Case Materials and News

Charlotte Hughes, Katie Thomas and Josephine Burnett

Cases

Animals in research: R (on the Application of Chiltern Farm Chemicals Ltd) v Health & Safety Executive (2017) [2017] EWHC 2491 (Admin)

Decision considering whether a bird field monitoring study was a vertebrate study. If it was, it was subject to the data sharing provisions of Regulation 1107/2009, art. 62, which attempts to reduce the numbers of animals used in research, by avoiding duplicate experimentation.

The claimant challenged the decision of the Health and Safety Executive that a bird field monitoring study was a vertebrate study and therefore subject to data sharing provisions under Regulation 1107/2009, art. 62. The purpose of the study was to assess the risk of the particular slug pellets to birds and was necessary as part of the process of obtaining authorisation to sell as a plant protection product. The bird pellets were applied to five fields and the farmland birds present at the test sites were netted, ringed and radio tagged so as to monitor the effect of the pellets.

Article 62 of Regulation (EC) 1107/2009 makes provisions for the sharing of tests involving vertebrate animals with the purpose of reducing the amount of experimentation conducted on vertebrates and to avoid duplicating testing in the case of plant protection products. Included is the provision to ensure that tests and studies involving vertebrate animals are shared and Art 62(3) provides that 'the costs of sharing the test and study reports shall be determined in a fair, transparent and non-discriminatory way.'

It was agreed that a bird field monitoring study would only fall within art.62 if it fell within the definition of a "regulated procedure" set out in the Animals (Scientific Procedures) Act 1986, as interpreted in the light of Directive 86/609. This encompassed any scientific procedure applied to a protected animal that might have the effect of causing that animal pain, suffering, distress or lasting harm.

The court held that the study fell within art 62 because it had the potential to cause suffering and harm to the birds, who may be at risk from consuming slug pellets or contaminated slugs, thus causing a degree of distress and suffering. It was not relevant that the slug pellets had been used for many years and the study was only required because of a regulatory change, which meant there was a need for re-authorisation. The claimant was therefore subject to the data sharing provisions.

Animal Welfare Offences – Sentencing: (1) Della Barker (2) Keith Williamson v RSPCA (2018) [2018] EWHC 880 (Admin)

As the first appeal by way of case stated against an order disqualification from keeping or owning animals, this case lays down guidance for how to approach ancillary orders, including disqualification orders under s.34 of the Act.

The Animal Welfare Act 2006, s.9, imposes a duty on owners or keepers of an animal to properly ensure their welfare. Section 34 sets out the available orders in the event of a conviction. In this case, a couple was found guilty of failing to meet their dogs' needs pursuant to the Animal Welfare Act, s.9 and an order was made disqualifying them for owning or keeping animals for seven years.

The dogs had been kept in crates for over 20 hours a day, they had a heavy flea infestation and the eldest dog had a medical condition which could have been treated but was not and he had to be put down. The dogs had not received veterinary treatment for any of their ailments for a number of years. One of the

appellants had mobility and disability issues and the couple was living in squalid and chaotic conditions.

The couple appealed by way of case stated against the disqualification order. The appropriate legal test was whether the sentence was one which was 'Wednesbury' unreasonable, i.e. no reasonable decision maker could have made. The appeal was based on the couple's good character, their long history of looking after the dogs, steps taken to sanitise the house following the RSPCA's visit, and there having been no cruelty. The Crown Court upheld the disqualification but varied the terms to allow the couple to keep their terrapin, determining the situation to have been correctly categorised as medium-term neglect, and therefore correctly sentenced.

The court noted that there were two sentencing guidelines relating to s.9 offences, both of which required consideration of ancillary orders, including disqualification from owning and keeping animals. However, the guidelines did not advise the court how to approach disqualification.

