

The Red Grouse is a sub-species of the Willow grouse. It mainly eats heather. Since around 1850 moorland in Scotland has been managed for the purposes of red grouse-shooting. To create suitable moorland, a series of changes took place. These included the construction of access infrastructure, the burning of heather moorland ("muirburn"), and of concern to animal welfare, the extermination of species including the white-tailed eagle, goshawk, and red kite through poisoning, trapping and shooting.

These habitat modifications were made for both red grouse shooting and driven grouse shooting. The latter involves the wild red grouse being 'driven' by beaters towards a static line of shooters. This relies upon the availability of high numbers of grouse.

Grouse moor managers use three elements of management to ensure a supply of Red Grouse. These are -

- Habitat manipulation (rotational burning of heather) to produce nutritious young heather for grouse to eat and also older heather to provide nesting cover and predator protection;
- Parasite control, including the medicating of the grouse with a veterinary drug dispensed via medicated grit and direct dosing. This is in parallel with the mass culling of mountain hares that host some parasites;

¹ Dr R. Tingay and A. Wightman, REVIVE : The case for reforming Scotland's Driven Grouse Moors. Accessible at <https://www.revive.scot/>.

- Lethal predator control – such as for foxes, weasels, stoats, crows.

Driven grouse moor management has been the subject of increasing concern. This resulted in the Scottish Government commissioning the Werritty Review on the environmental impacts of grouse moor management and the costs and benefits of large shooting estates to Scotland's economy and biodiversity. This is due to report this year.

Current Law

As a wild bird, the red grouse is *res nullius* (ownerless property). It had status as a game bird but this was ended by the Wildlife and Natural Environment (Scotland) Act 2011. This removed the distinct legal category of game species and added the species to Schedule 2, Part 1 of the Wildlife and Countryside Act 1981 as a bird that may be killed or taken (captured).

The management of red grouse is mainly under the control of those who own the land upon which the bird nests and feeds and the law only has a role in regulating matters such as the species that can be killed, the seasons and the hunting method, together with some regulation of management activities such as moor burning or muirburn. Apart from specific legislative provisions, and wider environmental and wildlife law, there is no specific body of law on grouse shooting. By contrast, fourteen other European countries regulate game bird hunting through legislation, including the licensing of individual hunters linked to strict requirement to report harvest quotas and bags. Such licences can generally be revoked if the legislation is breached. Penalties can be imposed for serious breaches. In addition, many of these countries, hunters must pass a two-part practical and theoretical examination to qualify for a hunting licence.

One option under consideration is that mooted by the Scottish Raptor Study Group. In 2016 they lodged a petition with the Scottish Parliament calling for a state-regulated licensing system for all game bird hunting in Scotland. The Werritty Review is also currently considering a potential licensing option as part of a

wider commissioned review of grouse moor management.

The Werritty Review is currently considering a potential licensing option as part of a wider commissioned review of grouse moor management.

REVIVE has identified a number of concerns arising from the absence of any comprehensive system of regulation. These are discussed below.

Heather Burning or 'Muirburn'

Grouse moor managers routinely burn patches of heather (known as 'strip muirburn') to create a diverse patchwork habitat to favour red grouse. This is governed by the recently-revised Muirburn Code produced by Scotland's Moorland Forum in 2017. This provides a combination of statutory requirements and 'good practice' guidelines². Muirburn is permitted only during the statutory season (1st October to 15th April inclusive) although it can be extended to 30th April with landowner's permission. Scottish Natural Heritage ("SNH") may also licence muirburn beyond the season in certain circumstances.

However, Code enforcement (apart from the seasonal restrictions) is limited. There have been suspected breaches of it such as the burning out of hen harrier nests on heather banks and of golden eagle eyries. These have been explained by grouse shooting representatives as being due to accidents relating to muirburn.³ It has also been argued that excessive muirburn has also been suggested as a factor in the long-term decline of breeding merlin on grouse moors in the Lammermuir Hills⁴.

Medicated Grit

Population fluctuations of red grouse occur, in part, because of a parasitic worm, the nematode worm, *Trichostrongylus tenuis*, a gut parasite causing

² Hill Farming Act 1946, section 23.

³ Heavisides et al, *Population and breeding biology of merlins in the Lammermuir Hills*, *British Birds* 110 at pp. 138-154

⁴ *ibid*

strongylosis. One of the intensification methods adopted has been the use of medicated grit to reduce the incidence of the worm and so avoid such fluctuations⁵.

The grit is dispensed via trays distributed across the moor. The use of grit is supposed to be administered under veterinary supervision and only as annual worm counts dictate. Even so there is no required system of monitoring for the use of the grit, including in particular, monitoring of the 28 day withdrawal period to ensure the veterinary drug *Flubendazole* does not enter the human food chain via any shot grouse⁶.

Predator Control

Red grouse are a ground-nesting species, and as such are highly vulnerable to aerial and ground predators. Under European and Scottish law all wild bird species are protected⁸, but the killing of 'pest' bird species by 'authorised persons' is permitted and regulated either by individual licences or by General Licences issued by SNH.⁷

Domestically the key legislation is found in the Wildlife and Countryside Act 1981 as amended by the Nature Conservation (Scotland) Act 2004. In European terms, the Birds Directive which is the short name for Directive 2009/147/EC of the European Parliament, provides protection. The 2009 Directive is the 'codified' or consolidated version of Council Directive 79/409/EEC. This was the original legislation that was enacted in 1979. It was then amended many times before the current version came into force. The Wildlife and Countryside Act 1981 was enacted to implement the Birds Directive and also the Bern Convention- Council Decision 82/72/EEC of 3 December 1981 concerning the conclusion of the Convention on the conservation of European wildlife and natural habitats in Great Britain. Therefore, all wild birds in Great Britain are protected today under the Wildlife and Countryside Act 1981.

⁵ Game Conservancy Trust, *Strongylosis Control in Red Grouse: current best practice guidelines for the management of strongylosis in red grouse* (2004).

⁶ *ibid*

⁷ Licences are granted under section 16 of the 1981 Act. There are three types of General Licence which are tied to the

General Licences avoid the need for individual licensing, which means that anyone without a recent conviction for wildlife crime may kill certain bird species under certain circumstances without needing any prior permission (except the landowner's), training or certification of competence, although General Licences do define conditions of use including authorised trap designs, restrictions on manner of use, provisions for the welfare of decoy birds, and the tagging of traps to identify the owner.

...enforcement of breaches of the General Licence conditions is especially problematic, particularly on large commercial driven grouse moors where multiple gamekeepers are employed.

Failure to comply with these conditions may constitute an offence under various wildlife and animal welfare legislation. However, many of these conditions have been widely and repeatedly criticised as being ambiguous and wide open to misuse and abuse.⁸

The extent of lethal bird control on driven grouse moors is unknown as there is no statutory requirement to report the number killed under a General Licence with the exception of the herring gull.

There are problems. Quite apart from having no idea how many birds are killed, or even how many traps are in use, there is no routine inspection of traps by the statutory authorities and no register of individual trap operators.

