JOURNAL OF ANIMAL WELFARE LAW

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Association of Lawyers for Animal Welfare

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The Association of Lawyers for Animal Welfare would like to thank Compassion in World Farming Trust for its generous support of this publication.

Introduction to the Association of Lawyers for Animal Welfare

The Association of Lawyers for Animal Welfare (ALAW) is a unique group, the members of which are lawyers and legal academics. ALAW's aim is to pursue the welfare and interests of animals through legal channels.

ALAW is an entirely non-profit making organisation aiming to harness the skills of its members and provide a forum for discussion of animal welfare law and related issues.

ALAW intends to monitor the progress of relevant legislation in Parliament and through its members to take part in the consultation process. It also intends to highlight any aspects of animal welfare law which appear to be in need of reform, and to contribute to the educative process through the dissemination of information relating to all aspects of animal welfare law, including where appropriate through training.

The most obvious areas of practice in which lawyers' training and expertise could be used to promote the cause of animal welfare, given the current climate, are those of criminal litigation, civil liberties and human rights. There are, however, a number of other, perhaps less obvious, areas in which lawyers could make a valuable contribution, including constitutional law, environmental health, planning, freedom of information, civil litigation, media law, associations and corporations, charities, and so forth. In addition, lawyers have well-developed skills such as advocacy and drafting that are of general application and could be utilized to assist and promote the cause of animal welfare.

Whatever their particular area of practice or specialism, therefore, by offering their skills and expertise, lawyers are well placed directly to contribute to the cause of animal welfare.

This first edition of the Journal of Animal Welfare Law – ALAW's newsletter – covers the main developments of the past year. The regular features of the Journal will include updates on court decisions concerned with animal welfare, a list of relevant new legislation and/or proposals for legislation, and articles on topical issues.

Anyone wishing to submit an article or case report should send copy to PO Box 67, Ellesmere, Shropshire SY12 9WZ or **email: info@alaw.org.uk**

Animal welfare law in the UK

Pauline Moylan,
Barrister

The greatness of a nation and its moral progress can be judged by the way its animals are treated - Mahatma Gandhi

It is an oft-recited mantra that the UK is a nation of animal lovers. If that is to be regarded as anything more than a popular myth, one might reasonably expect that ill-treatment of animals would be prohibited by law, and that non-compliance would be dealt with vigorously.

Another oft-recited mantra is that the UK has the best animal protection laws in the

world. Whereas that if true may be reassuring, it is irrelevant because it is merely comparative and says nothing in absolute terms of the effectiveness of British law. A one-off murderer in many respects may be regarded as "better" than a serial killer, but no one would suggest that murder is something of which to be proud.

In absolute terms, therefore, how effective are the UK laws in dealing with ill-treatment of animals?

Certainly there exists legislation that prohibits generally the mistreatment of animals. Whereas this serves to some extent to protect some animals in some circumstances, significant areas of activity or "categories" of animals are excluded from its ambit. Moreover, the laws purportedly designed to regulate the treatment of animals in those excluded areas serve in reality merely to legalise treatment that would be prohibited under the general legislation. As a result:

- of the hundreds of millions of animals slaughtered each year for food, most are raised in factory farms, neither seeing daylight nor breathing fresh air,
- each year millions of animals in laboratories are lawfully subjected to experiments including those in which animals are burnt, blinded, mutilated, irradiated and force-fed chemicals,
- many thousands more animals, for the sport or entertainment of humans, are denied the most basic freedoms for their entire lives.

The reality for animals in the UK thus falls very far short of the myth, and many now believe that UK laws are ineffective in dealing with the ill-treatment of animals not coming within the ambit of protection against cruelty provided by the Protection of Animals Act 1911 or the proposed protection of the Animal Welfare Bill. The recent case of *R (Compassion in World Farming Limited) v Secretary of State for the Environment, Food and Rural Affairs*[1] also highlights in the view of many (see article below) the failure of the courts to protect animals from the worst aspects of commercial exploitation.

The Animal Welfare Bill: an introduction to the philosophy of animal welfare legislation

Mike Radford
Reader in Law, University of Aberdeen

The Protection of Animals Acts have, during the course of almost a century, made a major contribution to animal protection, but there is an urgent need to reassess the scope and effectiveness of a legislative regime which in its present form pre-dates the First World War, and whose concepts and language can be traced back further into the nineteenth century.

As a consolidation act, the Protection of Animals Act 1911 was primarily intended to maintain the status quo, and it is therefore not surprising that both it and the Protection of Animals (Scotland) Act 1912 reflect the character of their Victorian and Edwardian predecessors, proscribing various forms of conduct which had previously come to be defined as offences of cruelty, and making miscellaneous provisions in respect of animal fights, impounded animals, use of poisons, use of dogs as draught animals,

[1] [2004] EWCA Civ 1009.

inspection of traps, and the regulation of knackers' yards, all of which had exercised legislators during the nineteenth century. While subsequently the legislation has been subject to limited amendment, its underlying character remains unaltered.