The court held that in most cases, one of three types of order under s.34 would be appropriate: prohibition against keeping or owning any animal, prohibition against keeping or owning a particular kind of animal where there has been a history of repeated failure against that animal but not others, or a prohibition against owning or keeping all animals except a particular kind of animal where that species is unlikely to come to harm ('an exclusory order').

In this case, a disqualification order was not wrong or oppressively harsh. The court could have imposed a fine, community penalty or custodial sentence and that would have been justified under the sentencing guidance. The disqualification order was reasonable; its purpose was to protect animals, rather than punish the appellants.

Animal Welfare Offences – Criminal Procedure: Smith v RSPCA (2017) [2017] EWHC 3536 (Admin)

Refusal to adjourn a part-heard trial for animal welfare offences on the basis the defendants were unfit to stand trial.

Part way during a trial of four defendants accused of animal welfare offences in relation to animals kept on their farm, one of the co-defendants took his life. The trial was adjourned. A month before the trial was due to resume; the court received a GP letter detailing the inability of the defendants to cope with the trial for a further six months. The district judge held that the letters did not comply with the Criminal Procedure Rule. The GP was called to attend court and gave evidence as to the mental state of the defendants.

The district judge refused to adjourn further, noting that the GP had not independently used the term "unfit" until prompted; the defendants had not recently been examined; and opined that they did not believe sleeplessness and depression amounted to unfitness to attend trial. The district judge found each of the appellants guilty of 12 charges and the appellants submitted that the refusal to adjourn was Wednesbury unreasonable, with a lack of properly exercised discretion, thus rendering the trial unfair.

An appeal by way of case stated was dismissed. It was held that a refusal to adjourn could be justified where medical evidence was inadequate, with the district judge correct in finding that the GP letters in this instance did not clearly state how the appellants were unable to stand trial. Based on this, and the fact that the appellants had not been examined for a month and no up to date medical report was provided, the district judge was entitled to conclude that the medical evidence did not prove unfitness to stand trial. The district judge had the potential unfairness to the appellants in mind and the refusal to adjourn had not been unlawful, with the correct test being applied and a fair trial being exercised.

(1) Mark Woodville Downes (2) Susan Carol Smith v RSPCA (2017) [2017] EWHC 3622 (Admin)

Routes of appeal from a magistrate's decision about jurisdiction to hear a case allegedly brought out of time.

S.31 of the Animal Welfare Act 2006 provides that proceedings must be commenced before the end of six months from the date that the prosecutor became

aware of evidence sufficient enough to justify proceedings.

Following the RSPCA's visit to the appellants' farm, where it was alleged that animals were kept in very poor condition, the appellants submitted that the time limit had not been adhered to, with the offences being out of time and the court therefore having no jurisdiction to try them. The trial judge held that they had jurisdiction to hear the charges.

The appellants relied on *R (on the application of Donanchie) v Cardiff Magistrates' Court* [2007] EWCH 1846 (Admin) to support the submission that a magistrates' decision relating to a preliminary issue of jurisdiction was final, and therefore could be challenged. The magistrate stated a case, asking whether she could state a case before verdict, given that it related to jurisdiction.

The court held that the court had to determine itself whether it had jurisdiction. If it declined jurisdiction, that decision could be challenged by judicial review or case stated. If it accepted jurisdiction, it did not have power to state a case and the only remedy for the aggrieved party was judicial review, the magistrate should not adjourn without good reason. In all other cases there was no power to state a case in relation to an interlocutory ruling. Donachie had been wrongly decided in relation to magistrates' power to state a case on an interlocutory basis and was disapproved.

Animal Welfare – Dog Fighting: Julie Wright (Claimant) v Reading Crown Court (Defendant) & RSPCA (Interested Party) (2017) [2017] EWHC 2643 (Admin)

Following conviction of the claimant for Animal Welfare Act 2006 s.8 offences relating to the keeping or training of a bull terrier-type dog for use in connection with an animal fight, the claimant applied for judicial review of the defendant crown court's refusal to state a case.

