A note from ALAW

Welcome to this first, specially expanded edition of the recently revamped Journal of Animal Welfare Law, covering the Winter 2008 and Spring 2009 editions.

As well as regular features including legislation and case law updates, this edition contains a range of articles from lawyers and academics covering subjects as diverse as freedom of information and snaring. It also features an essay on legal personality, from the winner of a recent Animal Law Centre essay competition.

As ever ALAW welcomes contributions, including articles and case reports, which should be sent for the attention of the editor, Christine Orr, to info@alaw.org.uk.

Paula Sparks, Barrister
Chairman, ALAW

Animal welfare group victory in EC access to information case[1]

Alan Bates, Barrister, Monckton Chambers
Carolyn Jew, student, Stanford Law School

In a major victory for the International Fund for Animal Welfare (IFAW), the Grand Chamber of the European Court of Justice (ECJ) has set aside the 2004 judgment of the Court of First Instance (CFI) in Case T-168/02 *IFAW Internationaler Tierschutz-Fonds gGmbH* v *Commission of the European Communities*.[2] The case arose out of the refusal by the Commission to allow IFAW to have access to documents that the Commission had received from the German Government. In giving reasons for that refusal, the Commission cited the fact that it had been requested by the German Government not to disclose the documents, and that it considered that it was bound to comply with that request. The ECJ, setting aside the CFI's earlier judgment, held that the reasons given for the Commission's refusal were invalid, since a Community institution is not bound to comply with a request by a Member State not to disclose documents which it has provided to that institution. Rather, the Commission's duty towards the Member State is limited to consulting with that State to determine whether one of the limited exceptions to disclosure set out in Regulation (EC) No 1049/2001 on access to documents[3] ("the Regulation") applies. Where the Community institution is not satisfied that one of those exceptions applies, the document must be disclosed.

Facts

On 19 April 2000, the Commission issued an opinion authorising Germany to declassify the Mühlenberger Loch site as an area protected under Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora.[4] That declassification made possible the enlargement of the Daimler Chrysler airbus factory and the extension of an airport runway.

IFAW, which is an NGO active in the field of the protection of animal welfare and nature conservation, requested access to various documents the Commission had received in connection with the industrial project, including correspondence from the German Government.

The Commission informed IFAW that, having regard to Article 4(5) of the Regulation, it took the view that it was obliged to obtain Germany's agreement before disclosing the documents in question. Article 4(5) provides that "[a] Member State may request the institution not to disclose a document originating from that Member State without its prior agreement." The Commission subsequently received a non-disclosure request from Germany, and since it considered that in those circumstances Article 4(5) of the Regulation prohibited it from disclosing the documents, it adopted a decision on 26 March 2002 refusing IFAW's request. In other words, the Commission took the view that a "request" from a Member State not to disclose a document amounted to an instruction to which it was bound to give effect.

The CFI's judgment

IFAW brought an action in the CFI for the annulment of the contested decision. In support of its application, it relied on two pleas in law – infringement of Article 4 of the Regulation and breach of the duty to provide reasons pursuant to Article 253 EC. The CFI dismissed the action as unfounded.

On the first plea in law, the CFI held that the Commission was correct in concluding that where a Member State relies on Article 4(5) of the Regulation and asks an institution not to disclose a document originating from that State, such a request constitutes an instruction not to disclose, which the institution must comply with, without it being necessary for the Member State concerned to give reasons for its request or for the institution to examine whether non-disclosure is justified.

On the second plea in law, the CFI held that insofar as the Commission explained the reasons for its refusal to disclose the specified documents by referring to the non-disclosure request made by Germany and by stating that such a request is binding on the institution to which it is addressed pursuant to Article 4(5) of the Regulation, such a

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[1] Case C-64/05 P *Kingdom of Sweden* v *Commission of the European Communities* [2007], not yet published in the ECR.
[2] [2004] ECR II-4135.
[3] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001, p. 43.
[4] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, L 206, 22.7.1992, p. 7.

statement of reasons was sufficiently clear to enable IFAW to understand why the Commission did not disclose the documents and to enable the Court to review the lawfulness of the contested decision.

The ECJ's judgment

Sweden, an intervener at first instance in support of IFAW, appealed the CFI's judgment. It put forward a single plea in law alleging infringement of Article 4 of the Regulation. The Grand Chamber of the ECJ set aside the CFI's judgment and annulled the Commission's decision refusing IFAW access to the documents at issue.

The ECJ noted that recitals 2 and 3 in the preamble to the Regulation demonstrate that its aim is to improve the transparency of the Community decision-making process, since such openness inter alia guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizens in a democratic system.

Moreover, Article 2(3) of the Regulation provides that the right of access to documents held by the Parliament, the Council and the Commission extends not only to documents drawn up by those institutions but also to documents received from third parties, including Member States, as expressly stated by Article 3(b). By so providing, the Community legislature had abolished the authorship rule that had been applied previously. Such a rule required that, where the author of a document held by an institution was a natural or legal person, a Member State, another Community institution or body, or any other national or international organisation, a request for access to the document had to be made directly to the author of the document.

In the light of these observations, the ECJ rejected the Commission's interpretation of Article 4(5), i.e. that it confers on a Member State a general and unconditional right to veto the disclosure of any document held by a Community institution simply because it originates from that Member State. It reasoned that to interpret Article 4(5) in this manner is not compatible with the Regulation's objectives of improved transparency and enhanced legitimacy, and poses a risk of reintroducing the authorship rule in the case of the Member States. Member States constitute an important source of information and documentation in the Community decision-making process, and the creation of a discretionary right of veto for Member States would substantially reduce the effectiveness of the right of public access.

Rather, the ECJ held that the correct interpretation of Article 4(5) confers on the Member States the power to take part in the Community decision, but only to the extent delimited by the substantive exceptions set out in Article 4(1) to (3) of the Regulation. In other words, the right of the Member State referred to in Article 4(5) resembles not a discretionary right of veto as suggested by the Commission, but a right to be consulted as to whether any of the grounds of exception under Article 4(1) to (3) exist in relation to an access request covering documents provided by that Member State to a Community institution.

In reaching such a conclusion, the ECJ relied on the fact that its interpretation is compatible with the objectives pursued by the Regulation, namely increased transparency and abolishment of the authorship rule. The ECJ also determined that the language of Article 4 supported its interpretation. While Article 4(1) to (3) clearly lists substantive exceptions that may justify a refusal to disclose a requested document, Article 4(4) and (5) lays down procedural rules for particular documents. Moreover Article 4(7), which lays down rules concerning the period during which the various exceptions to the right of public access to documents are to apply, refers expressly only to the exceptions laid down in Article 4(1) to (3) and make no reference to Article 4(5).

Accordingly, when an institution receives a request for access to a document originating from a Member State and notifies that State, the institution and the Member State should commence a genuine dialogue concerning the possible application of the exceptions laid down in Article 4(1) to (3). If, following such a dialogue, a Member State objects to disclosure of a document, it is obliged to state reasons for that objection with reference to those exceptions. The institution cannot accept a Member State's objection to disclosure if the objection gives no reasons at all or if the reasons are not put forward in terms of the exceptions. If the Member State fails to provide reasons or if the institution itself considers that none of the exceptions apply, it must give access to the document. Further, the institution itself is obliged to give reasons for a decision to refuse a request for

access to a document.

Commentary

Although the language of Article 4(5) may be ambiguous if viewed in isolation, its intended meaning and effect, as the ECJ determined, is quite clear when viewed in its legislative context. After careful analysis of both the objectives of the Regulation as set forth in the recitals and Article 1, and the structure and language of Article 4 itself, the ECJ concluded that Article 4(5) must be narrowly interpreted to provide the widest possible access to documents.

First, the ECJ recognised that the proper interpretation of Article 4(5) should give effect to the Regulation's stated purpose of increased transparency and accountability. Such goals could not be met if, as the CFI held, Member States could prevent disclosure of documents that originated from them, without providing any reason whatsoever for their objections. The ECJ decision draws a delicate balance between the right of access to documents provided for in Article 255 EC and the interests of the Member States in preventing disclosure of documents on the grounds of public interest. The legitimate interests of the Member States continue to be protected on the basis of the exceptions laid down in Article 4(1) to (3) of the Regulation and by virtue of the special rules for sensitive documents laid down in Article 9. Where such grounds for non-disclosure do not exist, however, access to the documents must be granted.