The present unsatisfactory state of the law can be largely attributed to the general absence of enabling powers in both the 1911 and 1912 Acts. In consequence, it has not been possible to introduce changes without recourse to primary legislation. The result is two-fold. First, because of the pressure on the parliamentary timetable, relatively few reforms have been achieved in the years since 1911. Secondly, the changes to the Protection of Animals Acts which have been introduced have been largely ad hoc and piecemeal, and have tended to owe more to the vagaries of parliamentary procedure and the luck of the Private Members' Ballot, than to principle.

Not only is the form of the present legislation unsatisfactory, so too is its substance. Courts in both England and Scotland have complained about the language and the problems this causes. Most important of all, however, the Protection of Animals Acts have been overtaken by events. For while changes to these statutes have been relatively infrequent, there has evolved, especially since the end of the 1960s, a separate, but complementary, body of legislation, the effect of which has been to extend the legal duty we owe to animals beyond simply ensuring that they are not treated cruelly. The problem is that this welfare legislation applies only to animals in specific circumstances, having been introduced in the main to fulfil the UK's obligations under European Community law.

It is legislation of a very different order from that of the Protection of Animals Acts. Traditionally, the law has focused on punishing animal cruelty, broadly interpreted to mean causing an animal to suffer unnecessarily. To inflict such treatment on an animal is self-evidently detrimental to its welfare. To that extent there is a degree of affinity between cruelty and welfare, but the two are far from being synonymous: prejudicing an animal's welfare does not of itself constitute cruelty. The offence of cruelty merely defines the standard below which conduct towards animals becomes unlawful. It imposes no requirement to improve upon that basic benchmark. Crucially, it fails to direct how animals *ought* to be cared for. In consequence, the concept of cruelty is not in itself sufficient to protect animals from inappropriate treatment, since there are many ways in which their standard of care may be less than satisfactory without it amounting in law to an offence of cruelty. This distinction is reflected in the thrust of public policy. On the one hand, the intention is to *prevent* cruel treatment by proscribing particular forms of behaviour. On the other, the aim is to *promote* improved standards of welfare by identifying those matters which are important to animals, and translating these into rules, guidance and advice, to which those responsible for the care of those animals are required to have due regard.

The focus of welfare legislation is therefore significantly different from that of the Protection of Animals Acts, especially by introducing criteria which are no longer defined exclusively by reference to suffering. Rather than being concerned with whether treatment of an animal has fallen below the rudimentary threshold of unnecessary suffering, animal welfare legislation is concerned instead to identify and meet the innate needs of the animal itself, and thereby to secure for it a reasonable quality of life.

Such developments are to be welcomed, but they only serve to highlight the shortcomings of the Protection of Animals Acts, which are cumbersome, outdated, and unwieldy. The combination of various provisions spread across a range of statutes, the anachronistic language and concepts contained in much of the legislation, and the lacuna as regards welfare – especially in relation to companion animals – together represent an unanswerable case for legislative reform.

The Department for the Environment, Food and Rural Affairs launched a draft Animal Welfare Bill last July.[2] It is essential that an organisation such as ALAW, which can contribute to the legislative process from a uniquely qualified and informed position, should be fully engaged in lobbying for change. A Bill is likely to be published after the general election, if Labour is returned to power.

The next edition of the Journal will feature an article examining in detail the provisions of the Bill and its implications for the protection of animals.

Is the Hunting Act just an empty shell?

David Thomas
Solicitor

Now that their Parliament Act challenge has failed, the hunting community is adopting a three-fold strategy to undermine the Hunting Act – civil (or, more accurately, criminal) disobedience; searching for ways of legally circumventing the law; and a propaganda campaign that the Act is unenforceable and that the police should not waste their time on it.

First, civil disobedience. Forty thousand hunt supporters have signed a declaration that they will defy the law. Civil disobedience is usually deployed in support of causes of rather greater moment than the freedom to use packs of dogs to chase and tear apart wild animals – the campaigns for the enfranchisement of women and against apartheid and British rule in India spring to mind. Nevertheless, preferring one's conscience to the dictates of a law perceived to be unjust has a long and honourable tradition and should be respected.

However, a crucial feature of Gandhian *satyagraha* or passive resistance – on which so many campaigns involving civil disobedience have been built – is that transgressors must accept the authority of the law in question and gladly submit to the prescribed punishment. Few hunters appear willing to do so. Indeed, the Countryside Alliance is careful not to encourage law-breaking. Instead, it is searching for ways around the law, as the second strand of the overall strategy. It has produced a comprehensive handbook suggesting ways hunting with dogs can continue legally. Some have suggested that hunts could kill a fox (by shooting it) and then drag its body ahead of their pack of dogs, an aspect of trail hunting (as distinct from drag hunting). If the dogs should chance upon a live quarry and chase it, this will simply be an "accident" falling outside the new legislation, it is argued.

[2] Command No 6252, 15.7.2004. The Scottish Executive's Environmental and Rural Affairs Department (responsibility for this issue is devolved under the terms of the Scotland Act 1998) is consulting on this issue and will also draw up a bill.