The court found that the dog had been kept at the claimant's home, in addition to spending considerable time as the home of another man, and that one or both of the men arranged for the dog to be sent to Ireland for assessment or training and therefore kept the dog for use in connection with an animal fight. The claimant asked the court to state a case on whether a person could keep or train an animal within s.8 through an agent.

It was held that the definition of the word "keeps" included actual physical possession of an animal, but also exercising a level of control over an animal, whether at the home of the person charged, or at the home of another. A section 34 disqualification order could allow for disqualification from participating in the keeping of animals, including knowingly having control of an animal wherever it might be kept. The Wildlife and Countryside (Registration, Ringing and Marking of Certain Captive Birds) (England) Regulations 2015 also provided clarification that "'keep' means to have in one's possession or control" and does not therefore require actual possession.

It was therefore understood that the court's refusal to state a case had been correct, with "keep or train" under s.8 including not only physical possession, but also where a person retained control of an animal while it was elsewhere. Restricting the interpretation of s.8 to actual physical possession would limit the criminalisation of those involved in training animals to fight.

Animal welfare – cost of caring for seized animal – whether bailment relationship was created so costs could be recovered.

David Lionel Tongue v (1) RSPCA (2) Timothy Heaselgrave (Trustee In Bankruptcy Of The Applicant) (2017) [2017] EWHC 2508 (Ch)

The applicant challenged the decision of the second respondent, who in bankruptcy proceedings admitted a proof of debt from the RSPCA, who were joined as the First Respondent.

The applicant had been sentenced to imprisonment for leaving his cattle with insufficient food and water. The cattle had been seized by a police officer and placed in the RSPCA's care. He later gave permission for the RSPCA to attend the cattle to provide them with care. Subsequently the RSPCA moved the herd to another farm and incurred costs of boarding the cattle over several years. Upon the applicant being adjudged

bankrupt, the RSPCA submitted proof of debt of over £420,000.

The RSPCA argued that they had a relationship of bailment and had come to owe the applicant a duty of care towards the preservation of the cattle, therefore there was a corresponding right to recover expenses incurred in fulfilling that duty.

It was held that bailment depended upon possession, usually as a result of mutual consent of both parties, however it was possible without bailor consent. The court held that the limited consent given to care for the cattle did not give rise to a relationship of bailor and bailee. In any event, the removal of the cattle with the assistance of the police would have rendered the police the bailees of the cattle, and the RSPCA in turn becoming bailee for the police, with the RSPCA continuing to hold the cattle under this arrangement.

It was further noted that the context of the acquisition of the cattle was one of a charitable nature, aiming to improve the lives of the animals, and requiring no fee for such an activity sits with such objectives. It would not have been apparent to the reasonable man that the RSPCA would seek to recover their expenses. The expenses associated with the boarding were therefore not recoverable.

About Charlotte Hughes

Charlotte graduated from the University of Wales, Bangor in 2012 with an LL.B Law with Spanish degree. From here she developed a special interest in animal welfare law, going on to volunteer and work in a range of animal welfare roles. Charlotte completed a Master of Animal Law and Society at the Autonomous University of Barcelona in 2016, and is due to begin the LPC in 2018, whilst continuing in her role as a Regulatory Paralegal.

EFRA Committee's inquiry about the import of fur products

On 7 February 2018 the Environment, Food and Rural Affairs Committee (the EFRA Committee) launched an inquiry into the fur trade in the UK.[1] This was after a recent spate of high-profile cases of real fur being sold as faux fur in popular shops on the high-street and online.[2]

While fur farming has been banned in the UK for 18 years, the UK still imports and sells fur from a range of species including "fox, rabbit, mink, coyote, racoon dog and chinchillas."[3] Since the ban was introduced, "the UK has imported more than £650 million of animal fur from animals farmed and trapped overseas."[4] EU regulations only ban the trade in fur from domestic cats and dogs, and that obtained during commercial seal hunts.[5]

The EFRA Committee held its first evidentiary session on 7 March 2018, which included oral evidence from witnesses, including reporters and directors of some of the UK's most popular retailers.[6] The session discussed how the fur trade has been exposed in the UK and what steps can be taken to avoid the sale of real fur as faux fur.[7] The report is due to be published in the near future.