Second, the ECJ correctly scrutinised the language and structure of Article 4 itself to determine that Article 4(1) to (3) sets forth exceptions to the general right of access, while Article 4(5) and (6) provide procedural rules for specific types of documents. The ECJ's conclusion is supported not only by the use of specific language within Article 4 (and, in particular, the word "request"), but also by the language of Article 9(3) which provides that the originator's consent is required for the disclosure of sensitive documents. Had the Community legislature intended to lay down in Article 4(5) a right of veto with regard to the disclosure of documents originating from a Member State, it would have chosen wording similar to that of Article 9(3). This argument was initially made by IFAW, but the CFI dismissed it by stating that the specific character of sensitive documents made it clear that Article 9(3) had no relationship to Article 4(5). The CFI is correct in noting that Article 9(3) refers to sensitive documents while Article 4(5) does not, but it failed to address the argument made by IFAW – that the Community legislature had the linguistic ability, if it so wished, to confer on Member States a right to veto the disclosure of documents originating from them.

As a result of the well-reasoned ECJ decision, animal welfare and environmental conservation groups – and, indeed, all citizens of the Union – can expect broader access to Community documents originating from Member States. Furthermore, any refusal to disclose documents must now be accompanied by substantive reasons setting forth the exception on which such refusal is based. An objection by the Member State to disclosure of its documents is not, in itself, sufficient to justify a Community institution's refusal to allow access to those documents.

It is hoped that this increased transparency of Community decision-making processes will result in greater accountability and confidence in the democratic institutions of the Community. Information provided by a Member State is often a crucial part of the evidence which informs the decision-making processes of the Commission, and access to such documents will therefore enable environmental and animal welfare groups to gain a fuller picture of the evidence that the Commission has before it, thus enabling those groups to lobby the Commission more effectively.[5]

The ECJ's judgment also raises some interesting possibilities of conflicts arising between UK public authorities' application of the public interest tests to refuse requests for access to information under the Freedom of Information Act 2000 or the Environmental Information Regulations 2004, and the approach of Community institutions in considering whether they are obliged to allow access to the same documents. If a UK public authority refuses to disclose documents under the Act or the Regulations, doing so in purported reliance on a public interest ground under that legislation, but copies of those documents are also in the possession of a Community institution, will the

[5] The Commission has recently adopted a proposal to amend the Regulation following a public consultation (to which IFAW responded), recent case law and its experience of applying the Regulation.

person seeking access to the requested documents be more likely to be successful by making an access request to that institution? This will in part depend on the willingness of the Community institutions to take a robustly independent stance in response to attempts by Member States to advance flimsy reasons why one of the exceptions in Article 4 of the Regulation applies.

The campaign to ban snaring in Scotland

Patricia Gail Saluja
School of Law, University of Aberdeen

Introduction

Over the last few decades there have been marked changes in the way humankind regards animals. Advances in our understanding of evolution and of animal sentience have given rise to a greater sense of affinity with other members of the animal kingdom. This perception is increasingly characterised by compassionate sensibilities with regard to animals, including enhanced concerns over the way animals are treated when they are sick or injured or during transport or slaughter or when they are subjected to snaring for purposes of "pest" and predator control on sporting estates and farms. The present article focuses on the last issue, namely, the practice of snaring.

Snares are thin wire loop devices which are positioned in such a way that one end is attached to a post or a heavy object while the other end forms the loop which traps the animal and tightens as the animal struggles. Target animals are generally foxes and rabbits. At present it is a matter of concern to a variety of organisations and to many individuals that this practice remains legal in the UK. Indeed, the UK is one of only five countries within the EU which permits the use of snares, the others being Belgium, France, Ireland and Spain.

In Scotland, the abolition of snaring has been the subject of recent high-profile campaigning led by Advocates for Animals ("Advocates"). Whilst recognising that other groups and individuals have also been involved in this movement, this article focuses on the role of Advocates in the campaign for legal change.

In its anti-snaring activities, Advocates has collaborated with a number of other animal welfare organisations[6] in setting up a website totally dedicated to this cause (www.bansnares.com) with the purpose of working towards a ban on the use of snares. Theoretically, this is by no means a groundless hope given that a legal basis for the possibility of introducing such a ban in Scotland has been in existence since 2004. In order to place the Advocates' campaign in perspective, it is necessary first to outline the relevant legal background as follows.

The legal basis for a ban on snaring in Scotland

The starting point is section 11 of the Wildlife and Countryside Act 1981 ("the 1981 Act"). This provision banned "self-locking" snares in the UK,[7] but left "free-running" snares still permitted, albeit with certain conditions imposed on their use, for example a requirement to inspect all snares "at least once every day".[8] [9]

The next key development was the advent of devolution in Scotland, established by the Scotland Act 1998. Under the terms of this Act, animal welfare became a devolved matter.[10] Using its devolved powers, the Scottish Parliament enacted the Nature Conservation (Scotland) Act 2004 (asp[11] 6) ("the 2004 Act"). The provisions relevant to snaring are located in paragraph 10 of Schedule 6 which amends section 11 of the 1981 Act. During the passage of the Bill through the Scottish Parliament and on invitation from the Committee concerned, Advocates provided a written submission supporting an outright ban. This was not accepted, although the 2004 Act did introduce some

[6] Hare Preservation Trust, Hessilhead Trust, International Otter Survival Fund, League Against Cruel Sports, The Marchig Animal Welfare Trust and Scottish Badgers.
[7] See section 11(1)(a).
[8] See section 11(3)(b).
[9] A self-locking snare is a wire loop which continues unremittingly to tighten by a ratchet action as the animal struggles, causing severe distress, pain and injury before death. A free-running snare is intended to be simply a restraining device which is supposed to release when the animal stops pulling – although this is not consistently the case, as explained below. Furthermore, according to Advocates, self-locking snares are still found in use from time to time despite having been prohibited in 1981.
[10] Scientific procedures on live animals and the regulation of the veterinary profession are, however, reserved to Westminster and are governed by the Animals (Scientific Procedures) Act 1986 and the Veterinary Surgeons Act 1966 respectively (Scotland Act 1998, Schedule 5, Heads B7 and G2).
[11] "asp" denotes an Act of the Scottish Parliament.

new restrictions governing the use of free-running snares in Scotland. For example it changed the requirement to inspect snares at least once a day to a requirement to check them at least every 24 hours, so as to ensure that no more than 24 hours may elapse between sequential inspections.

These amendments did not, however, extinguish the drive for a total ban in Scotland. Further campaigning was nurtured by two factors. First, the 2004 Act explicitly left the door open for a ban in the future because it conferred powers on the Scottish Ministers to ban *any* type of snare (in addition to illegal self-locking snares) by order. Second, during the Act's passage through the Scottish Parliament, the Minister responded to the disquiet of many MSPs by agreeing to carry out a public consultation exercise to determine opinions as to whether the Scottish Executive should implement further refinements or whether it should ban snaring outright in Scotland.

The Scottish Executive's consultation

The Executive launched a consultation paper in November 2006 seeking views by February 2007.[12] On 21 February 2007 Advocates issued a 14-page response setting out detailed information on the practice of snaring and making a strong case in favour of its total prohibition.[13] This is an important document as it presents strong supporting evidence and provides a picture of the approach which Advocates subsequently took during its campaign on the run-up to the Minister's decision in early 2008. Accordingly the key points are summarised below.

Advocates' response to the consultation

Advocates called for the elimination of snaring in Scotland and to this end it urged the Minister to use his powers under the 2004 Act to make an order banning the manufacture, sale, possession[14] and use of snares. They set out the following points in support of their submission, including references to relevant sources of information.

The suffering caused by snares: The banning of self-locking snares has not solved the problems of injury, suffering and killing. Also, Advocates reported that for a variety of reasons free-running snares may act as self-locking snares (e.g. the wire gets wrapped around the post or becomes frayed, kinked or tangled). There have been cases where victims have almost been cut in half, and in some of these instances they were still alive when found.

The indiscriminate nature of snares: Surveys show incidence rates of 21 to 69% for the snaring of non-target animals and suggest that it may be difficult in some environments to reduce the overall proportion of snared non-target animals to below 40%.[15] Advocates stated that non-target species in Scotland include mountain hare, pine marten, polecat, deer, squirrels, stoats, a range of wild birds including partridge, capercaillie, livestock such as cattle and sheep and domestic cats and dogs. In one case a person sustained an injury through catching her foot in a snare close to a public right of way.