The third strand of the strategy is then to suggest that the law is unenforceable. In fact, the principal offence, as Fraser Sampson said,[3] is straightforward: one must not intentionally use a dog to hunt a wild animal, subject to tightly-drawn exemptions. Of course, one cannot get inside the mind of a hunt participant to deduce what he or she really intended. But that is true of all criminal offences requiring a guilty mind (*mens rea*). The courts are well-used to looking at all the evidence, direct and circumstantial, to see if a defendant committing the prohibited act had the requisite intention. Shoplifting is an apposite example – did the defendant intend to steal or was the unauthorised taking an "accident" of absent-mindedness?

In the trail-hunting example, the court would look at all the evidence in deciding whether the intention was to chase live quarry with dogs. Does the hunt encourage foxes to breed? Was the trail laid over territory known to contain foxes? What equipment was used? What does filming, overt or covert, reveal? If the defendant has signed the civil disobedience declaration, that will be damning evidence of a guilty mind.

All this is the usual stuff of criminal prosecutions. If there is genuine doubt, the defendant should receive the benefit of it. There may conceivably be issues around the precise scope of some of the exemptions. Again, that is standard fare. It is difficult to see how there can be much doubt with stag hunting and hare coursing. But each case, quite properly, should be judged on its own merits.

As Alastair McWhirter of the Association of Chief Police Officers recently acknowledged, the police must enforce the Hunting Act as it must all criminal legislation. The Attorney-General has confirmed that it will be enforced in the usual way. If any force were to adopt a policy or practice of turning a blind eye, it would be susceptible to judicial review. Of course, it is for each force to decide its priorities. However, the fact that so many hunters have said they will defy the law should be a powerful factor encouraging the police to take appropriate prosecutions, especially early on. The police are guardians of the rule of law as well as of individual laws.

As Sampson argued, there are no doubt practical policing issues, but so there are with other offences with a public order dimension. The police may be well-advised to look for a subtle rather than openly confrontational approach. But ultimately the Hunting Act contains all the powers of enforcement they need, including the right to seize animals and equipment.

The Act is controversial legislation but it is perfectly enforceable. Indeed, the Countryside Alliance has implicitly recognised as much by launching a human rights challenge – if nothing were really going to change, how could any human rights be infringed? It is the police's job to enforce the law, sensitively but firmly. Otherwise the overwhelming will of elected parliamentarians, and indeed of the population at large, will be thwarted.

This article first appeared on 1 March in The Times, with whose kind permission it is reproduced.

[3] "Police must expect to be outfoxed by hunters", *Law*, 15 February 2005.

MEDIA WATCH

The following are some of the articles that have appeared in the press and may be of interest:

"A brief's best friend?" – *Law Society Gazette* Vol. 101 No. 43 pages 28-29, 2004. Lucy Trevalyan discusses the draft Animal Welfare Bill and reviews animal protection laws.

"Is fox hunting a human right or just wrong? Emotions at the ready . . . there are some surprising last minute arguments against the Hunting Bill" – *The Times*, 7 September 2004. Jon Robins examines the human rights issues surrounding the proposed hunting ban.

Regulation of animal experimentations at Cambridge University: the case of *R (BUAV) v Secretary of State for the Home Department*

David Thomas
Solicitor

On 12 April 2005 Mr Justice Stanley Burnton gave limited permission for the British Union for the Abolition of Vivisection (BUAV) to pursue judicial review proceedings against the Home Secretary. The BUAV sought permission to bring a judicial review against the Home Secretary on six grounds relating to his regulation of animal experiments under the Animals (Scientific Procedures) Act 1986 (the "1986 Act"). The grounds arose out of its undercover investigation of primate (marmoset) neuroscience research at Cambridge University in 2001/2002, in which the BUAV obtained extensive video and documentary evidence. The research was covered by three project licences, encompassing in total some 31 protocols, which themselves set out numerous operations and other procedures to be carried out on animals.

The research was in part into Parkinson's disease and stroke and in part basic research.

Following the BUAV investigation, the Home Secretary asked the chief inspector (CI), a Home Office official, to inquire into various allegations made by the BUAV. The CI concluded that all licensing decisions made by the Home Secretary were correctly made and that appropriate care was given to the animals.

The grounds, in summary, were:

Ground 1: the Home Secretary should have characterised at least some of the protocols as "substantial" rather than "moderate", according to his own definitions of those terms. "Substantial" relates to procedures which may lead to a "major departure from the animal's usual state of health or well-being". Only licence applications with "substantial" protocols are referred to the Animals Procedures Committee (APC), the Home Secretary's advisory committee, for advice

Ground 2: the Home Secretary should have ensured that there was appropriate staff on duty out of hours and that the named veterinary surgeon (NVS) was in practice able to attend out of hours, in each case so that (i) suffering – particularly post-operative suffering – was kept to a minimum; and (ii) marmosets could if necessary be immediately euthanased. These are statutory requirements. There was no system of out of hours cover at Cambridge

Ground 3: the death of an animal is an "adverse effect" and is therefore relevant

to the cost:benefit assessment required by Section 5(4) of the 1986 Act. The Home Secretary says death is "normally" not considered an adverse effect and is therefore ignored in the cost:benefit assessment

Ground 4: the testing and training of brain-damaged marmosets in small boxes should have been regulated under the 1986 Act on the basis that they clearly experienced distress, which should then have been taken into account in the cost:benefit assessment

Ground 5: the Home Secretary should have consulted the APC under Section 21 of the 1986 Act over guidance he issued about depriving animals of food and water (the Cambridge marmosets, including brain-damaged ones, were denied water for long periods to motivate them to perform tasks and also had their food restricted).

