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Association of Lawyers for Animal Welfare

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The Animal Welfare Bill

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The Animal Welfare Bill was introduced in the House of Commons on 13 October. Since July 2004 when a draft Bill was published, it has undergone public consultation, pre-legislative scrutiny (by the Environment, Food and Rural Affairs Committee) and significant re-drafting. Shifts in Government policy during this period have affected its content. Although much in the Bill is a welcome improvement on the present situation, it is in some respects more conservative and preserving of the status quo than had been hoped.

This article analyses some of the principal provisions of the Bill and the areas intended to be dealt with in secondary legislation.

Welfare offence[1]

The "welfare offence" is pivotal to bringing animal welfare law in line with prevailing ethical views on animals. The rationale underlying this offence is to enable action to be taken to prevent an animal from suffering to the degree required to act under the cruelty offence, by requiring a person responsible for an animal to take reasonable steps to ensure that its needs are met to the extent required by good practice. The needs of an animal will encompass its environment, diet, ability to exhibit normal behaviour, need to be housed with or apart from other animals, protection from pain, injury and disease and other factors. This offence should enable many animals to be helped in future.

However, although the duty is already qualified by the requirement to take only "such steps as are reasonable in all the circumstances", new wording since the draft Bill makes it relevant for a court to have regard to "any lawful purpose for which the animal is kept and any lawful activity undertaken in relation to the animal". This has the unfortunate potential to create inconsistent protection for animals depending on the purpose for which they are used. Rather than the offence leading to the disappearance of activities involving animals where it is extremely difficult or impossible to ensure their welfare (for example the use of elephants in circuses), this proviso seems to give such activities special latitude.

Cruelty offence[2]

The new offence of causing or permitting unnecessary suffering updates its somewhat archaic equivalent in the Protection of Animals Act 1911. Although the Bill does not expressly refer to mental suffering as the 1911 Act does, the explanatory notes to the legislation expressly include it.

Recordings of cruelty

The draft Bill created an offence of making, possessing, distributing or publishing recordings of an animal fight. This has been removed. It has been suggested that animal welfare legislation is not the appropriate place to deal with recordings of animal fights, cruelty and bestiality as these are a matter of moral outrage not welfare. Not only does this seem extraordinary given that such material must feed the taste for violence towards animals and the demand for fights and cruelty to take place, but there is no indication that the problem will be dealt with elsewhere, for example in possible new laws on possessing and accessing extreme internet pornography. The existing law on obscenity and use of animals in films applies inadequately to these problems.

[1] Clause 8.

[2] Clause 4.

The definition of "animal"[3]

The protection given by the new legislation will be restricted to vertebrate animals unless regulations are adopted to extend the definition of "animal". This limitation is ostensibly on the basis that only animals for which there is sufficient scientific evidence of their capability to experience pain or suffering should be included. There is, however, increasing scientific consensus that certain invertebrates have this capacity, in particular cephalopods and decapod crustaceans (octopus, squids and cuttlefish, crabs, lobsters and crayfish). These creatures are protected by welfare legislation in other countries, such as New Zealand, and the abovementioned Committee supported their inclusion in the new legislation. However, the Government proposes merely to "continue to review" this area, possibly because of the implications an extension of the definition of "animal" would have for the legislation governing animals used for experimental and scientific purposes.

The application of the Bill is further limited to, broadly, domesticated and kept animals. Wild animals living in the wild are not protected unless and until taken under control by a person.

Tail docking[4]

The Bill contains a ban on mutilations, including tail docking of dogs for cosmetic reasons, following the definition of a Royal College of Veterinary Surgeons working group. There is, however, a power to make exemptions in regulations that the Government has stated will, unless Parliament decides otherwise, permit docking.

Regulations[5]

Regulations may be made under the Bill for the purpose of promoting the welfare of animals for which a person is responsible, avoiding the need to use primary legislation to update welfare standards applying to non-farmed animals, a factor partly responsible for the slow manner in which this area of law has been updated. (There already exist powers to adopt regulations relating to farmed animal welfare.)

The Department for the Environment, Food and Rural Affairs published its regulatory impact assessment coincident with the Bill. The specific activities involving animals to be regulated are:

- pet shops (including internet selling),
- pet fairs,
- animal sanctuaries and rehabilitation centers,
- livery yards,
- tethering of equines,
- riding establishments,
- animal boarding,
- dog breeding,
- greyhound racing,
- performing animal trainers and suppliers,
- rearing of game birds for sport shooting.

These areas will be variously subject to licensing, requirements to register with the local authority or compliance with codes of practice. The proposals lack real detail at this stage but appear to be influenced by a new Government policy on "better regulation" and what industry is prepared to bear. Areas of concern include the increase in the maximum period for licensing and inspection of establishments such as pet shops and riding schools from one year to three years, over-reliance on certain industries where serious welfare problems are known to regulate themselves, and the legalisation of pet fairs under licence. The moves to license livery yards and to start to regulate animal sanctuaries are, however, positive.

[3] Clause 1.
[4] Clause 5.
[5] Clause 10.

Conclusion

Although this article focuses largely on where the Bill could have gone further, there is also much to welcome. It is hoped that some of its deficiencies can be remedied in Parliament. The new law is expected to enter into force in 2006. Further work will then be required over at least the next five years to put in place effective secondary legislation to further protect animals.

What we need is clarity: pet fairs and the Pet Animals Act 1951

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It was concerns about the depressing conditions in which pet animals were being sold at certain London markets that led Parliament to enact the Pet Animals (Amendment) Act 1983. That Act amended the Pet Animals Act 1951 so that it provided, in Section 2, that "[i]f any person carries on a business of selling animals as pets in any part of a street or public place, or at a stall or barrow in a market, he shall be guilty of an offence." The 1983 amendment eventually led to the complete eradication of pet-selling stalls at regular markets.