However, enforcement of breaches of the General Licence conditions is especially problematic, particularly on large commercial driven grouse moors where multiple gamekeepers are employed.

licensing purposes which are broadly conservation of wild birds, damage prevention and disease control

⁸ See for example RSPB Scotland, *The Misuse and Abuse of Crow Traps in Scotland* accessible at <https://vimeo.com/196554563>.



General Licences have of course been the subject of litigation in England. The group, Wild Justice brought judicial review proceedings in relation to three General Licences. Wild Justice argued that the three general licences (GL04, GL05, and GL06) had been granted unlawfully as Natural England had not complied with section 16(1A) of the 1981 Act⁹.

Their case was that Natural England failed to make its own assessment whether there were no other satisfactory solutions and in addition that it had unlawfully delegated responsibility for deciding that matter to Authorised Persons using the licences. Natural England accepted that there was merit in the challenged and it agreed to revoke the licences. At the time of writing SNH is understood to be considering the implications of this for General Licences issued in Scotland¹⁰ and it has

⁹ Section 16(1A) of the Wildlife and Countryside Act 1981 provides-
(1A) The appropriate authority— (a) 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;...

announced that it will go to consultation on General Licences in the summer¹¹.

Control of Mammals

The lethal control of some mammals notably foxes, stoats, weasels is widely undertaken on driven grouse moors. This is not covered by a General Licence. Accordingly moor managers may kill as many of these species as they wish, whenever they wish, and there is no requirement to report on the number killed.

The mountain hare is Britain's only native hare and has an important ecological role in the uplands, especially as a source of prey for top predators of conservation concern such as golden and white-tailed eagles. It is listed on Annex V of the 1992 EU Habitats Directive which requires member states to maintain populations in favourable conservation status. It is also protected

¹⁰ For a statement of the SNH position in light of the English case see <https://www.nature.scot/general-licence-status-scotland>.

¹¹ See <https://raptorpersecutionscotland.wordpress.com/2019/05/21/snh-announces-consultation-on-general-licences/>

by a closed season under the Wildlife and Natural Environment (Scotland) Act 2011, which makes it an offence to kill a mountain hare in the closed season (1st March to 31st July) without a licence from SNH. Even so mountain hares are also killed in large numbers on many moors in Scotland.

The argument for the cull of mountain hares is that this is a means of controlling the viral disease 'Louping-ill' (LIV) in red grouse which can be transmitted by ticks that are hosted by mountain hares and other mammals and can affect grouse chick mortality. This practice is controversial as some studies have found there to be *"no compelling evidence base to suggest culling mountain hares might increase red grouse densities."*¹²

Illegal Raptor Persecution

Full legal protection for all raptors followed with the enactment of the Protection of Birds Act 1954 as amended. Further legislation was also introduced during this period including a complex array of Scottish, UK and European-specific laws¹³. These afforded raptor species the high level of legal protection they have today, making it an offence to poison, shoot, trap, destroy nests or recklessly or deliberately interfere with a nesting raptor. Even so there is concern that the illegal killing of raptors takes place on grouse moors as a form of predator control.

Moorland and Hillside Infrastructure

Hilltracks ease access for grouse moor management purposes. However they can also have major visual and environmental impacts, particularly on the wilder landscapes for which Scotland is so highly-regarded. Private tracks constructed for agriculture or forestry use have been allowed under Permitted Development Rights (PDRs) since 1947, which exempts them from

¹² Harrison *et al*, *Culling Wildlife hosts to control disease: mountain hares, red grouse and louping ill virus*. *Journal of Applied Ecology* 47(4) at pp. 926-930.

¹³ The main protections are found in the provisions of the Wildlife and Countryside Act 1981 and the Birds Directive. Section 1 of the 1981 Act makes general provision for the protection of wild birds, their eggs and nests. Further residual protection might also exist under the Animal Health and Welfare (Scotland) Act 2006 insofar as a wild bird has been brought under the control of a person.

¹⁴ Lead based ammunition is the most significant unregulated source of lead deliberately emitted into the environment-see

the normal planning process. This has allowed tracks to be constructed without application for planning permission, the satisfaction of minimum standards, or any need to inform local authorities, statutory bodies, or the general public. From an animal welfare perspective negative impacts can include increased disturbance to wildlife.

Bird Scaring

Another technique that has emerged over recent years is the deployment of propane powered gas guns or scare cannons. These devices produce a periodic booming noise to cause a flight reaction in pigeons and geese etc. to remove them.

Lead Shot

Grouse are killed with shotguns using lead shot. Lead is a highly toxic metal that occurs naturally but has been widely distributed by human activity and it is known to pose significant threat to human health and wildlife health¹⁴. REVIVE consider that no 'safe' blood lead level in children has been identified below which negative health effects cannot be detected¹⁵ but all game birds (including red grouse) appear to be exempt from statutory testing for lead shot, in sharp contrast to other meat types destined for human consumption¹⁶.

Overview

There are of course contrary views to those maintained by REVIVE, however one of the aims of REVIVE is to open up the debate from all stakeholders.

However, at a glance one can see that in general terms this activity is subject to a very light form of regulation. Major aspects of it are not subject to any form of legal control at all and Scotland (and in indeed the wider UK) would seem to stand apart from the general picture

Wildlife and Human Health Risks from Lead-Based Ammunition in Europe: A Consensus Statement by Scientists-accessible at <https://www.zoo.cam.ac.uk/>.

¹⁵ Centre for Disease Control and Preventions, Response to advisory committee on childhood lead poisoning prevention recommendations-accessible at <https://www.cdc.gov/nceh/lead/ACCLPP/CDCResponse-Lead-Exposure-Recs.pdf>.

¹⁶ M.I. Avery, Lead Week. Accessible at <https://markavery.info/2016/01/29/lead-week-20-pbweekmia>.

found in other European countries where detailed legal control of the hunting of game birds is the norm, not the exception. Controls via a licensing regime would seem to be the most obvious way of tackling many of the concerns identified by REVIVE but as with all such regimes there needs to be an adequately evidenced basis for it.

This paper can only summarise areas of possible concern and space precludes greater coverage and views contrary to those advanced by REVIVE. However, it is fair to say that contributions from all sides will heighten the debate. In the view of the writer at least, it appears unlikely that driven grouse moor shooting and associated practices will remain subject to relatively light touch regulation as we move further forwards in a new vision for the rural environment in a 21st century Scotland.

What can Lawyers do for Animals? Education in and Practice of Animal Law in Scotland – Event Report

Iyan Offor & Julie Gibson, PhD Candidates at the University of Strathclyde

Introducing the Landscape of Animal Law in Scotland

Scotland's law schools are failing to educate its students about animal liberation: one of the defining social justice movements of our time.¹ In Scotland, animals and their defenders are left in dire need of legal expertise. This is because a lack of education in animal law has led to a dearth in legal research and practice of animal law in Scotland. It doesn't have to be this way.

In March 2019 the UK's first animal protection law firm, Advocates for Animals, opened its doors in London.² In the United States, animal law is taught at law schools country-wide. Lewis & Clark law school in Portland, Oregon, hosts the world's first and only LLM programme in animal law.³ So, why is it that Scotland has fallen so far behind and what can be done to change this?