The inadequacy and impracticability of snare inspection: The current legal maximum interval of 24 hours between inspections is too long to leave an animal in a device that has so much potential to cause suffering. Furthermore, according to Advocates, there is evidence that even this requirement is widely ignored.

Snares are not necessary: In terms of "pest" control, snaring is not the most efficient approach and consideration should be given to more humane alternatives. Also, in some environments, population dynamics are such that foxes actually protect crops by eating rabbits without exerting a negative impact themselves. In relation to alternatives, Advocates also drew on information which had been compiled by the National Federation of Badger Groups.[16]

Snaring in Scotland is liable to contravene EC law: The Habitats Directive[17] sets out the situations where

[12] The Executive's report on the consultation was published on 23 August 2007 and is available at www.scotland.gov.uk/Publications/2007/08.
[13] Anderson, L., "Consultation on snaring in Scotland: response from Advocates for Animals".
[14] With the possibility of introducing licences to authorise legitimate exceptions, e.g. for educational purposes.
[15] Kirkwood, J. et al, "Report of the working group on snaring", published by the Department for the Environment, Food and Rural Affairs, 2005, p. 8, see www.defra.gov.uk/WILDLIFE-COUNTRYSIDE/vertebrates/snares/.
[16] "Alternatives to snares: a review of alternative methods for controlling foxes and rabbits, and of the welfare and conservation concerns arising from their use", National Federation of Badger Groups, 2003, see www.badger.org.uk/_Attachments/Resources/.
[17] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 27 July, p. 7.

the use of snares (or any "traps which are non-selective according to their principle or their conditions of use"[18]) is prohibited. Basically, the prohibition applies to the setting of snares in areas where they are likely to cause the "deliberate capture or killing" of any of the species which are listed in Annex IV to the Directive (these species are known as European Protected Species (EPS)). For example, in *Commission of the European Communities* v *Kingdom of Spain*,[19] the Commission alleged that in certain areas of Spain snares were being set to catch foxes but were also liable to catch otters which are one of the protected species under the Habitats Directive.

As it turned out, the case was dismissed by the European Court of Justice (ECJ) because the Commission failed to produce evidence that the protected species was actually found within the areas concerned, particularly as the river beds were dried up at the time in question.

In its judgment though – and this point is critical for Scotland – the ECJ considered the meaning of "deliberate capture or killing" and held that the expression covers not only intentional actions but also actions where the actor has "accepted the possibility of such capture or killing".[20] This latter limb of the definition has major implications for those who set snares in Scotland. The reason is that Scotland has a considerable distribution of certain EPS,[21] and that in many cases it may be difficult for those who set snares to credibly deny acceptance of the possibility of such capture or killing.

Following its submission to the Scottish Executive, Advocates organised a high profile tour of Scotland to urge the public to assist the cause by protesting to the Minister against the practice of snaring. This became known as the "Hanging is still legal in Scotland" tour.

The "Hanging is still legal in Scotland" tour

This took place in January 2008 with teams making day-long visits to nine cities and towns around Scotland on a high-profile public education and campaigning exercise. It was launched in Edinburgh in the presence of Labour MSP Cathy Jamieson, Green MSP Robin Harper and SNP MSP Christine Graham. The tour then moved on to Galashiels, Dumfries, Glasgow, Inverness, Aberdeen, Dundee, Perth and Stirling. There was a range of activities at each destination, involving distribution of information including data on alternatives to snaring,[22] speaking to the public and petition-signing. Members of the public also took away postcards to complete and send to the Minister asking him to bring in a ban on snaring. The tour received coverage in nearly 40 local newspapers and on radio stations as well as being reported on BBC Scottish TV and ITV news.

Over 8,000 signatures were collected and supporters sent over 5,000 campaign postcards to the Minister and over 6,160 campaign postcards to MSPs demonstrating very strong public support for a ban on snares.

The Minister's decision

In a statement to the Scottish Parliament on 20 February 2008, the Environment Minister, Mike Russell MSP, announced that he would not be banning snaring as he considered that "snaring is still necessary in some circumstances".[23] Instead he pledged to introduce legislation to impose further conditions on the practice, including ID tags on snares and proposals for training. Advocates pointed out that these measures will not stop the wide-scale animal suffering caused by snares or prevent the capture of non-target animals including protected species.

This decision came as a surprise in many quarters as it was generally felt that the case against snaring had been powerfully made and had a high level of public support. Overall, 70% of responses to the consultation had supported a ban. Furthermore, in answers to Parliamentary questions by David Stewart MSP, the Minister said that, apart from formal responses to the consultation, he had received 7,192 items of correspondence on snaring, of which 7,182 called for a ban.[24]

[18] See Annex VI to the Directive.
[19] Case C-221/04 [2006] ECR I-4515.
[20] See paragraph 71 of the judgment.
[21] E.g. otter and wildcat.
[22] E.g. specialised fencing, tree guards to deter rabbit browsing, scare devices.
[23] The Minister's statement is available at www.scotland.gov.uk/News/This-week/speeches/Greener/snaring.
[24] The figures in this paragraph were supplied to the author by Advocates.

The way ahead

The decision of 20 February has by no means marked the end of this matter. Advocates, in conjunction with four other organisations,[25] has launched a renewed campaign calling for further legislative reform.

Freedom of information

David Thomas
Solicitor

Introduction

Readers will recall the case brought by the BUAV against the Home Office and the Information Commissioner relating to its request for information, under section 1(1)(b) of the Freedom of Information Act 2000 ("the FOI Act").[26] The Court of Appeal has now dismissed the BUAV's appeal[27] against Mr Justice Eady's decision, who had in turn allowed the Home Office's appeal against the Information Tribunal's decision. The Tribunal had held that the Home Office applied the wrong legal test when refusing to disclose the vast majority of the requested information.

The case has followed a tortuous route. At each stage, the BUAV has been faced with a different approach by the decision-maker/judicial body in question. The Court of Appeal's decision is both extreme and troubling, as I will explain.

The BUAV's request, the Home Office's response and the statutory regime

In January 2005, soon after the main provisions of the FOI Act came into force, the BUAV requested anonymised information contained in five specified project licences issued under the Animals (Scientific Procedures) Act 1986 ("the 1986 Act"). Project licences set out in detail the objectives of the research, what is to be done to the animals and with what expected adverse effects, what ameliorative measures should be taken and why the use of animals is considered necessary. The information is designed to enable the Secretary of State for the Home Department to assess whether the various statutory tests for the grant of a licence are met.

The BUAV only knew about the licences because the Home Office had published abstracts (summaries) of them. There are two separate regimes under the FOL Act: first, one of compulsory disclosure (subject to various exemptions), under section 1(1)(b), by public authorities of information held by them, pursuant to a request by a member of the public; and, second, one of voluntary disclosure under the publication scheme each public authority must have under section 19. Since December 2004 the Home Office has encouraged licence applicants to submit abstracts with their applications. If they do so, the abstract is then published by the Home Office under its publication scheme. Abstracts are normally 2-3 pages long, whereas the licences themselves can exceed 40 pages. A licence is in identical form to a licence application in its final form.

What a public authority voluntarily publishes under its publication scheme cannot adversely affect what a requester is otherwise entitled to under the compulsory regime: *Corporate Officer of the House of Commons* v *The Information Commissioner and others.*[28]

The Home Office released some, very limited, information from the project licences in question but otherwise rejected the request. It relied on a number of exemptions, including those under sections 38(1) (health and safety), 41(1) (information provided in confidence), 43(2) (commercial interests) and, crucially for present purposes, section 44(1)(b) (prohibitions on disclosure under different legislation). In the present context section 44(1)(b) leads one to section 24(1) of the 1986 Act (see below). The Commissioner eventually decided that section 24(1) applied to all the withheld information and he therefore did not consider whether the other exemptions applied. Nor has any other judicial body.

It is important to understand that the Home Office had conceded, in a judicial review brought by the National Anti-Vivisection Society in 1998, that it could not assure licence applicants that all information given to it would be treated as confidential. It reiterated this in December 2004,

[25] Hessilhead Wildlife Rescue, International Otter Survival Fund, League Against Cruel Sports and Scottish Badgers.
[26] See Thomas, D., "Freedom of information", *Journal of Animal Welfare Law,* Summer/Autumn 2008, p. 13.
[27] [2008] EWCA Civ 870, see www.bailii.org/ew/cases/EWCA/Civ/2008/870.html.
[28] [2008] EWHC 1084 (Admin), see paragraph 33.

just before the main provisions of the FOI Act came into force. In the Court of Appeal, the Home Office argued that it, and not applicants, was the arbiter of which information was protected, albeit that an applicant's views would of course be relevant.