Since the exotic pets craze of the early 1990s, however, a new form of market-type selling of pet animals has emerged which perhaps presents even greater animal welfare negatives than the market stalls which used to so sadden the compassionate market-goer. In many towns and cities across the UK, in community halls, leisure centres and schools, exotic animal fairs are taking place, often calling themselves "reptile exhibitions", at which animals are sold as pets directly to the public. The typical event consists of a number of different trestle-table stalls from which tens, hundreds, or even thousands, of reptiles and other exotic animals are displayed and offered for immediate sale by different independent breeders and dealers. In many ways the format is that of a jumble sale, albeit that the "goods" sold are sentient creatures rather than unwanted bric-a-brac. The animals have often been transported for many hours in the backs of hot cars and vans, before being displayed in unsuitable cages stacked one atop another. Many visitors to these "exhibitions" will make impulse purchases of exotic animals that have highly specialised care requirements, and will do so without the benefit of appropriate care advice from the sellers.

Pet birds are also being sold at such occasional events. Indeed, bird fairs tend to take place on a much larger scale than their reptilian counterparts. The National Cage and Aviary Bird Exhibition, organised by IPC Media (the publishers of *Cage and Aviary Birds* magazine), is the highlight of the bird dealers' calendar. The 2003 event, which took place in early December of that year at the National Exhibition Centre near Birmingham, was granted a pet shop licence by Solihull Metropolitan Borough Council for the selling of up to 100,000 birds. Undercover investigators from Animal Aid visited the event and documented a number of apparent breaches of the conditions attached to that licence, as well as of the Wildlife and Countryside Act 1981.[6] The multiple independent traders offering birds for sale at that event were drawn from across the UK, with at least one coming from another EU Member State. Plainly, therefore, the sellers were not mere small-time hobbyists, but were serious commercial operators. Many thousands of birds are believed to have changed hands in the course of that event.

Quite apart from the obvious welfare concerns that are posed by such events, campaigners against them also point to the potential risks to public health. Whatever claims may be made by the sellers of birds

[6] "From Jungle to Jumble – National Cage and Aviary Birds Exhibition 2003: Evidence, findings and recommendations", a report by Animal Aid, March 2004.

and reptiles at such fairs, it is improbable to deny that at least some of the animals being offered for sale will have been caught in the wild or will at least have recently mixed with wild-caught animals. Indeed, such events would appear to be an ideal outlet for the disposal of animals by black market dealers or persons involved in various forms of wildlife crime. The Animal Aid report[7] recorded that, of a sample of five birds which were purchased at the event and tested for *Chlamydia psitacci* (psittacosis), one (a Senegal parrot) had the infection, which can be transmitted to humans. The avian flu outbreak in Asia, and the continuing spread of the virus around the world, would appear to highlight the dangers inherent in bird-human interaction in large-scale market-type situations.[8] Reptile fairs also present significant public health risks, particularly in view of the absence of quarantine requirements for imported cold-blooded animals and the documented cases of fatal infection of humans with salmonella through contact with pet reptiles. Indeed, the occurrence of two infant deaths in the UK within six months as a result of salmonella infections from reptiles prompted the Department of Health to re-issue a warning in 2000 that children under five years of age, pregnant women, the elderly, and the immuno-compromised should all avoid contact with reptiles.

What, then, is the legal position with regard to these events? Do they fall within the prohibition, in Section 2 of the 1951 Act, of selling animals from market stalls and in public places? And if they do not, then do they require a "pet shop licence" from the local authority in order to avoid the commission of criminal offences contrary to Section 1 of that Act, which prohibits the keeping of a pet shop except under the authority of such a licence? Campaigners against such events have faced considerable frustration at the variety of views of the law adopted by different local authorities, who bear the responsibility for granting licences and prosecuting offences under the 1951 Act. While most local authorities have accepted the campaigners' arguments that these events fall within the Section 2 prohibition, some have licensed them under Section 1, while yet another group of local authorities regard these events as outside the scope of the 1951 Act altogether so they are left unregulated.

The Section 2 prohibition on selling animals in public places and from market stalls

What exactly is a "public place" for the purposes of the 1951 Act? The phrase is not defined in the Act itself, but has generally been defined in other regulatory legislation as "[a]ny place to which the public have access whether on payment or otherwise".[9] Such a definition would appear to be capable of embracing leisure centres, racecourses, school playing fields, agricultural showgrounds and other places where pet fairs typically take place. The difficulty with giving such a broad scope to the phrase, however, is the need to exclude conventional pet shops, which it plainly cannot have been the intention of the legislature to prohibit.

Further confusion has been caused by the organisers of pet fairs who have sought to portray their events as being open to "members only", essentially as a device to circumvent rulings by some local authorities that pet fairs that are open to the public, whether on payment of an admission fee or otherwise, are properly regarded as being held in public places and thus as falling within the Section 2 prohibition. Often the "memberships" sold are a thinly disguised

[7] Ibid.

[8] The death of an imported parrot in an Essex quarantine facility from the H5N1 strain of avian flu (the lethal strain which can be passed on to humans) in October 2005 led to a temporary EU ban on the selling of birds at pet fairs. The ban is due to expire on 31 December 2005.

[9] Licensing Act 1902. Other examples of the use of the same or a similar definition are: Indecent Displays (Control) Act 1981; Environmental Protection Act 1990, Part VIII, Section 149(11); Dangerous Dogs Act 1991, Section 10(2).

sham, with "membership cards" being provided on payment of what is in truth no more than a nominal admission fee payable at the door.

Whether or not a pet fair is held in a public place, however, it will still fall within the Section 2 prohibition if it involves the selling of animals as pets from market stalls. The usual common law definition of a "market" is "a concourse of buyers and sellers". It seems likely that the selling of animals from a stall at an event which consisted of a number of different independently-run stalls gathered together in an open-plan setting would come within that definition, whether the event was held indoors or outdoors, and whether it took place regularly or occasionally.