In order to begin to tackle these questions, a panel discussion and workshop were held at the University of Strathclyde on 29 April 2019.⁴ This event was co-hosted by the Strathclyde Centre for Environmental Law & Governance (SCELG) and the UK Centre for Animal Law (A-LAW). SCELG has begun to provide specialised seminars in animal law on the basis of doctoral research conducted at the centre. Meanwhile, A-LAW

has been instrumental in the advancement of animal law in the UK. A-LAW provides its members with networking and career-building opportunities in animal law, student engagement and support, as well as publishing the UK Journal of Animal Law and a student e-journal on animal law. A-LAW soon hopes to establish an A-LAW steering committee and events series in Scotland. The event held at the University of Strathclyde invited animal law and environmental law academics, practitioners, and students to critically reflect on the education in and practice of animal law in Scotland. In that regard, participants reflected on the question: what can lawyers do for animals? The participants were asked to recognise the necessity of maintaining a 'radical openness of mind' in order to work towards justice for animals.⁵

This report follows up on that event in two parts. First, this report distils key ideas that were established at the event through presentations by invited speakers and a workshop discussion. Second, this report maps out a suggested road forward for Scotland's law schools and its legal academics and practitioners.

Scotland's Lack of Animal Lawyers

The Problems with Animal Protection in Law

In Scotland, as in much of the world, animals are owned as property.⁶ Libertarian law has created a host of

¹ For reference to animal rights as a social justice issue, see: Robert C Jones, 'Animal Rights is a Social Justice Issue' (2015) 18(4) Contemporary Justice Review 467.

² See: <https://advocates-for-animals.com/>.

³ See: https://law.lclark.edu/centers/animal_law_studies/.

⁴ See: <https://www.engage.strath.ac.uk/event/580>.

⁵ Gary L Francione, *Rain without Thunder: The Ideology of the Animal Rights Movement* (Temple University Press 1996) 8.

⁶ Theft Act 1968 (UK), Art 4(4); Criminal Damage Act 1971 (UK), Art 10(1).



problems for animals: humans are free to do as they wish, subject to limited legal regulation. This has meant, in practice, that practices such as fox hunting or factory farming have become entrenched within society and they become hard to oppose. It is typically assumed that fox hunting is banned in Scotland. However, the Protection of Wild Mammals (Scotland) Act has such extensive gaps that fox hunting largely continues as it did before the legislation came into force.

At the same time, different species are offered certain protections in the law. The level of protection varies widely depending on the human use to which the relevant animal is subject. Domestic pets are typically afforded the strongest protection, followed by those charismatic mega-faunas treated as totemic objects (such as whales or elephants). Farm animals, sea creatures, and pests, for example, trail far behind in

terms of legal protection. This is a display of moral schizophrenia in our legal approach to animals. Thus, in Scotland, it is a crime to neglect the welfare of domesticated animals⁷ whilst poor welfare practices, such as factory farming and fox hunting, are permitted.

The welfare of Scotland's animals is regulated by law at multiple levels. Animal welfare is regulated domestically and at EU level.⁸ There is also a growing movement for global governance of animals.⁹ However, vast gaps remain in the law. Further, the welfare protection that is enacted in law is often inadequately drafted or enforced. In order to explore these issues and to identify what lawyers can do to improve the lives of Scotland's animals, two case studies were introduced at the beginning of a workshop discussion.

First Libby Anderson, policy consultant at OneKind, led a discussion regarding fox hunting in Scotland.

⁷ Animal Health and Welfare (Scotland) Act 2006, s. 19.

⁸ Brexit has resulted in some good scoping work that sets out clearly the spread of animal law between the UK and the EU. For one such text, see: UK Centre for Animal Law and Countryside Link, 'Brexit: getting the best deal for animals' (2017), available at: https://www.wcl.org.uk/docs/Link_A-law_Brexit_Animal_Welfare_Summary_Oct17.pdf.

⁹ Anne Peters, 'Global Animal Law: What It Is and Why We Need It' (2016) 5:1 Transnational Environmental Law 9; and Anne Peters, 'Liberté, Égalité, Animalité: Human- Animal Comparisons in Law' (2016) 5:1 Transnational Environmental Law 25

Anderson noted how wildlife legislation provides much more limited forms of protection to animals compared to that provided for domesticated species. This moral schizophrenia is owed to the differing ontologies we have developed surrounding certain animals.

In this respect, Anderson noted how foxes are referred to as sly, greedy and cunning in literature and in popular media. Our governance of them centres upon human motives to 'control' or 'manage' their populations, whilst paying little attention to the needs of the fox. Our conception of protecting wild animals often equates to leaving them alone, which requires much less positive action than what we might consider appropriate for domestic species. It was noted that the Scottish Government intends to set up an Animal Welfare Commission which would consider, *inter alia*, issues of wildlife welfare. However, there is no clear direction regarding what is considered adequate welfare protection for wild animals.

Following this discussion, Alice Di Concetto, Farm Animals Programme Officer at Eurogroup for Animals, introduced issues regarding the welfare of dairy cows kept in Scotland and the rest of the European Union. At EU level, no species-specific legislation exists for dairy cows. The only legislation that can be used to protect the welfare of dairy cows is the General Farming Directive 1998.¹⁰ This is too broad to motivate effective improvements to welfare in most cases.

In practice, the consolidation of the dairy industry has meant that more and more animals are being kept on fewer and fewer farms. At the same time, milk yields are increasing from individual cows and unproductive ('spent') animals are slaughtered.

These case studies helpfully framed the question: what can lawyers do for (these) animals (in Scotland)?

A Role for Lawyers in the Push for Better Animal Law¹¹

Libby Anderson was the first to address this question, providing insights from a policy perspective. Anderson's presentation identified the way in which campaigning for animal welfare protection, policy and law flow into one another. Devolution and the establishment of the Scottish Government was

identified as a key moment in the history of animal governance in Scotland. This is because almost all animal welfare legislation has become a devolved issue, though regulation continues at the European level.

Prior to devolution, there was almost no involvement in policy advocacy by organisations like the Scottish Society for the Protection and Care of Animals (SSPCA). This has now changed and there is an increasing need for legal expertise amongst animal welfare NGOs in Scotland.

Animal law has symbolic power in that it represents an effort to reduce the freedom to mistreat animals.

Anderson introduced the tortuous tale of the passage of the Protection of Wild Mammals (Scotland) Bill through the Scottish parliament. This demonstrated the lack of, and need for, animal law expertise in Scotland.

Backbencher Mike Watson introduced this Bill in 1999 with no access to government lawyers. He relied almost exclusively upon the policy work of NGOs for drafting purposes. Indeed, Mike Radford, Reader in Law at the University of Aberdeen, noted that most animal welfare law in Scotland is introduced as private members' Bills and is frequently inspired by the work of NGOs. Animal protection was noted to be a process, not an event. Thus, the need for lawyers arises at many points in time. Indeed, in this case the act did not come into force until 2002 and the first prosecution did not take place until 2017. The fine imposed amounted only to £400.