Section 24(1) of the 1986 Act

Section 24(1) provides:

> "A person is guilty of an offence if otherwise than for the purposes of discharging his functions under this Act he discloses any information which has been obtained by him in the exercise of those functions and which he knows or has reasonable grounds for believing to have been given in confidence."

So, the issue was whether the Home Office knew or had reasonable grounds for believing that the withheld information had been given to it in confidence. None of the licence applicants in question said that they regarded the information as protected; the Home Office simply inferred that they expected it to be.

Under section 75 of the FOL Act, the Secretary of State for Justice has to review all statutory prohibitions on disclosure and decide whether to repeal or relax them. In 2004, it was decided to retain section 24(1) of the 1986 Act, at least for the time being.

The Tribunal's decisions and that of Mr Justice Eady

The Tribunal agreed with the BUAV that one cannot give information "in confidence" within section 24(1) unless the law recognises it as confidential,[29] and that statements by a House of Lords minister when the bill which became the 1986 Act was going through Parliament supported this conclusion.

Tellingly, the Tribunal, which (unlike the BUAV) saw both the abstracts and the licences to which they related, said this about the former:

> "[T]he abstracts appear generally to adopt a style and tone intended to persuade the reader as to the value of the proposed experiments. This is in contrast to the style of the licence applications, which are more neutral in tone. This perception of a positive spin having been applied to the published information was increased by the absence from the abstracts of the detail about the experiments themselves."[30]

This underlines why the BUAV was not content with just the abstracts.

Mr Justice Eady, drawing on post-Human Rights Act privacy cases and the test of misuse of information they posit,[31] said that section 24(1) could apply even if the information did not have the quality of confidence and was not a commercial secret – but did not explain when.

The Court of Appeal's decision

The Court of Appeal said, in terms, that the Home Office had been wrong to make the concession in the 1998 judicial review. It was entirely up to providers of information whether to "give [information] in confidence" and thereby to bring it within the protection of section 24(1). The law of confidentiality was not relevant. The Home Office's role was limited to discerning the intention of the provider, where this was not clear.

Commentary

The Court of Appeal's decision is more coherent than the Home Office's very muddled approach (and, rightly, it did not favour Mr Justice Eady's misuse of information test). But it remains highly disturbing. It means that animal researchers have complete control over what information is put into the public domain. They can prevent the trivial, the embarrassing, information about animal suffering, information of crucial importance to human health, even information about their own wrongdoing[32]

[29] *Coco* v *Clark* [1969] RPC 41 is generally regarded as the leading authority as to when the law will protect information as confidential in the non-contractual setting.

[30] *British Union for the Abolition of Vivisection* v *The Information Commissioner and the Home Office* (EA/2007/0059), 30 January 2008, paragraph 8.

[31] See, for example, *Campbell* v *MGN Ltd* [2004] 2 AC 457 (HL).

[32] Iniquity deprives confidential information of protection but the Court held that the law of confidence had no application. In its petition for leave to appeal to the House of Lords the BUAV gives another example of how unsatisfactory it is to give animal researchers complete control over information:

> "A contemporary example, currently before the [Information Commissioner], illustrates the general point. The [Home Office] approves overseas suppliers of primates to UK laboratories. It withdrew approval from a particular supplier in Vietnam, because of poor welfare conditions

reaching the public, and thereby prevent public and Parliamentary scrutiny in an acutely controversial area. Moreover, they can effectively prevent judicial scrutiny of the lawfulness of Home Office regulation, an issue which featured large in argument but which the Court ignored in its judgment.[33] In some ways, the published abstracts, with what the Tribunal saw as "spin", make things worse, because far from facilitating public debate they may distort it.

Moreover, the effect of the Court's decision is that criminal liability attaches to public officials who wrongly disclose information where civil liability would not (because the disclosed information is not confidential).[34] That is a surprising result.

The House of Lords has now refused the BUAV permission to appeal, without giving reasons. The focus will now turn to campaigning for repeal of section 24, which can be done by ministerial order under section 75 of the FOI Act. In the meantime, other public authorities involved in animal experiments – such as universities – cannot generally rely on section 24 (because they generate the relevant information, rather than it be given to them as with the Home Office) and a number of FOI Act challenges to their decisions refusing information remain in the pipeline. It is astonishing, but perhaps revealing, the lengths to which animal researchers will go to prevent access to information. The BUAV's experience is that they and public authorities "talk the talk" about transparency, but that the reality is very different.

As in the High Court, the Home Office did not seek costs from the BUAV, and has thereby accepted that the case raises important points of principle. Indeed, the Court of Appeal expressed discomfort – albeit not as forcefully as had Mr Justice Eady[35] – about the inconsistency between the secrecy which is the result of its interpretation of section 24 and the presumption of transparency underpinning the FOI Act.

MEDIA WATCH

"**A dog's breakfast**", Law Society Gazette, Vol. 105, No 16, 2008, p. 30

Robert Wade examines the Dangerous Dogs Act 1991 and considers potential areas of reform.

"**How irrational does irrational have to be?: *Wednesbury* in public interest, non-human rights cases**", Judicial Review, Vol. 13, Issue 4, 2008, p. 258

David Thomas discusses the British Union for the Abolition of Vivisection's recent judicial review against the Home Office.

The *Financial Times*, 6 November 2008, p. 11, reported on European Union plans to strengthen the protection of animals in research by banning experiments with great apes, extending the ethical evaluations required before experiments with animals were authorised and setting minimum requirements for housing and care of animals subjected to testing.

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discovered there by its inspectors. Shortly thereafter it reinstated approval following evidence supplied by a third party. There are strong indications that the third party was a leading UK laboratory, with an interest in maintaining its supply of primates. On the Court of Appeal's construction, the information supplied by the third party would, at its behest, be hidden from Parliament, the public and the courts. No-one would be able to make an assessment about the appropriateness of the [Home Office's] decision to reinstate approval so quickly. The third party has indeed purported to give the information in confidence, even though it has no proprietorial interest in it (the information relates to conditions at an establishment it does not own or control)."

[33] Indeed, Dr Jon Richmond, head of the relevant department at the Home Office, had candidly acknowledged in evidence before the tribunal that judicial scrutiny would be impossible, even on the Home Office's slightly less restrictive approach to section 24(1).

[34] See *R* v *Johnstone*, 2003 FSR 42 where Lord Nicholls said, in relation to the criminal provisions of the Trade Marks Act 1994: "Parliament cannot have intended to criminalise conduct which could lawfully be done without the proprietor's consent. Parliament cannot have intended to make it an offence to use a sign in a way which is innocuous because it does not infringe the proprietor's rights. That would be to extend, by means of a criminal sanction, the scope of the rights of the proprietor." (paragraph 28)

[35] "There are no doubt many who would agree with BUAV's case that 'as much as possible of the information needs to be publicly available in order to facilitate public, Parliamentary, and ultimately judicial, scrutiny of performance by the Secretary of State of her statutory duties.' " The judge also said that "[i]t would appear sensible, so that all those concerned know where they stand, to adopt as the starting point the presumption that the content of applications should be generally available but to allow for confidential schedules to be attached." (paragraph 61)

UK CASE LAW

R (on the application of Royal Society for the Prevention of Cruelty to Animals) v Secretary of State for Environment, Food and Rural Affairs[36]

The RSPCA challenged by judicial review the legality of an amendment to the Welfare of Animals (Slaughter or Killing) Regulations 1995, Schedule 9 ("the Regulations"). The amendment to the Regulations added "ventilation shutdown" to the permitted methods of killing animals for the purpose of disease control. In particular the amendment was intended to make provision for the use of ventilation shutdown (which involves cutting off the ventilation in places where birds are housed with the inevitable result of death as temperatures rise to a level incompatible with life) as a method of killing birds in the event of an outbreak of avian disease.

The Regulations implemented Directive 93/119/EC concerning the protection of animals at the time of slaughter or killing[37] and the RSPCA challenged the amendment on the grounds that it was incompatible with that Directive. It argued that the amendment failed to have sufficient regard to the welfare implications for birds and the availability of alternative methods of slaughter in the event of an outbreak of avian influenza, that its practical implementation was uncertain and that it was disproportionate. The Secretary of State denied that the amendment was unlawful and contended that a provision had been made for ventilation shutdown to be used only as a last resort where other permitted methods of slaughter might be insufficient.