Ground 6: the Home Secretary should take into account the suffering and death of animals used for breeding and other animals not used in experiments when conducting the cost:benefit assessment.

The judge granted permission for grounds 3 and 5. He refused permission for grounds 1/2, 4 and 6.

Grounds 1 and 2 (assessment of suffering and out-of-hours care): the judge held that there was "evidence on which it is arguable that the Chief Inspector erred in reaching his conclusion that the severity limits had been correctly applied". He gave as examples licence 80/1326 which envisaged repetitive seizures that might not be well controlled by drug treatment and licence 80/1249, which envisaged that an animal might suffer persistent epilepsy – he accepted that the animal would already have suffered "a major departure from [its] health" before being killed and that this therefore required a substantial severity limit (rather than the "moderate" one it was given). He also referred to the researchers' Standard Operating Procedure (attached to licence 80/1249), which envisaged that some animals would suffer serious neurological symptoms, including seizures and psychotic behaviour. In relation to Ground 2, the judge said that he did not think it was arguable that the relevant provisions (Sections 6(6) and 10(2) of the 1986 Act) imposed a duty on licensees to have appropriately trained staff on site at all times. However, he described as *"more meritorious"* the argument that the fact that marmosets were left without observation for 15 or 16 hours (longer at weekends and holidays, in fact) shortly after a brain operation made it impossible for the researchers to ensure that a marmoset suffering "substantially" could be immediately killed (as required by Section 10(2)(b)).

However, the judge refused permission for grounds 1 and 2, for the following reasons:

Firstly, that the BUAV had to show, in relation to both grounds, *not* that the CI's conclusions were perverse or legally incorrect, but that the Home Secretary had acted irrationally in accepting the CI's conclusions. Since the CI was scientifically qualified and the Home Secretary was not, that was a difficult threshold for the BUAV to cross. In the opinion of the author (who acted for the BUAV), this approach is clearly wrong; the relevant test should be whether licensing decisions disclosed an error of law, not whether the Home Secretary was reasonable in accepting the advice of the CI. Put another way, if advice to a minister is legally flawed, so must the minister's decision to accept that advice. If the judge were right, it would mean that licensing decisions could, in practice, never be

challenged, because it will be always be virtually impossible to show that the Home Secretary, a layman, acted unreasonably in accepting the advice of his expert inspectors.

Secondly, even in relation to the requirement for immediate euthanasia, Parliament could not have envisaged that each animal would be under constant supervision (a contention not made by the BUAV). Thirdly, that there had been an unreasonable delay in bringing proceedings. To a significant extent the issues related to historical facts (some of which might be in dispute) and also to expert assessment. It might not be easy to apply a finding to different facts and finally, the cost and time involved in a full hearing, given the fact that expert evidence would be involved, were relevant factors.

Ground 3 (death as an adverse effect): the judge accepted that this claim was arguable and granted permission for it to proceed.

Ground 4 (training and testing), Stanley Burnton J. referred to *Notes on shaping animals*, a Cambridge document, indicating that an animal might become miserable or angry when subjected to testing of the sort contemplated and that symptoms included "screaming, trying to get out of the box, defecating". To the inexpert mind, he accepted that such symptoms were indications of "distress" within Section 2(1) of the 1986 Act (only procedures which may cause "pain, suffering, distress or lasting harm" need to be licensed). However, he again said the legal test was whether the Home Secretary was reasonable in accepting the advice of the CI that no distress was foreseeable. In addition, there had again been delay. Finally, the facts were peculiar to these research projects.

Ground 5: the judge accepted that it was arguable that the Home Secretary should have consulted the APC, on the basis that the guidance in questions amended a code of practice. He therefore granted permission to proceed with the claim.

Ground 6 (stock animals): the judge did not consider it arguable that the suffering and death of stock animals should be taken into account in the cost:benefit assessment. Their interests were protected under the provisions dealing with housing and care.

The grounds on which permission was granted will be considered at a full hearing. The BUAV is seeking permission to appeal the judge's decision on grounds 1 and 2.

UK CASE LAW

Nash v Birmingham Crown Court [2005] EWHC 38 (Admin)

This case concerned prosecution under the Protection of Animals Act 1911. Nash was convicted of causing unnecessary suffering to domestic cats by unreasonably omitting to provide them with proper care and attention contrary to Section 1(1)(a) of the said Act. The conviction was upheld by the Crown Court. It held that the information contained within the summons provided the appellant with reasonable information about the nature of the charges. It also held that even if the summons lacked particularity that did not render it defective, but gave a right to require further information about the nature of the charges. On appeal, the High Court held that the information

contained within the summons did not provide sufficient information about the nature of the charges and that the appellant was entitled to know what specific act or omission she was charged with. This did not render the summons defective, but required further information curing the defect be given in good time, and the appellant had indeed been provided with sufficient further information to enable the charges to be understood. The appeal was therefore dismissed.