The involvement of lawyers trained in animal law throughout this process would have mitigated many of the difficulties that have arisen regarding drafting and interpretation. One key issue was the addition of the word 'deliberately' to the offence of hunting a wild mammal with a dog. This has made it very difficult to enforce this provision.

¹⁰ Council Directive 98/58/EC concerning the protection of animals kept for farming purposes [1998] OJ L221/23 (Farming Directive).

¹¹ The knowledge and ideas forwarded in the following sections stem from the presentations and wider discussion held at this event.

The act has been subject to numerous legal challenges and judicial review regarding the human rights of fox hunters. Further, in practice, the exceptions in the act have meant that fox hunting continues, and the sport has simply been rebranded as “pest control”.

These issues identify a clear role for lawyers in the protection of animals. Lawyers could encourage stronger drafting of animal welfare laws and work closely with NGOs on policy and advocacy work. Indeed, Alice Di Concetto noted that legislators write law in theory but, in practice, legislators often seek guidance on drafting from the likes of specialist NGOs. This is a process in which lawyers could insert themselves in order to propose stronger language.

Regarding stronger drafting, Radford pointed out that it is not just the effective enforcement of a law that is useful for animals. Animal law also has symbolic power in that it represents an effort to reduce the freedom to mistreat animals.

Beyond the legislative process, it was also identified that lawyers trained in animal law would improve enforcement and prosecution of animal law. They can also help with interpreting the concept of unnecessary suffering. This concept frequently lies at the heart of animal welfare protection legislation.¹² Indeed, as Radford pointed out, in many cases it may be that enhancing animal protection does not require a change in the law but, instead, requires a change in the standard of what is deemed acceptable.

The Lack of Legal Education in Animal Law as a Barrier to Effective Lawyering

Beyond the legislative process, it was also identified that lawyers trained in animal law would improve enforcement and prosecution of animal law. They can also help with interpreting the concept of unnecessary suffering. This concept frequently lies at the heart of animal welfare protection legislation.¹³ Indeed, as Radford pointed out, in many cases it may be that enhancing animal protection does not require a change in the law but, instead, requires a change in the standard of what is deemed acceptable.

Having used case studies to clearly identify a role for lawyers in the protection of animals in Scotland, we turned to ask: where are the animal lawyers? Radford

provided insight, as the only academic in Scotland teaching an undergraduate course on animal law. There is a severe shortage of lawyers trained in animal law in Scotland. Before setting out why this is the case, Radford elaborated upon the reasons why lawyers ought to study and practice this intriguing area of law.

Radford recalled the way in which animal law has enriched the lives of his students by connecting them to the physical world around them and encouraging them to question their place within it. While Radford recognises that lawyers can do “a hell of a lot for animals”, he also recognised that animals can do a lot for lawyers and their lives, insofar as the study of animal law is an enriching experience.

Part of the draw of animal law is the limited spread of expertise. This means there is no shortage of interesting issues to be worked on, researched and litigated. Further, animal law is necessarily interdisciplinary. Thus, it encourages collaboration across the disciplines: lawyers engaging with scientists, historians, ethicists, political scientists, sociologists, and so on. A failure to recognise this has led to a categorisation of animal law as a “soft” subject. In fact, it requires academic rigour, an open mindedness, and an ability to tap into the research traditions of disciplines outside the law.

The impact that animal law education might have on the lives of animals is potentially vast. Radford cited John Adams as saying that “to teach is to be in touch with infinity because you never know where your influence will end”.

Of course, setting up a dichotomy of “us” and “them” between humans and animals, and focusing on what one can gain from the other, is dangerous. This glorifies anthropocentric advantage without prioritising the animals’ experiences. However, it is perhaps useful to explore how animal law, as an academic subject, can be marketed to students and researchers.

Moving on to critique the gap in education, Radford noted that animal law, as an academic subject, has struggled to catch on in Scotland and, to an extent, in England. The relevant courses which are available have largely relied on individuals who are interested in the subject to propose and continue with the courses.

¹² For example, Animal Welfare Act 2006, s. 4.

¹³ For example, Animal Welfare Act 2006, s. 4.

There is typically no school-level interest in seeing these courses entrenched within curricula. For this reason, each course is very distinct, constituting a passion project of the relevant academic. There is no textbook or standardised way of teaching animal law in Scotland or the rest of the UK.

Raising Animal Lawyers: Best Practice Examples

This event has thus identified a clear need for lawyers and a clear lack of relevant expertise in the protection of animals in Scotland. On that basis, the event moved on to envisage the road ahead, drawing upon best practice examples from other jurisdictions. Indeed, the overarching goal of the event was to seek to inspire action in Scotland.

This event has identified a clear need for lawyers and a clear lack of relevant expertise in the protection of animals in Scotland.

With regard to better legal education, it is useful to turn to the United States for inspiration. Animal law has taken hold there and is taught in most law schools. Alice Di Concetto is a graduate of the Lewis & Clark Law School, Center for Animal Law Studies (CALs) LLM programme. She spoke on behalf of Natasha Dolezal, Director of International Animal Law and Deputy Director of CALs.

Lewis & Clark law school has a rich history of teaching animal law spanning back to 1992. Their animal law conference, commenced in 1993, is the first and longest-running animal law conference. They also established the first animal law journal in 1994. Further developments have included the appointment of a dean of animal law, a full time animal law clinic, a summer school and a dedicated LLM programme.

Di Concetto was particularly careful to note the varying legal roles that have been filled by the graduates of CALs. CALs has demonstrated how the gap between scholarship and animal law and policy can be effectively bridged. Di Concetto, for example, now uses her legal training from CALs in order to advocate for better treatment of farm animals in her role as Farm Animals Programme Officer at Eurogroup for Animals. This lobbying work benefits greatly from legal

expertise. Scotland would do well to draw inspiration from US law schools where animal law has become entrenched within the curriculum.

The international dimension of the teaching at CALs exists in recognition of the fact that animal law stretches across borders. CALs has a host of international alumni who have taken their training back to their countries and who are using that training to improve the legal protection of animals. The value of a legal education in animal law is clearly demonstrated by the legacy of CALs.

Turning to animal law in practice, Edie Bowles provided an inspiring example of how knowledge of animal law can be used by practicing lawyers in order to improve animals' lives. Bowles shared her story about how she co-founded Advocates for Animals, the UK's first animal law firm, which opened its doors in March 2019.

Based in London, Advocates for Animals has begun to take on work related to Brexit, animal welfare policy, legal briefings and casework. The activities engaged with have included judicial reviews, freedom of information requests, undercover investigations, and work on soft law instruments. Bowles identified other key roles firms such as Advocates for Animals might fill. These included: responding to government consultations and drafting letters of complaint to demonstrate that the government is being held accountable. Bowles demonstrated, through discussion of her work, the way in which lawyers are needed to ensure effective enforcement of animal welfare protection legislation.