The Administrative Court held that that while the provisions of the Directive were aimed at rapid transition to death and the prohibition of avoidable pain and suffering, this did not guarantee an absence of all discomfort where the method, by its nature and the fact that it was a last resort, might not be able to achieve that, despite professional care, nor was there a requirement that death would always ensue from unconsciousness. The amendment was not incompatible with the Directive.

In considering proportionality, the Court held that given that the objective of the amendment was the protection of public health and safety and the fact that it was a provision of last resort, it was not disproportionate.

Finally, the Court rejected the argument that the amendment was not sufficiently certain; it was not possible to prescribe all the circumstances where the method might be used.

LEGISLATION

The *Dog Control Bill*, which purports to make provision for the control of dogs and their welfare, received its first reading in the House of Lords on 12 December 2008.

The *Trading of Primates as Pets (Prohibition) Bill*, initially introduced as a Private Member's Bill, was dropped at its second reading in the 2007-2008 session. The Bill aimed to prohibit the breeding, selling, purchasing and keeping of primates as pets in the United Kingdom.

The *Cat and Dog Fur (Control of Import and Export and Placing on the Market) Regulations 2008*[38] were introduced to provide a criminal sanction for breach of Regulation (EC) No 1523/2007[39], which banned the commercial import, export and sale of cat and dog fur following animal welfare concerns in certain third countries. The Regulation gave Member Sates until 31 December 2008 to provide an effective penalty for breach thereof.

In the UK the Customs and Excise Management Act 1979 provides a penalty of seven years imprisonment for deliberate breach of an enactment which prohibits imports into or exports from the UK. This legislation does not however cover unintentional breaches of the customs prohibition or deliberate or unintentional breaches on the prohibition on sale. The 2008 Regulations introduce a criminal sanction with a maximum penalty of £75,000 fine. There are also powers of investigation, seizure and forfeiture of goods to trading standards bodies.

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[36] [2008] EWHC 2321 (Admin.).

[37] Council Directive 93/119/EC of 22 December 1993 on the protection of animals at the time of slaughter or killing, OJ L 340, 31.12.1993, p. 21.

[38] SI 2008/2795.

[39] Regulation (EC) No 1523/2007 of the European Parliament and of the Council of 11 December 2007 banning the placing on the market and the import to, or export from, the Community of cat and dog fur, and products containing such fur, OJ L 143, 27.12.2007, p. 1.

The Dangerous Wild Animals Act 1976 (Modification) (Scotland) Order 2008[40] was made in exercise of powers under section 8(1) of the Dangerous Wild Animals Act 1976. The 1976 Act aims to regulate the keeping of certain dangerous wild animals[41] listed in a Schedule. Section 8(1) of the Act permits the relevant Minister to add animals from the Schedule which pose a threat to public safety or conversely to remove those animals from the Schedule which no longer pose such a threat.

The Order substitutes a new Schedule to the Act, removing a large number of animals previously listed and adding others.

The *Wildlife and Countryside Act 1981 (Variation of Schedule 4) (England) Order* 2008[42] and the *Wildlife and Countryside Act 1981 (Registration and Ringing of Certain Captive Birds) (Amendment) Regulations 2008*[43]

The Order and Regulations apply in England only and implement amendments to Schedule 4 to the Wildlife and Countryside Act 1981. The Order reduces the number of species that, if kept in captivity, have to be registered with the relevant Secretary of State and ringed or marked in accordance with section 7 of the 1981 Act. The Regulations amend earlier regulations by providing that for peregrine falcon and merlin, where there is appropriate certification under regulations which implement the Convention on the International Trade in Endangered Species (CITES), such listing is sufficient. Similarly, birds marked in accordance with those (CITES implementing) regulations will be considered marked for the purpose of the Regulations.

CONSULTATION PROCEDURES

A consultation procedure on codes of practice for the welfare of cats, dogs and equines respectively, by the Department of Environment, Food and Rural Affairs (DEFRA) was closed on 31 December 2008. The three proposed codes of practice aim to help pet owners understand their duties under the Animal Welfare Act 2006 and will offer practical advice on pet ownership. Whilst there would not necessarily be a sanction for failure to comply with a code of practice, any such failure could be referred to in a prosecution for cruelty offences under the Act.

DEFRA has launched a consultation on the draft *Welfare of Farmed Animals and Mutilations (Permitted Procedures) (England) (Amendment) Regulations 2009*, including a revised meat chicken welfare code. These regulations implement Council Directive 2007/43/EC.[44] It has also launched a consultation on a proposed EC regulation on slaughter and killing. This will replace Council Directive 93/119/EEC.[45] The deadline for responses for both consultations is 20 April 2009.

REPORTS

Farm Animal Welfare Council report on tail-docking and castration of lambs

In June 2008 the Farm Animal Welfare Council (FAWC) published a report considering the implications of castration and tail-docking for the welfare of lambs. The report acknowledges that the potential for suffering is considerable given the scale of the castration and tail-docking, which runs into several millions. Concern was raised about these practices in the FAWC's 1994 Report on the Welfare of Sheep, but the FAWC considered that there was insufficient scientific evidence available at the time to resolve the matter. Following research on the behavioural and physiological responses of lambs to castration and tail-docking the FAWC reports that scientifically-based advice can now be given that will minimise the suffering from these procedures and/or reduce the number of such procedures performed.[46]

APGAW report on dangerous dogs

In May 2008 the Associate Parliamentary Group for Animal Welfare (APGAW) produced a short

[40] SSI 2008/302.
[41] By section 5, the Act does not apply to dangerous wild animals kept in a zoo, circus, pet shop or registered scientific establishment, as such premises are covered by specific legislation.
[42] SI 2008/431.
[43] SI 2008/2357.
[44] Council Directive 2007/43/EC of 28 June 2007 laying down rules for the protection of chickens kept for meat production, OJ L 182, 12.7.2007, p. 19.
[45] Council Directive 93/19/EEC of 22 December 1993 on the protection of animals at the time of slaughter and killing, OJ L 340, 31.12.1993, p. 21.
[46] The report can be obtained at www.fawc.org.uk/pdf/report-080630.pdf.

report[47] on the issues surrounding dangerous dogs and the relevant legislation. With statistical data showing a record 4,000 cases of dog-bite wounds treated by doctors in the last year and a dramatic increase in the number of fighting dogs and dog-related anti-social behaviour, the main piece of UK legislation intended to address this problem, the Dangerous Dogs Act 1991, is clearly not achieving its aim. The report acknowledges the failure of the the 1991 Act and notes the negative welfare implications for dogs that are subjected to its provisions, regardless of whether they are a real threat. APGAW then turns to relevant member organisations for recommendations for reducing aggressive dog incidents and improving the welfare of the affected animals.

Many animal welfare organisations, including Battersea Dogs & Cats Home, the Blue Cross, the Dogs Trust, the Kennel Club and the RSPCA, have been looking at this issue for a number of years. They recommend preventative measures through early intervention, such as responsible dog ownership education programmes to encourage neutering, microchipping and dog training. Enforcement action similar to that provided for by the "improvement notices" under the Animal Welfare Act 2006 would also provide an early intervention mechanism.

The organisations generally believe that the current legislation should be consolidated and updated, with a new focus on the "deed not the breed" principle. The spectrum of offences should take into account different circumstances, such as an aggravating element where a dog is encouraged to attack another person or animal, and a corresponding defence where the dog is provoked. Penalties should be flexible and include exploring mandatory muzzling, re-homing and compulsory training.

Meanwhile, debate continues over whether the Index of Exempted Dogs should be reopened to allow owner-led applications alongside concerns about effective enforcement and its demands on the courts and the police.

The report concludes with a brief statement from each political party, all of whom agreed that there is need for reform of the current dangerous dogs legislation.

[47] "Dangerous dogs: an APGAW mini-report", see www.apgaw.org.uk/reports.asp.

Can a chimpanzee be a legal person?

Joeli Norman
Law student, Northumbria University

This is an edited version of the winning entry of an Animal Law Centre[48] essay competition. The question concerned a fictional scenario involving the Island of Joata which houses a sanctuary for chimpanzees. A company called Chimera Developments operated an animal research unit on the island and one of their chimps, named Winston, escaped. Winston was discovered by the sanctuary staff but he had been attacked and was injured. The sanctuary discovered that Winston was being used in military research. Winston was eventually taken back to the research unit against the wishes of the sanctuary. A legal team was assembled to try to secure Winston's return to the sanctuary. The students were asked to submit arguments for granting an order of habeas corpus in respect of Winston which could be used by the legal team.