Until this issue is resolved by the higher courts, however, confusion will continue to reign as to whether or not pet fairs do involve the commission of criminal offences contrary to Section 2.[10]

Assuming the events do not involve violations of Section 2, is a pet shop licence required under Section 1?

Section 1 of the 1951 Act makes it an offence to "keep a pet shop except under the authority of a licence granted in accordance with the provisions of [the] Act". The definition of a "pet shop" is provided in Section 7(1):
"References in this Act to the keeping of a pet shop shall, subject to the following provisions … be construed as references to *the carrying on at premises of any nature (including a private dwelling) of a business of selling animals as pets*, and as including references to the keeping of animals in any such premises as aforesaid with a view to their being sold in the course of such a business, whether by the keeper thereof or by any other person." (emphasis added)

Thus, it is not only conventional "high street" pet shops that are required to be licensed.[11] Accordingly, it would seem that, even if pet fairs do not involve the commission of criminal offences under Section 2, such offences would nevertheless be committed under Section 1 by any person "carrying on … a business of selling animals as pets" who was not doing so under the authority of a valid licence.

A question therefore arises as to the party who must apply for, and be issued with, a valid licence in order to "keep a pet shop" at the event (i.e. carry on a business of selling animals as pets). Section 1(2) of the 1951 Act appears to provide a simple answer:

[10] Section 2 has been the subject of a number of decisions in the magistrates' courts (see, e.g., *Rogers* v *Teignbridge District Council* (Torbay Magistrates' Court, 7 November 2000); *Rapa Limited* v *Trafford Borough Council* (Trafford Metropolitan Magistrates' Court, 18 June 2002); also the Scottish case *White* v *Kilmarnock and Louden District Council* 1991 SLT (Sh. Ct.) 69). However, Section 2 has not yet been the subject of a decision by the High Court or the Court of Appeal, and thus no binding authority exists.

[11] In *Chalmers* v *Diwell* (1975) 74 LGR 173, it was held that a premises where birds were held prior to export to overseas purchasers required a pet shop licence. The premises were effectively no more than a holding center: birds usually stayed on the premises for less than 48 hours, though they had occasionally remained on the premises for up to 12 days. Nevertheless, the defendant was held to have been keeping a pet shop. Giving judgment for the Court, Lawton J. attached no weight to the fact that purchasers did not visit the defendant's premises. It was sufficient that the defendant was: "in fact carrying on a business of selling animals [as] pets. He [was] in fact keeping those pets on the premises for the purposes of his business, even though it [was] for a limited time." The defendant appears to have supplied the birds directly to the final purchaser (i.e. the party who would keep the bird as a pet). It therefore remains unclear whether all premises that hold animals that are in the pet trade supply chain require a licence, or whether the requirement only applies to premises from which a business is carried on of supplying animals as pets to the final consumer (i.e. the pet owner).

"Every local authority may, *on application being made to them for that purpose by a person who is not for the time being disqualified from keeping a pet shop*, and on payment of such fee . . . as may be determined by the local authority, *grant a licence to that person to keep a pet shop* at such premises in their area as may be specified in the application and subject to compliance with such conditions as may be specified in the licence." (emphasis added)

Thus, the legislation appears to envisage pet shop licence applications being made only by the intending keepers of pet shops, i.e. the legal or natural persons intending to carry on a business of selling animals as pets (but not by persons employed within someone else's pet selling business). If that is correct, then it would appear to follow that every trader intending to sell animals as pets at a pet fair must apply for, and obtain, a valid licence from the local authority. It would not be open to local authorities to grant (as a small number have) an "umbrella" pet shop licence *to the organiser* of a pet fair under which all persons selling animals as pets at that event could shelter. The organiser of a pet fair is not, after all, the keeper of a pet shop at all since it is not the organiser who is carrying on a business of selling animals as pets. Rather, the organiser is carrying on a business of "renting out" stalls from which other parties (the independent traders) carry on their quite independent businesses of selling animals as pets.

Once again, however, we cannot be sure that this analysis represents the law until the point has been decided by a court of precedent.

Clarifying the law: the Animal Welfare Bill

The draft Animal Welfare Bill which was published by the Department for the Environment, Food and Rural Affairs (DEFRA) in July 2004 included powers for the Secretary of State to repeal the 1951 Act in its entirety and put in its place delegated legislation regulating the selling of pet animals. It was made clear at the time by DEFRA that they were minded to resolve the confusion over the legality of pet fairs by making express provision for such fairs to be licensed and repealing Section 2 of the 1951 Act – a change which would have been likely to lead to an increase in the number of such fairs, which would then have been unarguably legal. DEFRA sought to portray the proposed change as a pro-animal welfare move bringing pet fairs within the licensing control of local authorities for the first time. Accordingly, the question posed by DEFRA in its consultation documents was whether pet fairs *should be regulated*, and not, as anti-pet fair campaigners would have preferred, whether pet fairs *should be legalised.*

The draft Bill was considered by the Commons Environment, Food and Rural Affairs Committee in the 2004-5 Parliamentary session.[12] The Committee criticised DEFRA's consultation exercise in relation to the regulation/legalisation of pet fairs, recommending that DEFRA consult again, this time asking interested parties whether the confusion over the law should be resolved by expressly legalising pet fairs or banning them altogether.

The Animal Welfare Bill which is now making its way through Parliament does not provide a power for the Secretary of State to repeal Section 2 of the 1951 Act, since only Section 1(1) of that Act can be repealed in consequence of the making of delegated legislation. It is unclear whether that change was the result of a happy drafting error or a genuine change of heart by DEFRA. Curiously, the Regulatory Impact Assessment accompanying the Bill continues to state that pet fairs will be regulated (rather than prohibited). DEFRA's present position on the pet fairs issue is therefore unclear, and the Bill (as currently drafted) will do nothing whatsoever to resolve the confusion over the legality of pet fairs (which was, after all, DEFRA's original justification for its

[12] HC 52-1, December 2004.

intention to introduce regulation of such events). It thus seems that the legality of pet fairs will ultimately be decided by the courts, rather than the legislators we elect to make policy choices on the nation's behalf. What is needed is for the Bill to be amended to, in turn, amend Section 2 of the 1951 Act to make it clear that all commercial selling of animals as pets by more than one independent trader at a temporary event falls squarely within the Section 2 prohibition.