To encourage more lawyers to adopt roles regarding animal protection in Scotland will require engaging and training law students as well as identifying and inspiring interested academics and practitioners who can provide that training. In this regard, the UK Centre for Animal Law (A-law) provides a wealth of resources. Edie Bowles spoke on behalf of A-law in her role as student group manager. A-law has been instrumental in mobilising and coordinating legal expertise on animal law in the UK. The majority of their activities, however, have taken place in England (primarily London). A-law provides resources, networks and events that will prove invaluable in a move to bring animal welfare to more Scottish law schools. A-law produces the UK Journal of Animal Law as well as a magazine, essay competition, blog, and moot

contest. These outputs provide opportunities for students and academics to embark upon legal research and writing related to animal law.

A-law also has a network of student ambassadors and associated groups across the country. A-law's work in Scotland is due to increase with the upcoming establishment of an A-law steering committee for Scotland. It seems likely that this group will prove instrumental in carving out a road forward for the education in and practice of animal law in Scotland.

The Road Forward

This event marks the beginning of a conversation on animal law in Scotland. The inadequacy of legal education in animal law and the lack of research and practice stemming from Scotland have been largely accepted until now. However, there was a clear sense in these discussions that this state of affairs ought to change.

The road forward requires the identification of opportunities to continue this discussion. A-law's steering committee for Scotland will be instrumental in organising follow-up events where solutions to the lack of legal expertise can be elaborated upon.

A key component of the solution must be an increase in legal education in animal law in Scotland. There are a number of activities that may help in achieving this.

Environmental law academics, and others, may be encouraged to side-step into animal law. This would facilitate a relatively quick increase in research output and training and education opportunities at Scottish law schools.

At the school-level, there should be a recognition that animal law education is something that law schools in Scotland should be providing. Passion project animal law courses by individual academics are an encouraging development but, by themselves, are not enough to ensure a legacy of animal law education in Scotland. SCELG provides an example of how this may be beneficial, though admittedly this progress has occurred at the level of a research group rather than at school level. SCELG has facilitated doctoral research on animal law to be shared with students through undergraduate and postgraduate seminars and events.

This has provided the opportunity for environmental law students to learn about and conduct research into animal law. However, without school-level engagement, it is difficult for such impact to continue in the long.

A-law's steering committee for Scotland will be instrumental in organising follow-up events where solutions to the lack of legal expertise can be elaborated upon.

Further, it may be that research into animal law education could be beneficial. This could include comparative studies of the US and other jurisdictions that provide animal law education. Linked to this, it may also be useful to explore funding opportunities for animal law research in Scotland. In order to achieve this, it will be necessary to provide more support and advice to students in order to encourage them to conduct self-directed research into animal law. Once again, A-law's steering committee for Scotland could be instrumental in achieving this.

It is hoped that counteracting the dearth of animal law education in Scotland will create more legally trained professionals who are able to conduct legal research and practice-oriented work on animal law, both independently and in partnership with NGOs. It is hoped that, in turn, this will have a concrete, positive impact on the lives of animals in Scotland and abroad.

For Fur's Sake: Can the UK Ban Imports of Fur from Other Countries?

Rachel Dunn, Senior Lecturer at Northumbria University

Abstract

This article examines the current legal position of fur trade in the UK and the issues faced by consumers and the Government. Whilst some view Brexit as a detrimental position for the UK, including the author, there are some potential benefits for animal welfare. Free Movement of Goods within the EU makes it harder for the UK to ban imports of fur. Further, consumers are facing issues of not knowing whether the “faux fur” they are buying is real or not, with many high street retailers facing accusations over transparency of products. This article will consider what the UK can do to stop imports of fur products, both as a Member State of the EU and not. The animal welfare issues of fur farming will be discussed and why it is important that the UK does not financially support such trade, whether knowingly or not. It is proposed that the UK do ban imports of fur products.

Keywords

Fur trade, Brexit, animal welfare

Introduction

Fur farming is a serious consideration for animal welfare and millions of animals are killed for their pelts each year for the vanity of fashion. Animals on fur farms are subjected to extremely inhumane conditions and slaughtering. Often, they are kept in metal cages, over fed and killed using a variety of inhumane methods. Those who wish to take a stand against this

practice and buy fake fur may be actually buying real fur, however, and investigations over the last few years have found that big high-street brands have, mostly without realising, been selling products which contain real fur and advertising it as fake fur.¹

We have seen countries ban fur farms across the globe. Most recently, Norway, one of the biggest producers of fur, has pledged to introduce a ban which will see the diminishment of fur farms by 2025. The actual ban of imports and sale of fur products seems to be a harder task, with countries anticipating legal action over such trade restrictions. There has been a rise, however, of countries, and even cities, banning the sale of fur products and it is time the UK followed suit.

This article will explore the UK's current position on the fur trade and the issues consumers have faced when buying what they believe to be faux fur when it is proven to be real fur. It will explore what options we have to ban imports as a member of the EU and the Single Market and, if we can't, how we may be able to impose labelling requirements which will help consumers know what is in the textiles which they are buying. Conclusions will be drawn as to how the UK should proceed to control imports of fur products, to stop supporting this cruel practice.

Animal Welfare Issues on Fur Farms

It is estimated that more than 130 million animals each year suffer for the fur industry, with minks being the

¹ Humane Society International, 'TK MAXX, Boohoo, Not On The High Street Among Online Retail Giants Caught Selling Real Fur Advertised As 'Faux'' (20th December 2017) Accessed via

<http://www.hsi.org/world/united_kingdom/news/releases/2017/12/online-real-as-faux-122017.html> Last cited 28.10.18

most commonly killed at 97.7 million.² The animals are kept in metal wired cages for their entire life, unable to display usual behaviours akin to their species. For example, in the wild mink, a semi-aquatic creature, live in territories which stretch across lakes or river banks and build anywhere between 5-24 dens usually less than 10m away from the water, to store food and rest. On fur farms, however, they are unable to exhibit this behaviour, usually kept in cages sized 1/3 m² unable to explore and swim. Research has shown that minks in captivity do not adapt to their new surroundings, even when bred in captivity, and can suffer high levels of stress, specifically from the lack of a water resource for swimming.³ The mink is a solitary animal, but are often caged with other minks on fur farms, causing further distress and suffering.