Evidentiary session

During the evidentiary session Sarah Hajibagheri, a reporter for Sky News, explained how she and Claire Bass, executive director of Humane Society International (HSI), worked together to investigate the

[1] Commons Select Committee, 'Fur trade in the UK inquiry launched' (*www.parliament.uk,* 7 February 2018) <https://www.parliament.uk/business/committees/committees-a-z/commons-select/environment-food-and-rural-affairs-committee/news-parliament-2017/fur-trade-inquiry-launch-17-19/> accessed 2 April 2018

[2] Ibid

[3] Ibid

[4] Humane Society International, 'Written evidence submitted by Humane Society International UK (HSI UK) (FUR0040)' (www.parliament.uk, 13 March 2018) <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/environment-food-and-rural-affairs-committee/fur-trade-in-the-uk/written/78781.pdf> accessed 2 April 2018

[5] Commons Select Committee (n 1)

[6] Commons Select Committee, 'Fur trade in the UK examined by Committee' (www.parliament.uk, 7 March 2018) <https://www.parliament.uk/business/committees/committees-a-z/commons-select/environment-food-and-rural-affairs-committee/news-parliament-2017/fur-trade-in-the-uk-evidence-17-19/> accessed 2 April 2018

[7] Ibid

mislabelling of real fur as fake fur. They visited popular high street shops such as House of Fraser and TK Maxx, as well as online retailers Boohoo and Missguided.

During this investigation in April 2017 Claire was able to identify real fur being passed off as faux fur, sometimes for extremely cheap prices. Those items were sent to a fibres expert, Dr Phil Greaves, who was able to identify that the fur ranged in species from racoon dog, mink, and even cat. Online retailers such as Amazon, eBay and Not on the High Street have also been guilty of selling real fur as faux fur. Claire described finding 60 items on Amazon labelled as faux fur, and buying 10% of them – all items contained real fur from a range of species. Alex Bushill, a BBC London news correspondent, also investigated the fur trade in the UK. Clothing was bought from seventeen separate shops and stalls across London, with all vendors proclaiming the clothing was 100% faux.[8] In every case the items were also provided to Dr Phil Greaves, who confirmed that the faux fur was actually real fur. Although Bushill agreed that it was harder for smaller retails to obtain better profit margins on products, he pointed out that, "Nonetheless, they should not be misleading the public".[9] Shockingly, a wholesaler in Commercial Road, when challenged, responded with "Look, this is what we are all up to on Commercial Road. It happens everywhere".[10]

Although the global trade in fur is "fairly opaque", there has been a large increase in fur faming in China over the last decade, "with farmers having tens of thousands of animals with very low welfare standards."[11] This may be one of the biggest causes of

[8] BBC London News, 'Written evidence submitted by BBC London News' (www.parliament.uk, 7 March 2018) <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/environment-food-and-rural-affairs-committee/fur-trade-in-the-uk/written/78640.pdf> accessed 2 April 2018

[9] Environment, Food and Rural Affairs Committee, 'Oral evidence: Fur Trade in the UK, HC 823' (www.parliament.uk, 7 March 2018) <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/environment-food-and-rural-affairs-committee/fur-trade-in-the-uk/oral/80118.pdf> accessed 2 April 2018, Q 10 (pg 5)

[10] Ibid, Q 14 (pg 7)

[11] Ibid, Q 13 (pg 7)

the contamination of the supply chain in the UK. The low welfare standards of animals bred for fur is also one of the main reasons HIS wishes for a complete fur import ban in the UK. Claire also stated that, "High-welfare fur farming is basically an oxymoron."[12] All that any high-welfare schemes, such as the WelFur scheme, actually improve upon is productivity and return on investment. After all, there is the argument that "keeping wild and undomesticated animals in captive conditions like that can never be humane."[13]