Worcestershire County Council v Tongue and others [2004] EWCA Civ 140

The defendants were farmers who had been convicted of causing unnecessary suffering to part of their herd of cattle contrary to Section 1(1)(a) of the Protection of Animals Act 1911 and made subject to a disqualification order, preventing them from having custody of animals for the rest of their lives. The claimant authority sought an injunction for the removal of cattle from their custody on the grounds that they were in breach of the disqualification order. It submitted that the civil courts had jurisdiction to grant this relief by virtue of Section 222(1) of the Local Government Act 1972, under which it had the right to seek the assistance of the said courts in carrying out its functions under legislation.

It was held at first instance that although cattle were being kept in breach of the disqualification order, the fact that they were suffering and the desirability of their removal from the defendant's ownership did not give the court jurisdiction to make the order sought as the cattle were on the defendant's land and were his property. While a civil court had jurisdiction to grant relief in the form of a prohibitory injunction to restrain a person from infringing a statute where the local authority had the power to enforce that statute through the criminal courts, it did not have jurisdiction as a matter of principle to order the cattle to be taken into possession of a third party in the absence of the Council having some right in respect of the cattle.

The local authority appealed against the decision. It argued that it was responsible for maintaining the welfare of animals in the region and was entitled to remove the animals as they were still being kept in breach of the disqualification orders. The appeal was dismissed and the Court of Appeal held that the Order sought went beyond the powers of the courts under the Protection of Animals (Amendment) Act 2000.

LEGISLATION

The Incidental Catches of Cetaceans in Fisheries (England) Order 2005

The Order makes provision for the enforcement of Community obligations relating to sea fishing by vessels in certain areas as set out in Council Regulation (EC) No 812/2004,[4] requiring Member States to monitor the by catch of cetaceans by the implementation of an observer scheme and requiring certain vessels to deploy acoustic devices in relation to specified gear while fishing. The Order came into force on 2 February 2005 and does not form part of the law of Scotland or Northern Ireland and does not apply in Wales.

[4] Council Regulation (EC) No 812/2004 laying down measures concerning incidental catches of cetaceans in fisheries and amending Regulation (EC) No 88/98, OJ L 150, 30.4.2004, p. 12.

Draft Animal Welfare Bill, Command No. 6252, 15.7.2004
See page 3

The Fur Farming (Compensation Scheme) (England) Order 2004

The Order establishes a compensation scheme for mink farmers affected by Section 1 of the Fur Farming (Prohibition) Act 2000 banning fur farming in England with effect from 31 December 2002. The original scheme was quashed by the High Court.

The Conservation of Seals (Scotland) Order 2004

The Order prohibits from 4 September 2004 the killing, injuring or taking of common seals and grey seals in a defined area within the Moray Firth (Article 2). The protection offered to seals in this Order is in addition to protection afforded during closed seasons for seals provided for in Section 2(1) of the Conservation of Seals Act 1970.

In 2004 the UK signed up to the new *Council of Europe Convention on the Protection of Animals During International Transport*. The Convention will extend improved animal welfare standards beyond EU borders. Other countries that signed the Convention were Belgium, Croatia, Finland, Germany and Greece.

Freedom of information – implications for animal welfare campaigners

David Thomas
Solicitor

The Freedom of Information Act 2000 (the "FoI Act") finally came fully into force on 1 January 2005. With the Data Protection Act 1998 and the Environmental Information Regulations 2004, it forms a triumvirate of legislation dealing with access to information.

The FoI Act entitles anyone to ask a public authority whether it holds information of a particular description and, if it does, to disclose it. The information can pre-date the Act, provided it is still held by the authority in question. There are around 100,000 public authorities, ranging from government departments and local authorities to universities, health trusts and myriad other bodies. An applicant only has to pay for the cost of copying and postage, although a public authority can reject a request if it would take too long to find the information (roughly three and a half days with central government and two and a half days with other public authorities).

The right to information is not, of course, absolute. There are numerous exemptions, such as national security and defence, governmental policy-making, confidential information and personal safety. Prohibitions on disclosure in other legislation continue to apply. Some exemptions are absolute and some are subject to a public interest test. If a request is rejected, in whole or part, the applicant can complain to the Information Commissioner and then to the Information Tribunal. A challenge raising a point of law can be taken to the High Court. Ministers have the right of veto

even in relation to information the Commissioner etc says should be disclosed, but this is likely to be exercised only rarely.

A great deal of animal suffering takes place behind closed doors such that the public never gets to hear about it, unless there is an undercover investigation. The FoI Act should enable the veil of secrecy to be pulled back. Commercial confidentiality will continue to trump transparency in many cases, but much information should nevertheless be disclosable.

One of the principal battlegrounds will be animal experiments, where the Government and researchers have always resisted the disclosure of information (except on their terms). Early indications are that the Home Office will fight meaningful disclosure but there are powerful arguments that their approach is unlawful. Non-governmental organisations are likely to test these arguments over the coming months.