As a result of heightened stress levels and the restriction of movement and normal behaviour patterns, animals will resort to acts such as fur chewing and biting. Due to the wire cages animals can suffer from bent feet and/or sores on their bodies. In order for farmers to gain more fur, they will overfeed animals to obesity, and some claim that they are genetically modified to become so large, which causes health issues and restrains movement of the animal.⁴ The European Commission's Scientific Committee on Animal Health and Animal Welfare (SCAHAW) highlights that 'deaths on farms can be caused by disease, injury or physiological system failure, which shows that welfare has been poor.'⁵

For those animals not bred in captivity, their capture can be extremely distressing and cruel. Some wild animals are caught in traps, including leg hold traps and drowning traps, often left for days without water, food or shelter. If animals manage to escape, it is not without seriously injuring themselves. If they do not escape, they will be beaten or stomped to death once the trapper returns.⁶

Animals on fur farms are killed in a variety of ways depending on the animal and the farm. Minks are commonly killed using CO₂ gas. Practice varies between killing up to 50 minks in one box, which can cause suffocation before the gassing, or individual gas tubes, but SCAHAW acknowledges no reliable data on the merits of the different techniques.⁷ Mink will obviously be distressed during this time and there can be a delay between the mink entering the gas chamber, falling unconscious and dying. Other methods include electrocution and the breaking of their necks, although in EU countries and Norway neck breaking is now illegal.⁸ Foxes are commonly killed by electrocution, using two electrodes, one inserted in the mouth and one in the rectum. If used properly, it is meant to induce unconsciousness immediately.⁹

The welfare of animals on fur farms raises serious concerns, particularly when the purpose is for fashion and vanity. Humane Society International UK (HSI) argues that any animal welfare scheme is inadequate,

² Humane Society International, *Political Briefing Paper One: The Case for a Ban on the UK Fur Trade 2018*, 4. Accessed via <https://www.furfreebritain.uk/resources/HSI-Political-Briefing-One-The-case-for-a-ban-on-the-UK-fur-trade.pdf> Last cited 13.09.18

³ Mason GJ, *et al*, 'Frustrations of fur-farmed mink,' 2001 410:6824 *Nature* 35-36

⁴ J. Mononen *et al*, 'The development of on-farm welfare assessment protocols for foxes and mink: the WelFure project' (2012) 21 *Animal Welfare* 363

⁵ European Commission's Scientific Committee on Animal Health and Animal Welfare, *The Welfare of Animals Kept for Fur Production*, December 2001, 8. Accessed via https://ec.europa.eu/food/sites/food/files/safety/docs/sci-com_scah_out67_en.pdf Last cited 13.09.18

⁶ Humane Society International, *The Fur Trade*. Accessed via http://www.hsi.org/world/united_kingdom/work/fur/facts/fur-trade-facts.html Last cited 13.09.18

⁷ Humane Society International, *Political Briefing Paper One: The Case for a Ban on the UK Fur Trade 2018*, 67. Accessed via <https://www.furfreebritain.uk/resources/HSI-Political-Briefing-One-The-case-for-a-ban-on-the-UK-fur-trade.pdf> Last cited 13.09.18

⁸ Council Regulation (EC) No 1099/2009 – NOAH and Animalia, *Case Saga Furs: Nordic Fur Trade – marketed as responsible business*, (2015) 22. Accessed via https://www.furfreealliance.com/wp-content/uploads/2015/10/Pels_final_print_mail.pdf Last cited 28.10.18

⁹ Heather Prickett and Stephen Harris, *The Case Against Fur Factory Farming: A Scientific Review of Animal Welfare Standards and 'WelFur'*, A Report for Respect for Animals (2015) 28



stating that 'high-welfare fur farming is basically an oxymoron... they do not offer any meaningful welfare provisions for animals on these farms.'¹⁰ By allowing the sale of fur goods in the UK, we continue to support such businesses and their inhumane practices, regardless of welfare claims.

What is the UK's Position on Fur?

In 2000 the Fur Farming (Prohibition) Act was introduced, making the keeping of animals 'solely or primarily for slaughter for the value of their fur,'¹¹ illegal. The ban came into force in January 2003 and the UK was the first country in the world to ban fur farming. At the time the only animal used in fur farming in the UK was mink, which required a licence. Similar bans

were implemented in Scotland¹² and Northern Ireland.¹³ Whilst the enterprise of fur farming has been banned, the sale of goods which contain fur are currently not and the value of fur imported to the UK was approximately £55.6 million in 2016.¹⁴

Recent times have seen Parliament debating the issue, in light of a GovPoll in February 2018 which showed that 69% of the public would support a ban of fur trade and an e-petition receiving over 100,000 signatures.¹⁵ The debate was positive, with a conclusion that it was time for the Government to support the ban of the sale of animal fur in the UK. In May 2018, 50 veterinarians wrote to Michael Gove expressing their concerns of animal welfare at fur farms outside of the UK, asking for a ban on all imports of fur, arguing 'that their

¹⁰ Claire Bass: HSI, Oral evidence submitted to Environment, Food and Rural Affairs Committee: Fur Trade in the UK HC 823 (7th March 2018), Q42. Accessed via <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/environment-food-and-rural-affairs-committee/fur-trade-in-the-uk/oral/80118.html> Last cited 5.10.18

¹¹ S1(1) Fur Farming (Prohibition) Act 2000

¹² Fur Farming (Prohibition) (Scotland) Act 2002

¹³ Fur Farming (Prohibition) (Northern Ireland) Order 2002

¹⁴ Humane Society International, *Political Briefing Paper One: The Case for a Ban on the UK Fur Trade 2018*, 4. Accessed via <https://www.furfreebritain.uk/resources/HSI-Political-Briefing-One-The-case-for-a-ban-on-the-UK-fur-trade.pdf> Last cited 13.09.18

¹⁵ Petitions: UK Government and Parliament, *Ban the sale of animal fur in the UK* (2018) <https://petition.parliament.uk/petitions/200888> Last cited 27.06.19

purchase makes us party to the cruelty.’¹⁶ It was also stated in the June 2018 Parliamentary debate that, ‘We do not want fur farming on our own doorstep but are currently not strong enough to end our complicity in what can only be described as animal suffering.’¹⁷

It is clear that the majority of the UK oppose the fur trade industry, but consumers are facing a bigger challenge than known imports. In February 2018 DEFRA launched an inquiry and published a report into cases of real fur being sold as fake fur, as a result of a joint investigation by HSI and Sky News in 2017. At the start of their investigation they found retailers House of Fraser and Misguided were selling real fur as fake fur, finding fur from rabbit, racoon and mink in some of their products. Later investigations found that other retailers such as TK Maxx, Amazon, BooHoo and Kurt Geiger were also selling real fur, even when they were running no-fur policies.¹⁸

In most cases, these retailers were not intentionally selling real fur and DEFRA’s committee investigation highlighted the issues with labelling of textile products in the EU under the Textile Labelling Regulation of 2011.¹⁹ HSI highlighted in their evidence to DEFRA that labelling of animal products in textiles is inadequate and unclear as to what a garment contains. The 2011 Regulation requires that textiles containing fur carry the wording “contains non-textile parts of animal origin,”²⁰ which applies to various products, including leather and bone, but does not identify specific animal parts, such as fur. Further, products which comprise of less than 80% of weight of textile fibres fall outside of the Regulation and do not require labelling. This means that textiles which contain more than 20% fur, including shoes, handbags and accessories, can fall outside its scope and consumers may not know that what they are buying contains fur. More absurdly, this also means that items such as full-length fur coats fall

outside of the Regulation, because it is not considered a textile item.