A habeas corpus writ essentially requires a legal person detained by the authorities to be brought before a court so that the legality of the detention may be examined. It does not determine guilt or innocence, merely whether the "person" is legally imprisoned. The Habeas Corpus Act 1679 guaranteed this right in law. For the purposes of bringing a claim for habeas corpus on behalf of the chimpanzee, Winston, it must first be established that he is a legal person.

Establishing that Winston is a legal person is vastly different to saying that he is a human being and so entitled to all human rights. It is important to establish Winston as a legal person because this would provide him with basic human rights, including the right to have a habeas corpus writ brought on his behalf. There is no direct case law on this point in England and Wales, but international cases will be considered.

One of the earliest cases concerning treating an animal as a legal person occurred in 1977, when an American judge had to decide whether or not a dolphin was a legal person. Dolphins are similar to chimpanzees in that they are both intelligent animals. However, it was held by Judge Doi that the dolphin could not be classified as a legal person and it was

[48] www.animallawcentre.org.uk.

defined purely as property.[49] This case shows the courts' typical attitude to animals: they are merely property. Nonetheless, at a similar time, also in America, an action was brought under the Marine Mammal Protection Act 1972 to try to stop a dolphin from being sent to the United States Navy. In this case, the attorney signed a settlement agreement as an attorney for the dolphin.[50] This is a rare case, but illustrates to a limited extent that the law is seriously considering the legal status of animals. This case had limited effect as it was unpublished and so did not receive much publicity and the dolphin was not awarded legal status. Other countries have edged closer than America to giving animals, especially chimpanzees, legal status. This is shown by the fact that recently there have been many cases brought on behalf of animals.

In 2005, in Brazil, a habeas corpus writ was brought before a court in respect of a chimpanzee called Sucia.[51] The Court did not grant habeas corpus, as the application was dismissed due to the death of Sucia. The Court therefore did not have to seriously consider whether a chimpanzee is capable of being a "legal person". Nevertheless, it did seriously consider the application, which is further than any previous action for a habeas corpus writ in respect of an animal has gone. Previously the Federal Supreme Court of Brazil had struck out a request of habeas corpus writ to release a caged bird. The Hon. Justice Djalci Falcao, who voted for dismissal of that case, reasoned that "an animal cannot be involved in a legal relationship as a subject of law; it can only be an object of law, acting as a thing or asset".[52] Sucia's case illustrates that the courts are now at least willing to hear applications.

More recently, in April 2007, an Austrian court examined the question of whether a chimpanzee can be a legal person and therefore capable of having a legal guardian appointed by a court.[53] The central argument brought on behalf of the chimpanzee, Hiasl, was that a chimpanzee's DNA is 98.77% the same as that of humans. The Court dismissed the claim on the ground that if Haisl was appointed a legal guardian, this might create the public perception that humans with court-appointed legal guardians are on the same level as animals.[54] This decision may still be appealed. Although this application was unsuccessful it showed the Court's willingness to seriously consider an application on behalf of an animal.

One of the most compelling arguments that may be used in Winston's case is that humans, chimpanzees, bonobos, gorillas and orang-utans are all members of the Homindae family. The effect of this is that, as mentioned above, humans and chimpanzees have 98.77% the same DNA.[55] They are genetically closer than horses and zebras, which are able to breed with each other, and also genetically closer than mice and rats.[56] This close genetic relationship means that human and chimpanzee blood can be exchanged through a transfusion, while neither human nor chimpanzee blood can be exchanged with any other species. The immune system and the anatomy of the brain and nervous system are also similar in humans and chimpanzees. These resemblances are the reason why chimpanzees are used in so many medical research experiments.

Not only are chimpanzees genetically similar to humans, they also share many of the same characteristics. Chimpanzees are intelligent beings, who are capable of emotions such as happiness, fear and despair. Moreover, they are sociable, know how to live in a society, and have the ability to learn.[57] This was demonstrated in a project undertaken in America called "Project Washoe", in which a chimpanzee, Washoe, was taught to communicate with humans via sign language.[58] Chimpanzees are also similar to humans in that they are capable of non-verbal communication, such as kissing, embracing, holding hands and laughing. These actions are not performed in exactly the same context, but they do have similar meanings.[59]

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[49] Brooman, S., and Legge, D., *Law relating to Animals*, Cavendish Publishing Limited, London, 1999, p. 54.
[50] Wise, S., "The legal status of non-human animals", a paper given at the fifth annual conference on Animals and the Law hosted by the Association of the Bar of the City of New York on 25 September 1999, p. 55, see www.Animallaw.info/journals/jo_pdf/lralvol8_p001.pdf.
[51] See www.Animallaw.info/nonus/cases/cabrsuicaeng2005.htm.
[52] Ibid, second paragraph.
[53] "Court to rule if chimp has human rights", Kate Connolly, *The Observer*, April 2007, see www.observer.guardian.co.uk/world/story/0,,2047459,00.html.
[54] "Chimp denied a legal guardian: court turns down request in case aiming for 'ape rights' ", Ned Stafford, BioEd Online, 26 April 2007, see www.bioedonline.org/news/news.cfm?art=3289.
[55] See www.greatapeproject.org.
[56] Ibid.
[57] Ibid.
[58] "The evolving legal status of chimpanzees", a legal symposium hosted by Harvard Law School on 30 September 2002, see www.Animallaw.info/journals/jo_pdf/lralvol9_p1.pdf, p. 16.
[59] Ibid, p. 5.

The close genetic relationship and shared characteristics of chimpanzees and humans is compelling and the main reason why chimpanzees should be granted legal status. The law has developed to a limited extent to protect animals but it does not go as far as laws protecting humans.[60] Legislation on animals is merely concerned with animal welfare.[61]

Under the law animals are treated as property.[62] Chimera Developments is Winston's owner, and as such can subject him to scientific experiments. Under the law animals cannot be granted legal status because they are non-human. However, the law treats corporations, partnerships, local government and clubs[63] as legal persons even though they are non-human. This distinction seems extremely unfair and arbitrary. As such this distinction should be challenged and it provides another ground for Winston's application.

It may be difficult to persuade the court to hold that Winston is a legal person due to the attitudes of society, which are resilient against awarding non-humans legal status. However, recognising chimpanzees as legal persons is not the equivalent of defining them as humans, it merely recognises that both are entitled to ensure their protection through legal rights. At some point a court must be willing to make the leap, and class a chimpanzee or other animal as a legal person.[64] It has been proposed by many academics and lawyers that animal rights will develop in similar way to that in which the rights of women and slaves developed.[65]

Chimera Development's legal team will be arguing that non-humans should not be given legal status. It is likely to be argued that humans differ from chimpanzees in that humans can effectively communicate with one another and have conscious thoughts and feelings. However, as mentioned above it is now clear that chimpanzees are capable of all these actions but in a different context to humans.

Chimera Development's legal team may rely upon a counter argument proposed by academics and philosophers including Immanuel Kant. This is that animals cannot be granted rights as "rights cannot be attributed unless the subject of those rights has the capacity or will to enforce them and to attach a duty to another not to infringe those rights".[66] However, this argument is not plausible. This is because, if this was the case, then neither young children nor the mentally incapable would have any legal rights, but in fact their legal rights are protected by a legal guardian. The use of a legal guardian to protect animal legal rights is a possible method to resolve this issue. According to Professor Wise, "[t]o deny chimpanzees these rights will open the judges up to a very serious charge of simply being biased and arbitrary".[67]

After weighing up both the arguments for granting Winston legal status and the counter arguments for withholding legal status, it would seem that the arguments for granting him legal status are more compelling. The law seems ready to advance forward and grant a chimpanzee legal status.

The strongest argument put forward on Winston's behalf is the scientific evidence that chimpanzees are 98.77% genetically similar to humans. It is therefore to be expected that humans and chimpanzees have behavioral characteristics in common, such as the ability to learn and communicate and self-awareness. These characteristics may not be identical but they are used in similar contexts. In addition, the distinction currently made between animals which are rejected legal status and corporations, partnerships and local governments which are granted legal status is unfair and arbitrary. International case-law may also be of use as persuasive precedent.