The Hunting Act: human rights and EC law challenges

David Thomas
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Introduction

On 29 July, the Divisional Court gave its judgment in the latest challenge to the validity of the Hunting Act 2004 (the "Act").[13] There were two main challenges, the first, led by the Countryside Alliance with a number of individual claimants, based on human rights arguments, and the second on European Community (EC) law. The Government was the defendant in each case.[14] The RSPCA was given permission to intervene to oppose the challenges.

The Act prohibits the hunting, or assisting the hunting of, wild mammals with dogs, unless one of the many exemptions in Schedule 1 applies. The exemptions relate to particular activities (such as stalking a wild mammal, or flushing it out of cover, in certain circumstances) or to species (rabbits and rats are not protected). Hare coursing is also banned. In this article, "hunting" refers to hunting with dogs.

The human rights arguments: engagement of, and interference with, articles of the European Convention for the Protection of Human Rights and Fundamental Freedoms

There were ten individual claimants, including a huntsman with stag hounds, a professional terrierman, the owner of a livery yard business, a farrier, hare coursing greyhound trainers, a landowner who allowed hunting over his land, the master of a beagle pack and a person who claimed his social and family life revolved around hunting. They argued that the Act breached their rights under one or more of the articles of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), including in particular Article 8 (right to respect for private life and the home), Article 11 (freedom of assembly and association), Article 1 of the First Protocol ("1P1") (right to possessions) and Article 14 (prohibition on discrimination).

In each case, the Court had first to decide whether the Article could in principle apply to the subject matter of the Act. If so, the question was whether there was a *prima facie* breach and, if so, whether the Government could nevertheless justify it. Since the justification arguments applied equally to the EC claim, the Court dealt with them together (see below).

Article 8 ECHR: engagement and interference

The Court said that, at best, the right to respect for private life could only be engaged for those for whom hunting was central to their lives. Two claimants who came reasonably close on the facts were the livery yard owner and the terrierman. However, the Court decided against even these claimants. The nature of the "intrusion into personal integrity and inter-personal development" caused by the hunting ban was qualitatively different from that

[13] *The Countryside Alliance and others; Derwin and others; Friend and Thomas* v *HM Attorney-General and the Secretary of State for the Environment, Food and Rural Affairs, RSPCA intervening* [2005] EWHC 1677.
[14] In the form of the Attorney-General and the Secretary of State for Food, the Environment and Rural Affairs.

involved in most of the relevant cases of the European Court of Human Rights and the intensity was less. In addition, much of the intrusion here was economic and therefore more appropriate for consideration under Article 1P1.

As far as the respect for home limb of Article 8 was concerned, the Court agreed with the Inner House of the Court of Session in *Adams* v *Scottish Ministers*[15] (a challenge to the equivalent legislation in Scotland) that land over which hunting takes place cannot be a person's "home" (which only extends to their dwelling house and immediate surroundings). It also held, applying the House of Lords' decision in *Harrow LBC* v *Qazi*,[16] that there was no relevant interference where someone lost their home because it was tied to their employment or business which was itself affected by the Act.

Article 11 ECHR: engagement

The Court agreed with *Adams* that Article 11 was not engaged. Although hunts could no longer gather for the purpose of hunting with dogs, they could meet for other purposes such as drag-hunting.

Article 1P1 ECHR: engagement and interference

Article 1P1 prohibits governments from depriving people of their "possessions" or controlling their use, unless this is in the public interest. The claimants argued that their land, animals and inanimate objects and livelihood all constituted "possessions" and that there had been deprivation or control.

It was common ground that there was interference with some claimants' physical or real estate possessions, such that the Government had to provide justification. The Court thought that the interference constituted mainly if not entirely control rather than deprivation, which meant that there was unlikely to be a right to compensation (there is none under the Act). It also held that loss of the opportunity to earn income (as opposed to the goodwill of a business) was not a "possession".

Article 14 ECHR: engagement

The prohibition on discrimination in Article 14 only applies if and to the extent that one of the other articles is engaged. There is a list of prohibited types of discrimination, with a catchall "other status". The Court said that for the latter to apply a claimant had to establish a relevant personal characteristic; there was none in the present circumstances. As was pointed out in *Adams*, any discrimination arising out of a hunting ban was "not between persons but between activities".

EC claimants: engagement of articles of the Treaty establishing the European Community

The argument was that various articles in the Treaty concerned with cross-border economic activities were breached. These were principally Articles 28 (free movement of goods) and 49 (services).

The EC claimants included Irish dealers selling horses and coursing greyhounds to the UK, a person providing hunting holidays in the UK to EC visitors, a Portuguese national who has visited the UK for hunting holidays and the owners of a horse livery and hireling businesses with EC clientele.

Article 28: engagement

Article 28 prohibits "quantitative restrictions on imports and all measures having equivalent effect … between Member States". The Court said that there was no dispute that horses and greyhounds are "goods" within the Article.

[15] [2004] SC CS 127.
[16] [2004] 1 AC 983.

Applying the European Court of Justice decision in Keck,[17] the Court held that Article 28 was not engaged, even though there was a sufficient factual link between hunting and the export of horses and greyhounds from Ireland to the UK. This was because the Act had no greater impact on the cross-border trade than on trade in the animals within the UK.