The Regulation’s minimal requirements mean that consumers are not fully aware of what they are buying and is not fit for purpose. Many animal welfare charities have called for changes to the current labelling scheme. In their written evidence, Four Paws UK stated that the requirements for labelling should include:

- ‘the species from which the fur derives (both the common and scientific name)
- the country of origin of the fur (where the animal was bred, hunted and killed)
- how the animal was reared and killed (whether the animal was caught by trapping or reared in a cage with a wire floor.’²¹

This will clearly help consumers know what kind of product they are buying and the conditions in which the animal was reared and killed. It is not dissimilar to the Truth in Fur Labelling Act 2010 in the US. The Minister for DEFRA, however, has made clear that there will be no plans to change labelling requirements and challenge the Regulation whilst the UK is still a Member State of the EU.²² Once we leave the EU this issue may be more easily resolved, without the influence of the 2011 Regulation, but it may not be for some time that legislation is provided to combat this issue.

Current EU Legislation

One of the largest producers of factory farmed fur is the EU.²³ They have provided some legislation on the matter previously, with Regulation (EC) No 1523/2007 banning the ‘placing on the market and the import to, or export from, the Community of cat and dog fur, and products containing such fur.’ The ideal behind this ban

¹⁶ Letter accessed via <http://www.hsi.org/assets/pdfs/letter-verts-experts-fur.pdf> Last cited 13.09.18

¹⁷ Stated by Daniel Zeichner, HC Deb 4th June 2018, vol 642, col 1WH

¹⁸ House of Commons: Environment, Food and Rural Affairs Committee, *Fur trade in the UK*, (22nd July 2018) Seventh Report of Session 2017-19, 6

¹⁹ Regulation 1007/2011

²⁰ Article 12

²¹ Four Paws UK, Written evidence submitted to Environment, Food and Rural Affairs Committee (FUR0041), para 4.

²² House of Commons: Environment, Food and Rural Affairs Committee, *Fur trade in the UK*, (22nd July 2018) Seventh Report of Session 2017-19, 11

²³ Heather Prickett and Stephen Harris, *The Case Against Fur Factory Farming: A Scientific Review of Animal Welfare Standards and ‘Welfare’*, A Report for Respect for Animals (2015) 11

was that cats and dogs are considered to be pets and is not acceptable to make items with their fur. A similar Regulation has been introduced banning trade in seal products in the EU,²⁴ both of production and imports. This is a step towards a ban in the EU, but with many other animals, particularly mink, being bred for their pelt, it does little to eradicate the issue. Further, the EU has prohibited the use of leghold traps in the Community and any imported pelts and goods of animals which originate in countries which use trapping methods.²⁵ This does not, however, prohibit the imports of furs caught by trapping from countries which meet internationally agreed humane trapping standards.

...at the moment, it will be difficult to impose a ban on the sale of fur in the UK, especially since the majority of fur sold here is imported from the EU and EFTA area.

Although the EU allows fur farming to continue, it does provide some legislation which relates to welfare standards on farms, including fur farms. Directive 98/58/EC requires Member States to make provisions that owners or keepers of animals kept for farming purposes ensure that animals are 'not caused any unnecessary pain, suffering or injury.'²⁶ The conditions in which they are kept should have regard to their species and domestication,²⁷ with specific provisions to their freedom of movement, accommodation, feed and water and breeding procedures,²⁸ but this is general to all animals kept for farming, not just for fur, and there is no specific EU legislation that relates solely to fur farming.

Lastly, the EU legislates for the killing of animals,²⁹ but, again, Regulation 1099/2009 is not specific to animals

farmed for their fur and includes the production of food, wool and other products. It states that the killing of animals for fur should be carried out by and under the direct supervision of a person holding a certificate of competence.³⁰ Article 3 provides that animals should 'be spared any avoidable pain, distress or suffering during their killing and related operation.' This Regulation provides specific requirements for the variety of methods described above, with the aim of provisions in Article 3. Specific Guidance for the electrocution of foxes and the carbon dioxide euthanasia of mink,³¹ has been provided by the European fur sector. It is appreciated that the sector is trying to maintain some consistency of the killing of these animals to develop best practice for their welfare, but providing guidance does not validate the scale of killing that happens annually, nor the unnecessary of farming these animals at all. The paramount interest of fur farms will always be for their profits; animal welfare, no matter how widely claimed to be of importance, will be secondary to that.

Can we Ban Fur Imports and Sales Whilst a Member State?

The main issue for the UK is that whilst we are still a Member State of the EU it is not simple to ban imports and the trade of fur, due to Free Movement of Goods. Article 34 of the Treaty of the Functioning of the European Union prohibits quantitative restrictions on imports between Member States and measures having equivalent effect and Article 35 similarly relates to exports. This means that, at the moment, it will be difficult to impose a ban on the sale of fur in the UK, especially since the majority of fur sold here is imported from the EU and EFTA area. Further, measures having equivalent effect go beyond outright bans, and prohibits any rules which will hinder, directly or indirectly, actually or potentially, trade.³² This includes origin marking requirements,³³ as they may impose burdens on importers (who may have difficulty

²⁴ Regulation (EC) No 1007/2009

²⁵ Council Regulation (EEC) No 3254/91

²⁶ Article 3

²⁷ Article 4

²⁸ Directive 98/58/EC Annex

²⁹ Council Regulation (EC) No 1099/2009

³⁰ Article 7

³¹ For more information and links, please visit: <https://www.fureurope.eu/fur-policies/legislation/animal-welfare/>

³² Dassonville (case8/74) [1974] ECR 837

³³ Commission v UK (Origin Marking) (Case 207/83) [1985] ECR 1201

complying with it), content restrictions³⁴ and authorisation/certification requirements.³⁵ The latter includes inspections to ensure that goods satisfy national standards and are authorised for sale prior to them being offered to consumers.

On the face of it, it seems that the UK will struggle to impose an outright ban on fur imports and also to inspect items which claim to be fake fur. Further, changing labelling to state the origin of the product, as was suggested by Four Paws UK amongst other labelling requirements, will cause issues for Article 34. The Government have acknowledged, however, that this does not preclude prohibitions under Article 36, under which we could argue prohibition/restrictions on the ground of the protection of public morality, so long as it does not constitute a means of arbitrary discrimination or disguised restriction on trade. As discussed, there is significant favour in the UK of banning imports of fur and it seems that an argument on the basis of public morality is justified. This argument has been used in a World Trade Organisation (WTO) case, which will be discussed in more detail below. There is no EU case precedent for the application of public morality in the trade of cruel animal products, but it seems that the UK will have a strong argument. As the UK does not have a domestic production of fur, a ban cannot be viewed as disguised discrimination or protection of trade for commercial reasons. We will have to argue that the need to protect public morality is strong and sustained, and as there have been many petitions signed and polls taken recently, this should not be too difficult to demonstrate.

If the UK were to make the step toward banning sales of fur products, successfully arguing this exemption, it could lead to other Member States being able to follow suit and implement similar bans in their own country. It may be easier for us to make this step post-Brexit, without facing challenges from other Members States whose trade may suffer as a result, but implementing the ban prior to leaving could have a positive effect for animal welfare across the community and be a

‘welcome gift to our friends in Europe.’³⁶ It is also a consideration for the UK if we do remain in the Single Market after we exit the EU, whereby we may still be subjected to Free Movement of Goods.

As the UK does not have a domestic production of fur, a ban cannot be viewed as disguised discrimination or protection of trade for commercial reasons.