French cosmetics challenge

David Thomas
Solicitor

France is challenging before the European Court of Justice (ECJ) the animal testing amendments to the Cosmetics Directive[5] introduced in 2003.[6] The amendments are very complicated, but in essence they ban animal testing for cosmetics in the EU by March 2009 at the latest and the sale in the EU of cosmetics tested on animals after that date (or March 2013 in relation to three particular tests), wherever the testing took place.

France argues (amongst other things) that (a) the sale ban is inconsistent with the World Trade Organisation (WTO) agreements; (b) the provisions as a whole are ambiguous and therefore fail the test of legal certainty; and (c) they are disproportionate in their effect (the advantages to animal welfare are outweighed by the disadvantages to business).

On 17 March, Advocate General Geelhoed delivered his opinion on the case to the ECJ. He advised the court to dismiss the challenge, on all grounds. His reasoning is powerful and he makes comments which have an importance for animal welfare beyond this case. His view is that, although this would be a matter for the WTO dispute panels not the ECJ, the sale ban does not fall foul of the WTO agreements. This is particularly important, given that it is often argued – incorrectly – that the agreements prevent bans on the import of cruelly-produced goods.

The ECJ normally adopts the advice of its advocate generals and it would be a surprise if it did not do so in this case.

[5] Council Directive 76/768/EEC of 27 July 1976 on the approximation of the laws of the Member States relating to cosmetic products, OJ L 262, 27.9.76, p. 169.

[6] Case C-244/3 French Republic v European Parliament and Council of the European Union, not yet published.

The reality gap lives on: the case of *R (Compassion in World Farming Limited) v Secretary of State for the Environment, Food and Rural Affairs*[7]

Alan Bates
Barrister, Monckton Chambers

This is the latest case in which the English courts have had to consider the yawning gap between the consensus that animals should not be caused to suffer unnecessarily, and the continued existence of systems of intensive farming that unavoidably have a detrimental impact on animal welfare when compared with alternative non-intensive methods. The case concerned the compatibility of the intensive farming of broiler chickens with the Welfare of Farmed Animals (England) Regulations 2000[8] (the "Regulations"), which implement Council Directive 98/58/EC[9] (the "Directive").

Approximately 44 billion broiler chickens are reared worldwide each year. Broiler chickens can be divided into two groups. The first group is ordinary broilers that are reared for their meat ("meat broilers"). The other group is the breeding flock ("breeder broilers"), whose role is to produce chicks. The case concerned the restricted feeding regime to which both male and female *breeder* broilers are subjected. The need for their feed consumption to be severely restricted arises from the reduction that selective breeding has achieved in the time it takes for a chicken to reach its 2 kg slaughter weight. That time has been halved over the last 30 years, with a broiler chicken now going from hatching to slaughter weight in just six weeks. Chickens of such fast-growing genotypes are vulnerable to a range of serious ailments because their legs, hearts and lungs do not develop quickly enough to support their massive muscle growth.

In the case of breeder broilers their rapid growth presents a serious welfare dilemma. Since broilers do not reach sexual maturity until between 18 and 24 weeks after hatching, breeder broilers must be kept alive for at least three times as long as the time it takes a meat broiler to reach slaughter weight. If female breeder broilers were permitted to feed *ad libitum*, their welfare would be seriously undermined by heart problems and lameness. In addition, their commercial utility would be undermined by high mortality rates, and because egg production and hatchability would be poor. In an attempt to reduce such problems, breeder broilers, for the first 20 weeks of their lives, are fed one half or less of what meat broilers are given to eat (sometimes as little as 20%). While this is partially effective in reducing the incidence of health and welfare problems arising from their growing too quickly, the restrictive feeding regime itself presents a serious welfare concern because (as the Government accepted by the time of the Court of Appeal hearing) scientific studies have demonstrated that the feed restrictions result in the birds experiencing "chronic hunger"[10] to the detriment of their welfare.

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[7] [2004] EWCA Civ 1009.
[8] SI 2000/1870.
[9] Council Directive 98/58/EC of 20 July 1988 concerning the protection of animals kept for farming purposes, OJ L 221, 8.8.1998, p.23.

[10] Mench, J. A., "Broiler Breeders: Feed Restriction and Welfare", *World Poultry Science Journal*, March 2002: "Broiler breeders are truly caught in a welfare dilemma, because the management practices that are necessary to ensure health and reproductive competence may also result in the reduction of other aspects of welfare … Broiler breeders show evidence of physiological stress as well as increased incidence of abnormal behaviours, and are also chronically hungry.".

The only way to avoid this welfare dilemma is to avoid rearing birds of certain fast-growing genotypes, and to instead use birds of genotypes which would not require that the breeding flock be subjected to a restrictive feeding regime that resulted in birds being chronically hungry. Essentially, the contention of the claimant animal welfare organisation was that the law required the adoption of that course.

The Directive

The Directive laid down minimum standards for the protection of animals kept for farming purposes. Article 10 requires Member States to bring into force national measures to implement the Directive by 31 December 1999, though they are free to maintain or apply stricter standards.