Article 49: engagement

Article 49 says in essence that a national of a Member State must be allowed to provide services in other Member States. The Court said that the provision of livery and hireling services, and offers of participation by hunts, fell within the Article (although it was unclear whether *recipients* of cross-border services could also rely on it).

Justification and proportionality (ECHR and Treaty)

To the extent that Articles 8, 11, 1P1 and 14 are engaged and there is *prima facie* interference with the rights in question, there is an escape clause for Contracting Parties on various specified grounds. Even where those grounds apply, the interference must be no greater than is necessary (the proportionality test). There are similar get-outs under the Treaty. For example, Article 30 allows restrictions on imports and exports on the grounds (*inter alia*) of "public morality" and the "protection of the life and health of ... animals".

The claimants' essential argument was that the Government could not justify a hunting ban because there was insufficient scientific evidence, in relation to the various quarry species, that the use of dogs caused more suffering than other methods of the population control which was said to be necessary. They made much of the fact that the Government's preferred solution had been to register hunts if they could meet the twin tests of utility (population control) and least suffering, not the outright ban (subject to exemptions) which Parliament enacted. They also argued that the exemptions regime created unjustifiable anomalies.

After considering some of the voluminous evidence, and in particular the report of the Burns Inquiry (which concluded that hunting with dogs "seriously compromised the welfare" of each quarry species), the Court held that the Act had a legitimate aim, namely "preventing or reducing unnecessary suffering to wild mammals, overlaid by a moral viewpoint that causing suffering to animals for sport is unethical and should, so far as is practical and proportionate, be stopped". There was sufficient material available to the House of Commons for it to conclude that hunting is cruel, and more cruel than alternative methods of population control. The fact that the scientific evidence was not conclusive did not matter. A ban was a proportionate response to the perceived mischief; and the alleged anomalies could be explained.

The Court concluded that whether to ban hunting was "intrinsically a political judgment and a matter of domestic social policy, incapable of measurement in any scientifically calibrated scale, upon which the domestic legislature had a wide margin of discretion". The House of Commons had been entitled to reject the registration option.

Conclusion

Each of the claims was therefore dismissed in its entirety. However, because of the importance of the issues raised, the Court granted permission to appeal on certain grounds.

Of course, should the House of Lords decide in the hunters' favour in the other main challenge to the Act – relating to the use of the Parliament Act – human rights and EC law arguments become irrelevant. The appeal in that case was heard in July.

[17] Joined cases C-267/91 and C-268/91, *Criminal proceedings against Bernard Keck and Daniel Mithouard*, [1993] ECR I-6097.

MEDIA WATCH

"When free trade trumps animal protection" – to be published in the *New Law Journal*.
David Thomas argues that animal protection must be given much greater importance in international trade law.

UK CASE LAW

Covance Laboratories Limited and Covance Laboratories Incorporated v PETA Europe Limited and others[18]

On 16 June 2005 an important judgment was handed down by Judge Peter Langan in the High Court of Justice (Leeds District Registry).

The background to the case is that in 2004 a member of PETA USA obtained employment with Covance Laboratories Ltd ("CL USA") in its Primate Toxicology Department. She filmed the treatment of monkeys, including monkeys being hit, choked, taunted and terrified (apparently deliberately) by employees. She made her film into a video, and also made detailed written records of the systems and procedures used by CL USA. Her material was analyzed by lawyers and vets within PETA USA, who concluded that CL USA was committing serious breaches of federal and state legislation. On 17 May 2005 PETA USA submitted complaints against CL USA to various US bodies, and held a press conference to publicize these matters. Later the same day PETA Europe publicized them in Europe.

The following day, Judge Langan heard an application by the holding company of CL USA for an injunction to prevent publication of the video, which he granted. On 27 May and 10 June 2005 he heard submissions for the continuation of the injunction until trial. It was asserted that PETA Europe received film material "knowing that it was secret, confidential and private to" CL USA, and that PETA Europe knew that the material was taken and compiled in breach of the investigator's obligations as an employee. The injunction was discharged, on the following grounds.

The judge noted that an injunction which would prevent further publication would interfere with the right to freedom of expression, a right guaranteed by Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Section 12 of the Human Rights Act 1998 provides:

"(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression…

(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed…"

In addition, under Section 12(4), where the proceedings relate, *inter alia*, to journalistic material (as in this case), the Act specifies that the court must also have regard to the extent to which it would be in the public interest for the material to be published.

Regarding the effect of Section 12(3), Judge Langan applied the House of Lords decision in *Cream Holdings Ltd* v *Banerjee*:[19] "the general approach should be that courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court he will probably ('more likely than not') succeed at the trial". He also applied the Court of Appeal's judgment in *A* v *B plc*,[20] in which Woolf CJ stated: "the existence of a public interest in publication strengthens the case for not granting an injunction … the fact that the

[18] Not yet published.

[19] [2005] 1 AC 253, 22.
[20] [2003] QB 195, 11.

information is obtained as a result of unlawful activities does not mean that its publication should necessarily be restrained by injunction on the grounds of breach of confidence…"

Concerning the merits of the case, the judge stated that the question of whether there was an interest capable of being the subject of a claim for confidentiality should not be allowed to be the subject of detailed argument at the interlocutory stage. Whether or not the information in the video was of its nature confidential could not be determined without a debate on the authorities i.e., just such detailed argument. He stated that it was impossible to say that the issue was one in which CL USA was likely to succeed at trial. Nevertheless, assuming for the purposes of the judgment that CL USA would establish confidentiality, he stated that even if that assumption was made "the effect of doing so is far outweighed by matters on which it is possible…to reach definite conclusions. I refer to the [defence] of public interest…" The existence of this defence made it highly unlikely that CL USA would succeed at trial. Therefore, in accordance with the abovementioned case-law, the injunction was discharged.