UK Labelling Regime

The current labelling regime in the UK was also discussed. It is covered by the EU textile labelling regulation.[14] There are so many caveats and exemptions that it is basically useless and doesn't work for consumers. The mislabelling of real fur also has economic impacts. Real fur imports carry a higher tax – if real fur is being imported labelled as faux fur, the UK treasury is missing out on a hefty amount of taxes.

There are a handful of regulations which the UK can look to emulate post-Brexit, with the US Truth in Fur Labelling Act 2010 being one of them. "It requires all fur items, regardless of weight or type, to carry a label that specifies the species of the fur animal used and the country of origin."[15] The Swiss regulation also goes further, requiring the label to stipulate the method of farming, as well as slaughter.

Boohoo

BooHoo was found to be selling earrings with a 'faux-fur' trim for £5 – which was found to be mink – via the Sky investigation. Paul Horsfield, merchandising director for boohoo.com, revealed that within seven days of the revelation that particular suppler had been discontinued. Further, of five incidents of real fur being labelled as faux fur known to Boohoo, all products originated from China. Boohoo have now put some suppliers on 'red watch', and for the next six months any products being produced will go through a more thorough examination process than usual. A second strike will lead to financial penalties, and a third strike will lead to potential discontinuance of use of the supplier.

House of Fraser

High street giant House of Fraser also found out about their product - a pair of gloves with a rabbit fur trim - due to the Sky investigation. Dorothy Maxwell, head of sustainability at House of Fraser, revealed that within a day the product was taken out of the Oxford Street store. Dorothy highlighted that "contamination of the supply chain" is happening with certain brands that they work with, and "this could happen in any brand if it does not have good due diligence."[16] However, during the oral evidence session it was revealed that a similar incident occurred in 2015.

Missguided

Missguided also found out via the media. They seem to have made some very intensive changes, including providing training to the buying and merchandise technical teams and the supply base, which is predominantly based in China, where the incident happened. Neil Hackett, interim sourcing director at Missguided, admitted that they were only checking development samples when the incident occurred, but have now put processes in place to ensure production samples are also being checked. They have also created a declaration, which needs to be made on all imports for supplies, that the material they are putting on any component is in fact faux fur.

Conclusion

It is evident that the fur trade is still a real problem in the UK. Although retailers only seem to be tacking the problem once the media becomes involved, most are committed to eradicating the sale of real fur in their stores. All witnesses agreed that improving the labelling of products would be an excellent way forward, especially after Brexit.

There are three ways to tell if fur is real as outlined in the evidentiary session. Firstly, if real fur is parted where the hairs join the base, a skin will be found. In

[12] Ibid, Q 42 (pg 18)
[13] Ibid, Q 45 (pg 19)
[14] Textile Regulation (EU) No 1007/2011
[15] Environment, Food and Rural Affairs Committee (n 9), Q 27(pg 13)
[16] Ibid, Q 74 (pg 28)

faux fur this base will always be fabric weave. Secondly, the tips of fur strands in real fur will taper to a point, whereas faux fur will not. Finally, if you are able to cut a piece of the fur off and burn it, faux fur will curl into a ball and smell like plastic. Real fur will frazzle and smell like burning hair.

About Katie Thomas

Katie studied law at the University of Warwick and started her training contract at Norton Rose Fulbright in March 2017. She is keen to use her legal background for animal welfare purposes.

Defra's proposal to ban electronic training collars - Briefing

On 12 March 2018, the Department for Environment, Food and Rural Affairs ("Defra") launched a public consultation on its proposal to ban electric training collars ("e-collars").

What are e-collars?