Article 4 provides:

"Member States shall ensure that the conditions under which animals (other than fish, reptiles or amphibians) are bred or kept, having regard to their species and to their degree of development, adaptation and domestication, and to their physiological and ethological needs in accordance with established experience and scientific knowledge, comply with the provisions set out in the Annex."

The Annex referred to is organised under a number of headings, such as staffing, inspection, freedom of movement, accommodation, and breeding procedures. One such heading is "Feed, water and other substances", under which paragraphs 14 and 15 provide as follows:

"14. Animals must be fed a wholesome diet which is *appropriate* to their age and species and which is *fed to them in sufficient quantity to maintain them in good health and satisfy their nutritional needs*…

15. All animals must have access to feed *at intervals appropriate to their physiological needs*." [emphasis added]

In addition, paragraph 21 (the final paragraph) provides:

"No animal shall be kept for farming purposes unless it can reasonably be expected, on the basis of its genotype or phenotype, that it can be kept without detrimental effect on its health or welfare."

The domestic implementing Regulations reproduce in Schedule 1 the scheme and layout of the Annex, albeit with certain amendments designed to maintain a higher domestic standard. Regulation 3(2) places a burden on owners and keepers of animals to "*take all reasonable steps* to ensure that the conditions under which the animals are bred or kept comply with the requirements set out in Schedule 1." [emphasis added]

The claim brought by Compassion in World Farming (CIWF)

CIWF sought judicial review of both the Secretary of State's implementing Regulations and her refusal to adopt a policy of prosecuting farmers under those Regulations for subjecting breeding broilers to the restricted feeding regime. The judicial review application was first heard by Newman J in the High Court,[11] where CIWF argued two grounds:

(1) *The "reasonable steps" derogation:* The Directive should be read as imposing an obligation on Member States to achieve the *end result* of ensuring that the prescribed minimum standards were met, and not merely as requiring Member States to regulate the *conduct* of keepers by requiring them to take *'all reasonable steps'*

[11] [2003] EWHC 2850 (Admin).

to achieve that result, as the Regulations had done.

(2) *The "chronic hunger" violation:* The restricted feeding regime applied to breeder broilers did not comply with paragraphs 14 and 15 of the Annex to the Directive (which had been transposed into the domestic Regulations as paragraphs 22 and 24 of Schedule 1). Alternatively, the regime breached paragraph 22 of Schedule 1 which went further than the Directive, providing that animals had to be fed in sufficient quantity "*to promote a positive state of wellbeing*". Accordingly, the Department for the Environment, Food and Rural Affairs, by refusing to adopt a policy of prosecuting keepers of breeder broilers who subjected them to feeding practices that led to their experiencing "chronic hunger", was failing to enforce the Regulations.

Newman J's judgment

Newman J rejected both of CIWF's grounds of challenge. In relation to the first ground, the judge noted that Article 249 of the Treaty establishing the European Community allowed Member States a "choice of form and methods" when implementing directives. The Annex to the Directive incorporated concepts the application of which depended on scientific value judgments, e.g. "appropriate care" (paragraph 4), "suitable accommodation" (paragraph 4), "appropriate steps to safeguard health and wellbeing" (paragraph 13) and, of particular relevance to the present case, a "wholesome diet" (paragraph 14) and feeding at "appropriate" intervals (paragraph 15). The lack of certainty intrinsic within those concepts would give rise to particular difficulty if they were treated as obligations imposing strict liability.[12] By subjecting keepers to a "reasonable steps", rather than an absolute, obligation, the UK had taken sufficient action that was apt and likely to give rise to substantial compliance with the standards set out in the Annex to the Directive. Accordingly, the UK had acted within its margin of discretion to properly transpose the Directive.

Newman J also rejected the second ground of challenge. All animals kept by humans were subjected to a feeding regime of one form or another and, at certain times, those animals may be described as "hungry". Hunger was a natural physiological state that motivated eating. Although the literature provided some support for the proposition that the feed restrictions resulted in the birds being "chronically stressed", the assessment of stress in birds was scientifically problematic and it could not be shown that the breeder broilers were "starving".

It was not enough for the claimant to argue that the feed restrictions resulted in breeder broilers being left "chronically hungry", "very hungry" or that, from time to time, they exhibited distress. *Intensive farming in connection with chickens was not of itself unlawful, and the need to achieve a balance in connection with the health of breeder broilers was an attendant aspect of intensive farming systems.* The period of feed restrictions was limited and directed to a particular need, and the facts that breeder broilers on restricted feeding regimes were able to gain weight and that their essential bodily functions were not compromised were significant factors in counteracting the suggestion that they were being kept sufficiently hungry to compromise their wellbeing.

[12] Reference was made to the common law's reluctance to impose strict liability in respect of criminal offences: see *Sweet v Parsley* [1970] AC 132, 148-150, *per* Lord Reid.

The Court of Appeal's judgment

CIWF appealed to the Court of Appeal, though before that Court only the second ground for review ("chronic hunger") was pursued. In so doing, CIWF focused on the final words of paragraph 22 (which were not derived from the Directive), requiring that animals be fed sufficient food "to promote a positive state of wellbeing". That constituted a distinct requirement that was not met by the restrictive feeding regime.