If we were to be unsuccessful with a holistic ban on the import and sale of fur goods, there is another option the Government, and other EU countries, can consider, to address the issue of the selling of fur products claimed to be fake fur. As stated above, Article 34 also applies to the labelling and inspection of imports within the EU, which means the UK may face issues when imposing the requirements for labels suggested by Four Paws UK or if they want to inspect goods to determine if they contain real fur before allowing them to be offered to consumers. Under the principles of *Cassis de Dijon* the UK could argue a mandatory requirement with the defence of consumer protection. Often, this defence is rejected due to arguments that national legislation goes beyond what was ‘necessary’ to protect consumers and it may be difficult to argue in favour of a fur sale ban. This was the issue with *Estee Lauder v Lancaster*, in which the ECJ rejected claims of consumer protection and stated that ‘it is necessary to take into account the presumed expectations of an average consumer who is reasonably well informed and reasonably observant and circumspect,’³⁷ when deciding if a particular description of the goods is misleading. Due to the current issues, however, with consumers buying real fur they thought was fake, the UK may be able to argue that better labelling and inspections are necessary to protect the consumer. Further, during evidence taken by DEFRA, Claire Bass, Executive Director for HSI in the UK, highlighted that retailers and consumers found it difficult to tell the

³⁴ *Cassis de Dijon* (Case 120/78) [1979] ECR 649

³⁵ *Dynamic Medien v Avides Media* (Case C-244/06) [2008] ECR I-505

³⁶ Stated by Daniel Zeichner, HC Deb 4th June 2018, vol 642, col 7WH

³⁷ *Estee Lauder Cosmetics v Lancaster* (Case C-220/98) [2000] ECR I-117, para 27

different between real fur and fake fur. For example, close to 50% of people use cheap price as an indicator of fake fur, thinking that because an item is cheap it must be fake; similarly, some believe that because an item has been dyed an unnatural colour, such as pink, it must be fake fur.³⁸ It is unreasonable to argue that consumers should be well informed when deciding on a real or fake fur product, when the indications they use are unreliable.

There is no previous EU case law specifically relating to animal products in textiles which we can use to argue a mandatory requirement, but there are some similar cases which have arisen in the past. In *Commission v United Kingdom*,³⁹ it was decided the UK failed to fulfil its Article 34 (then Article 30 EEC) duties by requiring an indication of origin on goods sold, including textile goods; the argument of providing consumers with adequate information to make decisions on what they are buying was rejected. This case also pointed to a survey conducted in England, that consumers judge the quality of a product due to the country in which it is made. This argument was rejected, stating that this may prompt consumers to favour domestic goods rather than imports. Again, this argument does not stand for fur trade, as there is no domestic farming industry which can be favoured by consumers and thus is not disguised discrimination. Whilst origin marking has failed for the UK previously, the point here is not for consumers to distinguish between domestic and international goods, but to know the welfare standards of the fur they are buying, partly due to the origin of the product. There does seem to be a strong argument, but successful mandatory requirements based on consumer protection are not common.

It was highlighted in the fur trade Parliamentary debate that a WTO case shows that a ban may be possible. This

case involved action brought by Canada and Norway against the EU, when in 2010 they banned the trade of seal products in the EU, arguing it was necessary to protect public morals.⁴⁰ Seals are killed for their skins and fur to be used in clothing and sold for other uses. The WTO have similar rules to the EU on restricting trade, and Canada and Norway claimed the ban was more than necessary to satisfy promoting public morals.⁴¹ This ban, however, was allowed by the WTO as a proportionate measure to protect public morals,⁴² with an amendment in 2015 to allow for seal products obtained from hunting by Inuit or other indigenous communities. The UK Government has since a move to bring this legislation into domestic law, preparing for our exit from the EU, with the Seal Products (Amendments) (EU Exit) Regulations 2018, banning imports and trade of seal products within the EU. If this has been argued successfully for seals, then it may, and surely should, extend to all animals killed for their fur, with the support of polls to show the necessity to protect public morals.⁴³

Conclusion

It does not seem as though the EU will legislate themselves for the prohibition of fur farming and selling fur products and even though they claim that animal welfare is an important objective for their policy, some have argued that continuing to allow fur farming and not provide specific legislation for it is a paradox.⁴⁴ When the UK leaves the EU it may be that we can impose a ban on the import and sale of fur products, depending on our trade deal. If so, then the UK will be taking a stand against this industry and advancing our animal welfare values even further. The Government have recently confirmed a ban on ivory sales, to help protect elephants who are hunted for

³⁸ Claire Bass: HSI, Oral evidence submitted to Environment, Food and Rural Affairs Committee: Fur Trade in the UK HC 823 (7th March 2018), Q42. Accessed via <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/environment-food-and-rural-affairs-committee/fur-trade-in-the-uk/oral/80118.html> Last cited 5.10.18

³⁹ *Commission v United Kingdom* (Case C - 207/83) [1985] ECR 1201

⁴⁰ EC – Seal Products, WT/DS400 & 401/AB/R (adopted 18 June 2014)

⁴¹ World Trade Organisation, General Agreement on Tariffs and Trade (GATT), Article XX (a)

⁴² Stated by Daniel Zeichner, HC Deb 4th June 2018, vol 642, col 6WH – 7WH

⁴³ Iyan I.H. Ofor and Jan Walter, 'The Applicability of GATT Article XX(a) to Animal Welfare' (2017) 1:1 *The UK Journal of Animal Welfare* 10

⁴⁴ Sabine Brels, "'Anti-fur' Policy and the European Union Paradox: Towards a Ban on Fur Farming for Community Law Consistency' (2012/2013) *Autumn and Winter Journal of Animal Welfare Law* 18

their tusks,⁴⁵ and must seriously consider introducing a Bill to ban the sale of fur in the UK under similar measures.

There is already a worldwide movement to eradicate fur farming sales.⁴⁶ Countries outside of the EU have effectively prohibited the sale of fur or fur farming. For example, New Zealand bans the import of mink, which has effectively banned the farming of mink, and India banned imports of mink, fox and chinchilla fur in 2017. West Hollywood banned the sale of fur in 2011, being the first city in the world to do so, and San Francisco followed suit in 2018.⁴⁷ Countries which have traditionally been leading in fur farming are even moving away from the industry. Norway, one of the biggest European countries with strong fur farming industries, has decided to prohibit the farming and close all farms by 2025,⁴⁸ and will become the first Nordic country to do so. Further, many fashion labels have gone fur-free, such as Gucci, Hugo Boss and Ralph Lauren. We may be able to follow this movement and become the first European country to ban the sale of fur.

⁴⁵ Government confirms UK ban on ivory sales, 3rd April 2018 Accessed via <<https://www.gov.uk/government/news/government-confirms-uk-ban-on-ivory-sales>> Last cited 20.10.18

⁴⁶ Fur Free Alliance, Fur Bans. Accessed via <https://www.furfreealliance.com/fur-bans/> Last cited 27.09.18

⁴⁷ *Ibid*

⁴⁸ *Ibid*

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