E-collars are corrective behaviour devices used to train pets, and which operate by emitting electronic or static pulses and other signals. Typically, these devices are used on cats and dogs, and are commonly used by pet owners. A recent survey carried out by RSPCA found that while 88% of dog owners agreed that training should not frighten, worry or hurt dogs, 5% of owners said they used electric shock collars.[17]

There are two types of e-collar. The first is the hand held remote-controlled device, which is operated by the owner and used to stop unwanted behaviours by triggering an electronic pulse. The second is the containment system, which is used to keep animals within a certain area, and which triggers an electronic pulse when the animal approaches the boundary of that area.

E-collars and animal welfare: Positive reinforcement

There is concern that e-collars cause unnecessary pain, suffering and distress, and have a negative impact on the animal's welfare. Research has shown that training can be effective without the use of such devices and that positive reinforcement (reward-based training) is in fact more effective than using e-collars.[18] Positive reinforcement training methods are also in line with Defra's code of practice for dog training, which states:

> "An incorrect training regime can have negative effects on your dog's welfare. Reward based training, which includes the use of things that dogs like or want (e.g. toys, food and praise) is enjoyable for your dog and is widely regarded as the preferred form of training dogs".[19]

Lack of training and regulation

There are also a number of issues around the training users receive before operating e-collars. For example, how do owners know what level to issue the electric pulses at without causing unnecessary suffering? The use of e-collars is currently unregulated, and owners do not need to be trained before using them.

This means that pet owners are free to use e-collars at whatever intensity and duration they choose.[20] Further, the efficacy of an e-collar is down to the ability of the owner to use it promptly, since issuing the shock too long after the animal has exhibited the unwanted behaviour would only serve to confuse and agitate the animal.

The proposed ban

Defra's aim is to introduce regulations under the Animal Welfare Act 2006 to ban the use of both types

[17] https://www.rspca.org.uk/whatwedo/latest/details/-/articleName/2018_03_11_Ban_of_electric_shock_collars_in_England

[18] Blackwell EJ, Bolster C, Richards G, Loftus BA, Casey RA., *The use of electronic collars for training domestic dogs: estimated prevalence, reasons and risk factors for use, and owner perceived success as compared to other training methods*, BMC Vet Res. 2012;8(1):93.

[19] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/697953/pb13333-cop-dogs-091204.pdf.

[20] *The Scottish Government's Proposed Guidance on the Use of Electronic Training Equipment: A Response*, Professor Sheila Crispin and Mike Radford February 2018.

of e-collar. Regrettably however, since launching the proposal, Michael Gove announced that a total ban on the use of these devise may not in fact be the way forward. This is due to concerns that banning electronic containment systems may lead to an increase in the number of pets being killed on the roads. At the moment, therefore, it remains to be seen whether Defra will backtrack and tone down the ban to cover only the hand held remote controlled devices.

The proposed ban would apply to England only, although the Scottish Government is planning to publish statutory guidance on the issue, and the ban has already been in place in Wales since 2010. Elsewhere in the world, e-collars are banned in Denmark and Germany, and are subject to tighter legislation in New Zealand and Australia.

Significantly, Defra's proposed ban only extends to the use of e-collar, and does not cover the sale of these devices. At the moment, e-collars are easily available at low cost for anyone to buy over the internet. Surely, the impact of a ban on the use of e-collars would be compromised if people are not also prohibited from selling them in the first place. It would be down to Westminster to ban the sale of e-collars across the UK, since the devolved parliaments of Wales and Scotland do not have the power to legislate on such matters.

Hopefully, parliament will seize this opportunity and legislate against both the use and sale of all types of electric shock collar devices.

About Josephine Burnett

Josephine studied Law with French at the University of Birmingham and graduated in 2013. She volunteers for the RSPCA as a Volunteer Speaker and have been a member of A-Law for 1.5 years. She also regularly attends the All Party Parliamentary Dog Advisory Welfare Group meetings and is currently completing her training contract.