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[60] *Law relating to animals*, p. 50, see footnote 49.
[61] Wise, S.M., *Rattling the cage: toward legal rights for animals*, Perseus Publishing, Cambridge, Massachusetts, 2000, p. 45.
[62] *Law relating to animals*, p. 31, see footnote 49.
[63] Ibid, p. 86.
[64] "The legal status of non-human animals", p. 35, see footnote 50.
[65] *Law relating to animals*, p. 80, see footnote 49. In 1772, there was a landmark case in which James Somersett, a black slave brought back to the UK from Jamaica, was freed after a debate sparked by his demand for habeas corpus. Lord Mansfield successfully argued for his release.

[66] *Law relating to animals*, p. 80, see footnote 49.
[67] "The legal status of non-human animals", p. 48, see footnote 50.

The Animals (Scientific Procedures) Act 1986 under the microscope

Deborah Rook[68]
Principal lecturer in law, Northumbria University

An exemplary regulatory scheme?

On paper the Animals (Scientific Procedures) Act 1986 ("the Act"), which governs the controversial area of animal experimentation, looks impressive. It appears to permit only those experiments on animals that are absolutely necessary. In 2002 a report of the House of Lords Select Committee on Animals in Scientific Procedures referred to the Act as "the tightest system of regulation in the world".[69] This article puts the Act under the microscope to examine whether it is as stringent in its protection of animals as its wording suggests or whether its words offer a hollow promise of protection to laboratory animals.

A licensing system

The statutory regime consists of a licensing system whereby anyone carrying out an experimental procedure on a protected animal, i.e. a non-human vertebrate, which may have the effect of causing that animal pain, suffering, distress or lasting harm, must first obtain certain licences from the Home Secretary. A project licence must be obtained which authorises the research and personal licences are required for each individual involved in the experiments. In addition, the place in which the experiments are conducted must be certified as a designated establishment.

The cost-benefit assessment

Section 5 of the Act incorporates a utilitarian cost-benefit assessment so that a project licence cannot be granted unless the likely benefit to be derived from the experiment outweighs the likely costs, in terms of animal suffering. In assessing benefit, section 5(3) sets out a list of permissible purposes, for example, the "advancement of knowledge in biological or behavioural sciences"; but these are sufficiently wide to encompass a whole array of purposes. The benefit to be derived from the experiment still needs to be quantified in some way. It is not enough that the experiment satisfies one of the permissible purposes. How does one quantify potential benefit that may or may not be discovered in the course of scientific research? Clearly this is a very difficult test to apply in practice and one wonders how exactly the Home Secretary assesses benefit for the purposes of the utilitarian calculation.

Assessing the benefits

In the context of medical research Drs C.R. and J.S. Greek have compiled a large list of examples of experiments which, they submit, demonstrate that the use of the animal model is detrimental to humans. Their book *Sacred Cows and Golden Geese: The Human Cost of Experiments on Animals*[70] provides many such examples. Not only can the animal model fail to predict the toxic effects of drugs (for example, Zimeldine caused a paralyzing illness in humans), but reliance on the animal model can also lead to potentially useful drugs being needlessly abandoned. Penicillin provides a powerful illustration of this. Fleming tested penicillin on rabbits but it did not work so he temporarily gave up his research. Later, in desperation, he administered penicillin to a sick person who subsequently recovered. Fleming later admitted "[h]ow fortunate we didn't have these animal tests in the 1940s, for penicillin would probably never have been granted a licence, and possibly the whole field of antibiotics might never have been realised."[71] It is unlikely that the Home Secretary looks at the wider picture of the efficacy of the animal model when assessing benefit, but rather concentrates on the specified predicted benefits of a particular project as stated by the applicants. Nevertheless, this legislation begs the wider question of the extent to which the animal model in medical research benefits (or harms?) humans and it is appropriate for those implementing the legislation, and their lawyers, to grapple with this difficult issue.

Assessing the costs

Leaving aside the difficulty of assessing the benefit of the experiment, the "cost" part of the equation proves to be equally problematic. The Home Secretary must weigh up the adverse effects of the

[68] Fellow of the Oxford Centre for Animal Ethics (www.oxfordanimalethics.com).
[69] "Animals in Scientific Procedures", July 2002, Chapter 1.15, see www.publications.parliament.uk/pa/ ld200102/ ldselect/ldanimal/150/15001.htm.
[70] Continuum, 2002.
[71] Ibid, p.73.

experiment in terms of potential animal suffering. To this end the licence applicant relies on a system for categorising severity of animal suffering. This classification system is not mentioned at all in the Act, but instead is detailed in guidance notes.[72] Severity is classified as mild, moderate, substantial or unclassified. The project as a whole is given a severity *band* and this reflects the likely suffering of the *average* animal used in the project. Thus it is based on the overall cumulative suffering of all the animals concerned. Each separate protocol (procedure) within the project is given a severity *limit* which indicates the maximum level of suffering that an individual animal *may* suffer. This represents the worse case scenario for a single animal. The nature of the severity band of a project i.e. the cumulative suffering of all, means that it can hide the fact that a number of substantial procedures will be carried out on animals for the purposes of that project. This raises the difficulty that "a project containing ten mild protocols, each involving 10,000 animals, and one substantial protocol involving fifty animals, could well be classified as mild".[73] On this basis, an experiment could include acute toxicity tests on fifty monkeys resulting in prolonged pain but nevertheless the project may only be classified as "mild".

A 2004 report by the Boyd Group and the RSPCA[74] recognised the need for a severity categorisation system but stated that there were significant difficulties with the current system. It highlights the difficulties faced by licence applicants due to the inadequate guidance provided by the Home Office on how to decide which category to apply. It recommends that more examples and case studies be provided to illustrate the different categories. It also suggests that the use of the word "moderate" is too comfortable a term for many of the adverse effects that it encapsulates with the consequent risk of downplaying the animal suffering involved.

Categorising severity in practice

This area of the law recently came under scrutiny in the context of a judicial review case which arose out of an undercover investigation by the British Union for the Abolition of Vivisection (BUAV) concerning experiments on marmoset monkeys at Cambridge University.[75] The purpose of the experiments was to research into the functioning of the human brain and illnesses affecting it such as Parkinson's disease. The experiments involved inducing strokes or brain damage in the marmosets, for example, by cutting or sucking out parts of the brain or by injecting toxins. In the applications for the project licences, these adverse effects on the marmosets were categorised as moderate. The BUAV argued that these had been miscategorised and that they should have been classified as substantial. In the High Court Mitting J agreed with the BUAV that the chief inspector was wrong not to categorise some of the procedures as substantial. The Home Office had adopted a "relative approach" in which the Cambridge experiments were compared to other experiments that caused more suffering and therefore relatively speaking the Cambridge ones were less painful and could not be in the same category as the others. The BUAV argued that the baseline for comparison should be the animal's usual state of health. The Court of Appeal also rejected the "relative approach". What this case highlights is how inadequately the "substantial" category has been implemented in practice in the past. If the Home Office has been using as its comparator the worst possible suffering of an animal rather than its usual state of well-being, then many procedures will have been incorrectly classified as moderate. The implications of this are two-fold: the licence applications did not get the additional level of scrutiny from the Animal Procedures Committee[76] which they should have done and the public have been misinformed about the number of substantial experiments taking place over the years.

Is death an adverse effect?

One interesting issue that arose from this case in the High Court was the question of whether the death of an animal was an "adverse effect" and therefore relevant to the question of cost in the cost-benefit assessment. The current policy is that the death of

[72] Guidance on the Operation of the Animals (Scientific Procedures) Act 1986, 2000.
[73] "Categorising the severity of scientific procedures on animals", a report by the Boyd Group and the RSPCA, July 2004, p.2, see www.boydgroup.demon.co.uk/ severity_report.pdf.
[74] See footnote 73.