Judge Langan considered that concern that laboratory animals should be treated with basic decency was a matter of interest to substantial sections of the public. In the present case, the holding company of CL USA published an animal welfare statement on its website that it would treat animals with "respect" and would follow "all applicable laws and regulations". He said that a comparison of what was said in the statement and what may be seen on the video was "a comparison between two different worlds…If, as seems likely…the group of which CL USA forms part has fostered a misleading impression, PETA Europe is entitled to correct it publicly."

This ruling is greatly to be welcomed, establishing as it does that the public has a legitimate interest in being informed about animal abuse in laboratories.

Glyn (t/a Priors Farm Equine Veterinary Surgery) v McGarel-Groves and Others [21]

In this case, the defendant (Mrs McGarel-Groves) was the effective claimant by reason of her counterclaim to the actual claimant's otherwise undisputed claim for veterinary fees. The claimant (Mr Glyn) and the second Part 20 defendant (Mr Grandiere) were the effective defendants (both veterinary surgeons). Mrs McGarel-Groves sought compensation from each of them in connection with the death from laminitis of her horse Anna (a dressage competition horse), allegedly caused by an overdose of cortico-steroids.

Mr Glyn was the vet generally responsible for Anna. Mrs McGarel-Groves regarded him as responsible for Anna's health and if Anna was to be seen by another vet, Mrs McGarel-Groves always wanted him to be in attendance to ensure that Anna came to no harm.

In 2001, Anna's trainer suggested to Mrs McGarel-Groves that she had an orthopaedic problem and needed treatment with cortico-steroids. Mrs McGarel-Groves agreed, on the condition that Mr Glyn would be in attendance to observe and ensure that Anna was treated properly. She was never warned of the slight risk of laminitis that accompanied treatment with cortico-steroids.

Mr Glyn did attend Anna's treatment (by Mr Grandiere), and watched as injections were carried out. However, he stated that he did not know what drugs were administered, nor how much. He stated that the decision to carry out the injections "with all the attendant risk" was a matter for Mr Grandiere given that he was the French Dressage Team Veterinary Surgeon. He claimed that he was not present in any sort of supervisory role, and that rather he was present as an observer, and to provide a history.

[21] [2005] EWHC 1629 (QB).

It was held, however, that, having regard to the wording of Mr Glyn's invoice for the day in question, he was much more involved in the decision-making as to the nature of the treatment to be given than he claimed. Moreover, it was clear from Mr Glyn's own evidence that his duty to observe gave rise to a further duty to intervene to protect Anna if the proposed or actual treatment was in any way inappropriate. He rendered himself unable to judge whether the treatment was inappropriate by failing to ask what drugs were being injected or the dosage, and was therefore in breach of this duty.

Regarding Mr Grandiere, the judge found that there was no clinical justification for the treatment administered, and that he was therefore negligent. He should also have warned Mrs McGarel-Groves of the risk the treatment entailed.

Responsibility for Mrs McGarel-Groves' loss was apportioned between Mr Grandiere and Mr Glyn on an 85:15 basis.

Culling of non-native species

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Alien species, more correctly identified as non-native species, have been around for centuries. Indeed, it would not be inaccurate to state that much of our common wildlife falls into this category. Mammals such as rabbits, grey squirrels and fallow and muntjac deer have all been introduced into Great Britain at various times. Currently, for a number of reasons, some non-native species are a major cause of concern.

Non-native species that become invasive will almost always raise concern as they may then cause problems which can be very serious. For example, coypus farmed for their fur in the last century escaped or were deliberately released into the wild where they cause massive damage. Because of this, it was decided that they should be totally eradicated, which took two attempts over several years to achieve. A more recent example is that of the American bullfrog, a species imported into Great Britain as tadpoles to provide an interesting addition to garden ponds. Again there were escapes into the wild and further importation was banned in 1997. This article will use three case studies to illustrate different problems posed by alien species that have become invasive, and highlight the ethical dilemmas that arise when sentient creatures have to be controlled, in part because of the need to fulfil our legal obligations on biodiversity and conservation.

The first case study will examine the ruddy duck, an alien species that does not cause problems in Great Britain but presents such a threat to a critically endangered Spanish species that it is planned to eradicate the birds entirely from this country as well as any that have made their way to Europe.

The ruddy duck

A North-American species, ruddy ducks were originally imported into Great Britain by the Wildfowl and Wetlands Trust, to their centre at Slimbridge from which, allegedly, three of the ducks escaped to produce, by 2000, an estimated 5,000 birds in the wild. There they do no harm as they have found and filled an ecological niche.

However, most years, a few ruddy ducks fly to Spain where they may come into contact with the white-headed duck, a critically endangered species teetering on the edge of extinction. Mating may take place, producing hybrids, some of which will be fertile because of the close genetic relationship between the two species.

The United Nations Convention on Biological Diversity[22] requires the white-

[22] Entered into force on 29 December 1993.

headed duck to be saved from extinction and that includes maintaining its genetic purity. Furthermore, the white-headed duck is listed as a "priority species" under the Habitats Directive,[23] that is, a species for the conservation of which the European Community has particular responsibility

To quote the Department for the Environment, Food and Rural Affairs (DEFRA): "Without control, ruddy ducks are … expected to colonise continental Europe and threaten the white-headed duck with extinction, through hybridisation and competition".[24] Therefore Birdlife International prepared an action plan, in line with the Council of Europe Convention on the Conservation of European Wildlife and Natural Habitats[25] and endorsed by the European Commission, which "highlights the need for control, and ultimately eradication, of both wild and captive populations of ruddy ducks (particularly the UK source population)".[26] The Wildfowl and Wetlands Trust and the Royal Society for the Protection of Birds (RSPB) state that the cull must go ahead.[27] Other experts, such as Professor Christopher Smart of the Centre of Environmental History at St. Andrews University, argue that there is nothing wrong with hybridisation, hybrids being "the raw stuff of evolution".[28]

The cull is going ahead. DEFRA has issued licences "to kill, or take ruddy ducks ... including the taking or destruction of their eggs".[29] The licences have been granted because of the need to conserve flora and fauna.[30] Authorised persons can carry out the killing which must be done quickly and humanely and detailed records must be submitted to DEFRA so that essential details of the operation are collated and on record.[31]

Is this a rather extreme solution to a problem that could arguably be solved in less destructive ways? The birds are difficult targets, hard to kill, and the killing can cause much disturbance which is something that can in itself be illegal in certain circumstances.[32]

The second case study poses an entirely different set of problems. In this instance, the alien species is the hedgehog.