CIWF criticised the judge for approaching the case on the basis that it was a given that intensive farming of chickens of the selectively bred genotypes now being used had to be accepted. Paragraph 29 of Schedule 1 to the Regulations (which materially replicated paragraph 21 of the Annex to the Directive) provided that "[n]o animal shall be kept for farming purposes unless it can reasonably be expected, on the basis of its genotype or phenotype, that it can be kept without detrimental effect on its health or welfare". In any event, the claimants contended that the judge had been wrong to balance the commercial interests of intensive farming against the minimum standards specified by the Regulations and the Directive.

The Court of Appeal dismissed the appeal. Giving a judgment with which the other members of the Court agreed, May LJ held[13] that, provided that breeder broilers were fed so that their diet was wholesome and appropriate to their age and species and sufficient to maintain them in good health and satisfy their nutritional needs (as had been found by Newman J to be the case[14]), there would be no contravention of the last eight words of paragraph 22 if they were for part of their lives persistently hungry.

Like Newman J, May LJ effectively took it as a given that the legislation allowed the intensive farming of chickens of fast-growing genotypes. Paragraph 22, he held, was concerned with the feeding of animals which owners or keepers happened to be rearing, irrespective of their genotype. CIWF's objection based on paragraph 29 of Schedule 1 was brushed aside without detailed consideration.[15]

May LJ, having thus refused to consider the possibility that the rearing of fast-growing genotypes was not permitted by the legislation, then inevitably went on to find that the restricted feeding regime was not incompatible with paragraph 22 since a balance had to be arrived at between mutually incompatible welfare concerns. The promotion of an animal's "wellbeing" required a balancing of factors which may conflict, and the last eight words of paragraph 22 of Schedule 1 imposed no discrete strict obligation. The obligation was *"to take all reasonable steps"* and *"to promote"*. Performing the balance in itself met the requirements imposed by those words.

In a seemingly reluctant concurrence, Sedley LJ accepted that "the behavioural evidence show[ed] that breeders [were] distressed by the low level of feeding to which they [were] confined for their first 20 weeks, and that this on its face [was] inimical to their wellbeing". However, the selection of genotypes was "beyond the reach of the measures at issue" in the appeal. Accordingly, while agreeing with May LJ "[f]or the present", Sedley LJ concluded that it might "nevertheless be for consideration whether, if the ingredients of an offence [were] otherwise present, the use of a genotype which

[13] Court of Appeal's judgment, paragraph 49.
[14] Newman J's judgment, paragraph 60.

[15] May LJ asserted that CIWF had abandoned reliance on that paragraph before the High Court, and should not be permitted to resurrect it before the Court of Appeal.

ma[de] suffering unavoidable [would] afford a defence".[16]

Commentary

What will be of greatest significance in this case to those with an interest in animal welfare law generally is the way that the High Court and Court of Appeal approached the issues. Rather than look at the strict minimum welfare requirements set out in the Directive and the domestic Regulations, before then determining whether or not the feeding regime was compatible with those requirements, the two Courts regarded the potential reach of the legislation as going no wider than requiring a balance to be struck between the welfare consequences of adopting different alternative feedings regimes *within the existing intensive farming system.*

May LJ's judgment was particularly unsatisfactory in that he completely failed to engage with paragraph 29 of the Regulations, which is plainly directed at preventing the keeping of animals which, by reason of their genotypes, cannot be farmed without detriment to their welfare. Developments in selective breeding and genetic engineering should not be allowed to erode the minimum welfare standards laid down by European Community law.

The author believes that a principled approach would require a simple two-stage test. First, what are the minimum standards imposed by the legislation? Second, is the system of husbandry, practice or technique that is at issue in the case consistent with *all* of those minimum standards? Where the legislation has set out minimum standards that cannot be achieved within an existing system of intensive animal husbandry, or by the use of a particular selectively bred or artificially engineered genotype, it is the system or the use of that genotype, and not the standards, that should give way. Legislatures would then have to face up to the fact that that the existing systems and practices violate the very minimum standards that have been laid down.

Whilst this approach would, in this case, have outlawed an existing agricultural practice with a pronounced impact on the broiler industry, is this not a situation where it is incumbent on the courts to "let justice be done, though the skies may fall"[17]?

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- Oncomouse: a note on the reasoned decision of the Technical Board of Appeal of the European Patent Office (March 2005).
- An examination of the deficiencies in how both the law and prevailing morality treat animals and the importance of empathy in moral philosophy.
- Laboratory animals and the art of empathy, with comment by Professor R.G. Frey of Bowling Green State University and a further response by the author.

[16] Court of Appeal's judgment, paragraphs 56-58.

[17] "We must not regard political consequences, however formidable they may be. If rebellion was the certain consequence, we are bound to say, "*Justicia fiat, ruat coelum*" " – William Murray, Lord Mansfield (1705-1793).

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Animal cruelty, of course, does not recognize national boundaries and we are building up a network of lawyers who are interested in animal protection in many different countries.

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- highlight areas of animal welfare law in need of reform,
- disseminate information about animal welfare law, including through articles, conferences, training and encouraging the establishment of tertiary courses,
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