[75] *R(BUAV)* v *Secretary of State for the Home Department* [2007] EWHC 1964 (Admin) and, on appeal, *Secretary of State for the Home Department* v *Campaign to End All Animal Experiments (trading as BUAV)* [2008] EWCA Civ 417. See Thomas, D., "BUAV wins important judicial review", *Journal of Animal Welfare Law*, December 2007, p. 1, and Thomas, D., "Court of Appeal ruling in BUAV judicial review", *Journal of Animal Welfare Law*, Summer/Autumn 2008, p. 1.
[76] A statutory advisory committee.

an animal is not considered an adverse effect under section 5(4). The BUAV contended that this approach was wrong and that the Home Secretary ought to take into account the deaths of animals. This issue potentially raised a fascinating philosophical question: if an animal is painlessly killed does it suffer any loss? Does its death result in any adverse effect? A number of eminent philosophers have tackled this question including Peter Singer and Tom Regan. Clearly when a human dies their life plan is frustrated, they can no longer pursue their wants and desires for the future. In addition, the death of a human usually causes others to suffer loss and grief. What follows from the painless death of an animal? Marmosets are intelligent primates with complex social lives – do they have wants and desires? Do they grieve the loss of their companions? These are difficult issues that would have been extremely challenging to decide in court. It was therefore unsurprising that the lawyers brushed these questions aside by a simple reliance on semantics. Section 5(4) refers to "adverse effects" which was accepted as synonymous with the words "pain, suffering, distress or lasting harm" (section 2(1)). The Court accepted that death was a grievous harm to a living animal; however, it could not be defined as a "*lasting* harm". Mitting J agreed with the Home Office interpretation that "killing is the means by which adverse effects are to be terminated. Accordingly, killing cannot itself be an adverse effect".[77]

Significantly, Mitting J did however accept that death was a relevant factor in the setting of a severity limit of a procedure. This approach conflicted with that taken by the Home Office. The Home Office approach has been that where a procedure anticipates the premature killing of an animal because of adverse effects it is experiencing, that is legally irrelevant to the assessment of a severity limit. The Court of Appeal also rejected the Home Office's approach. Whilst this is a step in the right direction, it is unfortunate that the death of an animal is not considered as a cost in the cost-benefit assessment.

The availability of non-animal alternatives

Section 5(5) of the Act requires that the Home Secretary be satisfied that the purpose of the programme "cannot be achieved satisfactorily by any other reasonably practicable method not entailing the use of protected animals". Therefore the availability of non-animal alternatives is an integral part of the protection afforded to animals under the Act. The Home Secretary must always be satisfied that the use of animal experiments is absolutely necessary in each individual case and that there is no other "reasonably practicable" alternative. It is perplexing how this clear and stringent test did not prevent the use of animals in testing cosmetic products for 10 years until the ban in 1997. At a time when a number of companies, such as The Body Shop, were producing cosmetics without animal testing, the Home Secretary was still granting licences for the testing of cosmetics on animals in the UK. Why did the availability of the alternative non-animal methods not prevent the grant of licences for cosmetics testing? Do the words "*reasonably practicable*"' allow the use of alternative non-animal methods to be ignored if other factors (perhaps company profits?) are involved?

A recent BUAV report entitled "Creatures of habit: animals in recreational drug research"[78] indicates that licences are still being granted in instances where alternative non-animal methods of research are available. This seriously challenges the ability of section 5(5) to achieve what it purports to achieve, i.e., the limitation of experiments on animals to those instances where it is absolutely necessary. For example, in one experiment at Cambridge University rats were used to investigate the addictive nature of cocaine.[79] The procedure involved surgically inserting a catheter into the jugular vein of the rats and conditioning them, by the use of electric shocks to their feet, to be frightened of loud sounds. The research discovered that the addicted rats would still seek more cocaine even when it was associated with electric shocks. Clinical observation of human patients has already established the addictive nature of cocaine and it is difficult to see in what way the above experiment added to our current knowledge.

Conclusion

The stringent tests in section 5 of the Act in theory set a high threshold of protection for laboratory animals, suggesting that only those experiments that are absolutely necessary will receive licences. Only those experiments that offer considerable benefits

[77] Paragraph 53.

[78] Taylor, K., 2007.

[79] Ibid, p. 5.

(since these benefits must outweigh the animal suffering) and for which no non-animal alternatives exist will be granted a licence to proceed. Unfortunately, on closer inspection, how the Act works in practice offers a bleaker picture. The cost-benefit assessment, which looks so promising on paper, is difficult to implement. The benefit is limited to the projected optimism of the researchers rather than the wider picture of the efficacy of the animal model. The costs are difficult to quantify and the severity classification scheme needs to be modernised. The obligation to use non-animal alternatives appears to have little weighting in practice. The UK boasts an exemplary regulatory system on paper but the author argues that its practical implementation does not approach its potential.

The criminalisation of the possession of extreme pornographic images of bestiality: the Criminal Justice and Immigration Act 2008

Susan Easton
Barrister, Reader in Law
Brunel Law School

The new Criminal Justice and Immigration Act 2008 ("CJIA") covers a wide range of areas of criminal law as well as immigration issues. It also contains new provisions on the possession of extreme pornographic material depicting scenes of violence and abuse, necrophilia and sexual acts with animals. The provisions on possession of an extreme pornographic image are found in section 63(1). To fall within section 63(1) an image would need to be both pornographic, that is, "of such a nature that it must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal" (section 63(3)) and extreme. Extreme images include: "a person performing an act of intercourse or oral sex with an animal (whether dead or alive)", if a reasonable person looking at the image would think that any such person or animal was real" (section 63(7)).

The offence applies to still or moving images and to data capable of being converted to an image and to offline and mobile phone material. The maximum penalty for possession of extreme pornographic images of bestiality will be 2 years imprisonment (section 67).

Defences for accidental possession, unsolicited material and legitimate reasons for possession are stipulated in section 65 with the burden of proof lying on the defence. Proceedings may only be brought with the consent of the Director of Public Prosecutions (section 63(10)). No date has yet been fixed for entry into force of these provisions, but it is expected to be early 2009.

These provisions have been introduced to address the tide of extreme pornography on the Internet with which the Obscene Publications Act 1959 ("OPA") is ill-equipped to deal. The new provisions are much broader than those of the OPA because mere possession is sufficient for an offence to be committed, whereas under the OPA it is necessary for an obscene article to be published and distributed and obscenity is defined in terms of the tendency to deprave and corrupt those persons who are likely to read, see or hear such material.

Although the provisions on violence in the CJIA have generated considerable debate, the use of animals and corpses has received less attention. The use of animals clearly raises animal welfare issues insofar as it entails exploitation of and assaults on animals and treating them without respect. While such use of animals does not raise the issue of consent to harm which has preoccupied the criminal law since *R* v *Brown*,[80] and which has been considered by the Law Commission in its consultation papers on consent in the criminal law,[81] nonetheless the use of animals in pornography is clearly still problematic because it is degrading to animals, as well as to humans. Consent is an irrelevant issue just as it would be in relation to necrophilia. Even if a person made a living will giving consent to their body being used for sexual purposes after their death and for this to be recorded, such consent would not make that activity either lawful or non-degrading. Animal pornography again emphasises the use of animals as a means to an end, in this case the sexual gratification of humans, and reinforces their subordinate status, even if that gratification is achieved voyeuristically.

The exploitation of animals in pornography is not covered by the Animal Welfare Act 2006 or its predecessor, the Protection of Animals Act 1911. However bestiality has of course long been a

[80] *R* v *Brown, Laskey, Jaggard and others* [1993] 2 All ER 75, [1994] 1 AC 212.
[81] "Consent and offences against the person", Law Commission, 1994, "Consent in the criminal law", Law Commission, 1995.

criminal offence,[82] governed previously by section 12 of the Sexual Offences Act 1956, and now by section 69 of the Sexual Offences Act 2003 ("SOA"), which makes sexual intercourse with an animal an offence punishable by 6 months imprisonment and/or a maximum fine in the magistrates' courts and by a maximum of 2 years imprisonment in the Crown Court. However, section 69 of the SOA does not cover sexual interference with a dead animal, in contrast to the possession offence in the CJIA.

One apparent anomaly is that under the SOA the substantive offences of intercourse with a live animal and sexual penetration of a corpse carry the same sentences as possession of images of such acts under the CJIA, which may have implications for the deterrent effect of these provisions. However, if bestiality and necrophilia are committed in the course of a pornographic production, then these actions are crimes in their own right and, by viewing the material, the consumer is creating a demand for those acts and is to that extent complicit in the crime. But even if the action is simulated, such images in pornography still legitimise the sexual exploitation and degradation of animals and indeed of the individuals in those productions.

The new provisions are concerned with the use of animals in sexual contexts so would not cover possession of images of other forms of animal abuse which are not intended for sexual arousal. Indeed, the use of images of violent assaults on animals in art has a long history, for example with animals depicted in their death throes in hunting scenes. They also would not capture the more modern example of animal suffering embodied in "works of art" such as the notorious example of the Costa Rican artist, Guillermo Vargas, who exhibited a tethered emaciated dog so the audience could watch him starve to death, a production which caused considerable outrage and led some galleries to boycott his work. The debate on the borderline between art and pornography, however, lies outside the scope of this article.

[82] It was originally not a crime at common law, but an ecclesiastical offence and made a felony by statute in the 16th century.