The hedgehogs in the Outer Hebrides

It is a matter of record that between 1974 and 1975 seven hedgehogs[33] were introduced onto the Uist Islands in the Outer Hebrides to catch slugs. However, the hedgehogs also ate the eggs of waders and other ground-nesting birds, some rare and endangered, found in internationally important breeding colonies on the islands. Under normal circumstances this would probably not have mattered, however on the Uist Islands hedgehogs are an alien species and, because there are no natural predators there, there has in effect been a hedgehog population explosion.

Because of the important implications for biodiversity, the Uist Wader Project was created and, after at least a year of negotiations, in 2001 it was agreed by Scottish National Heritage, the RSPB and

[23] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22.7.1992, p. 7.
[24] "Review of non-native species policy", report of a DEFRA Working Group, 2003, p. 76.
[25] Entered into force on 1 June 1982.
[26] See footnote 24.
[27] Marren, P., "A question of breeding", *Daily Telegraph*, 22 March 2003.
[28] Ibid.
[29] Under the Wildlife and Countryside Act 1981, Article 16, licence number WLF100106.
[30] The purpose for which the licence is granted.
[31] Under the terms and conditions of the licence.
[32] See, for example, Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, OJ L 103, 25.4.1979, p. 1, Article 4(4).
[33] See footnote 24, p. 59. Seven hedgehogs were recorded but there could have been other, unrecorded, introductions.

the Scottish Executive that the hedgehogs should be totally eradicated from the islands.[34] Since then, an intractable dispute has arisen about how this should be achieved. The members of the Uist Wader Project have spent some three years trying to devise solutions other than culling the animals and have not come up with an answer, save that relocation is not an option. On the other side, various hedgehogs groups, The Peoples' Trust for Endangered Species and the European Hedgehog Research Group are firmly convinced that relocation is the correct answer.

The cull began in spring 2002, on North Uist where the hedgehogs were killed by lethal injection after they had been located using a spot lamp. No licence was necessary to authorise the killing because hedgehogs are not included in Schedule 5 ("rare animals") of the Wildlife and Countryside Act 1981 and are therefore not protected. By 2005, there were apparently so few animals left that the tactics had to be changed and it has now been decided that there will be an autumn cull in addition to the spring cull and that it will be carried out under the provisions of the Protection of Wild Mammals (Scotland) Act 2002 which entails flushing out the hedgehogs with dogs then shooting them.[35] Although the end result is the same, this method of killing is even less acceptable than lethal injections. Indeed, Scottish National Heritage did have discussions with the Scottish Executive to see whether there was a possible alternative to shooting, without success.

The final case study provides an interesting comparison with both the others. The American mink is a savage predator that causes problems on both mainland Britain and some Scottish islands, the Hebrides in particular.

[34] Information given to the author by Scottish National Heritage.
[35] Section 2(1).

The American mink

Like the coypus, the American mink was imported into this country to be farmed for its fur and, again, some of the animals escaped or were deliberately released. In the wild they flourished and have established a feral population throughout most of Great Britain. They are very successful hunters, killing birds and small animals, in particular the water vole.

The Convention on Biological Diversity requires the water vole to be protected and the Government's Biodiversity Action Plan for Water Vole "encourages humane control of mink where they pose a threat".[36] Water vole numbers have declined dramatically in recent years and they have become so endangered that there are now a number of breeding and reintroduction programmes in place. If, however, vole numbers are to recover, they will need some protection from, *inter alia*, American mink.

At present, Government policy aims for local suppression rather than complete eradication and it is for landowners and occupiers to decide whether or not they want to take action against mink on their land. Where this happens, the animals are live-trapped and humanely destroyed by lethal injection.[37] However, there is also the Hebridean Mink Project,[38] a pilot project the idea behind which is that, eventually, there will be total eradication of the animals on the Hebrides as they are home to such important breeding colonies of birds. Again, the culling method is live-trapping and lethal injection.[39] Interestingly, the legislation banning hunting with dogs does make provision for mink still to be hunted, flushed out by dogs then shot.[40]

[36] Briefing paper given to the author by DEFRA.
[37] Ibid.
[38] Information given to the author by Scottish National Heritage.
[39] Ibid.
[40] See, for example, Protection of Wild Mammals (Scotland) Act 2002, Section 2(3).

In recent years, mink numbers have begun to decline in some areas and research suggests that in part this is due to an increasing population of otters, two commentators stating: "otters have permanently suppressed mink population growth".[41] This is indeed a welcome finding because there is little or no need for human intervention where a native species holds an alien population in check.

Conclusion

It will now be obvious that, in some situations, the presence of alien species can give rise to acute ethical dilemmas. In the examples given the alien species were introduced by human beings. In each case, they are a threat to biodiversity.

There are circumstances where arguably culling is a necessary evil both to comply with the law and with the need to retain biodiversity. However, where the target of the cull is a sentient creature, surely culling should be used as the last resort, and alternative solutions sought. Indeed, sometimes it is hard to accept that all other possibilities have been thoroughly explored and rejected. For example, while few would consider relocating mink, it does seem unfortunate that there is so much dissension about relocating hedgehogs, whose numbers are declining on the mainland,[42] where other species are being re-introduced. In this area there are no easy answers.

[41] Bonesi, L. and MacDonald, D., "Otters versus mink", *Mammals UK*, winter 2005, p.7.

[42] A survey being conducted by the Mammals Trust UK and Royal Holloway, University of London, which is now in its fifth year, indicates that regionally, hedgehog numbers are falling, although the survey needs to run for about ten years to properly establish long-term trends. An earlier study carried out in 1991 when compared with a similar study carried out in 2001 showed declines of up to 50% in some areas.

Import of dog and cat fur to the EU

Christine Orr
Solicitor

Millions of dogs and cats are killed each year for their fur in Asia, principally in China. A 1998 investigation by the Humane Society of the United States (HSUS) and investigative journalist Manfred Karreman revealed the inhumanity of the living conditions of these animals and the methods of slaughter. In China, large numbers of dogs, including puppies under six months old, were kept in dark, windowless and bitterly cold sheds, chained by thin metal wires. Methods of slaughter included tying dogs tightly around the neck and then stabbing them, after which they were skinned, often while still alive. Cats were hung from wires while water was poured down their throats through a hose until they drowned. A subsequent investigation by Care for the Wild International, again in China, revealed workers in fur farms attempting to stun animals by repeatedly slamming them against the ground then beating their heads with clubs, after which they were skinned, again often still alive.[43]

The HSUS investigation led to a ban on the import and export of dog and cat fur in the US. After further investigations revealed dog and cat fur on sale in several EU countries, five of these countries (Belgium (temporary ban), Denmark, Italy, France and Greece) also introduced various bans. Despite these bans, the EU has become the major market for dog and cat fur since the US ban. Traders in China have stated that dog and cat fur is produced for the West.

The import of dog and cat fur is legal in the UK. Trade statistics separately identify imports of fur from 12 named animal species. However, 66 tonnes of "other fur" (the category into which dog and cat fur falls)

[43] For further information on the trade, see www.voice4dogs.org.

is also imported into the UK each year. As the 12 named species cover almost every animal used to make fur products, it seems very likely that the majority of "other fur" comes from dogs and cats. As few people would be willing to buy items made from dog and cat fur, it is generally not labeled as such. Instead it is labeled as "fake fur", with a made-up name such as "Gaewolf", or not labeled at all. A *Newsnight* investigation revealed a member of the British Fur Trade Association who said he would be willing to import this fur and label it misleadingly.

The Department of Trade and Industry stated in July 2003 that it would be willing to ban the import of this fur if it obtained "hard evidence" that it was on the sale in the UK, which had not so far been produced. It gave as the reason for its inability to otherwise support a ban that "the Government's better regulation agenda requires practical and proportionate evidence-based action". In January 2005 it updated Parliament on this issue and stated that as there was still no evidence of domestic dog and cat fur on sale in the UK the Government's position remained the same.[44] [45] It may be argued, however, that a ban should be enacted as a preventative measure, and because a moral position should be taken. The UK government should also put pressure on the EU to adopt a ban, especially as it has argued that action would be more effective if taken at EU level.[46]

In December 1993 MEP Struan Stevenson tabled a European Parliament Written Declaration which called on the European Commission to "draft a regulation … to ban the import, export, sale and production of cat and dog fur",[47] which was signed by 346 MEPs. This should have compelled the Commission to act, but it claimed to lack the legal power and that this was a matter which should be handled by national governments. However, a legal opinion produced last year by UK barristers Philippe Sands QC and Kate Cook,[48] both experts in European law, challenges this view.

In summary, the opinion provides:

- There is a good argument that Article 4(4) of Regulation (EC) No 1774/2002[49] already provides a basis for the EU to adopt rules to regulate the import and export of dog and cat fur.
- The EU has competence under Article 95 of the Treaty establishing the European Community to adopt a ban on the production and sale within the EU of dog and cat fur on the basis that such a measure is necessary to remove an obstacle to the functioning of the internal market. A measure adopted under Article 95 must, under the Protocol on protection and welfare of animals annexed to the Treaty, take account of animal welfare.
- The EU also has competence to ban the import and export of fur under Article 133 of the Treaty, and (on a preliminary view) such a ban would be compliant with World Trade Organisation rules.

In view of the above, there is arguably no reason for the Commission to postpone any longer the adoption of a proposal for a ban. Indeed, it should act urgently given the horrific nature of the trade and the expressed view of the Parliament.

[44] See www.dti.gov.uk/ewt/catdogfur.htm.
[45] It also stated in 2005 that mass spectrometry was now able to identify domestic dog and cat fur, although a question mark remained over chemically-treated fur. This makes the imposition of a ban practicable.
[46] See footnote 44.
[47] Written declaration 17/2003. Concurrently, a majority of the Council of Agriculture Ministers also called for a ban.
[48] For HSUS and Respect for Animals, April 2004.
[49] Regulation (EC) No 1774/2002 of the European Parliament and of the council of 3 October 2002 laying down health rules concerning animal by-products not intended for human consumption, OJ L 273, 10.10.2002, p. 1.

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ALAW is an organisation of lawyers interested in animal protection law. We see our role as pioneering a better legal framework for animals and ensuring that the existing law is applied properly.

We believe that lawyers should, as well as interpreting laws, ask questions about the philosophy underlying them: they have always had a central role in law reform. There is also a real need to educate professionals and public alike about the law.

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.

What ALAW will do

ALAW will:

- take part in consultations and monitor developments in Parliament and in European and other relevant international institutions,
- 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,
- through its members provide advice to NGOs and take appropriate test cases,
- provide mutual support and information exchange for lawyers engaged in animal protection law.

Who can be a member?

Solicitors, trainee solicitors, legal executives, barristers, pupil barristers, judges and legal academics are eligible to join and will receive regular issues of the Journal of Animal Welfare Law. Other interested parties can become subscribers to the Journal and receive information about conferences and training courses. Membership fees: UK and EU – £25.00; overseas – £35.00; concessionary (student/retired etc) – £5.00.

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