Case Reports

R. (on the application of Badger Trust) v Welsh Ministers Court of Appeal (Civil Division) [2010] EWCA Civ 807

On 13 July 2010, the Court of Appeal ruled against the Welsh Assembly Government's plan to carry out a cull of around 1,500 badgers in a 288 sq km (111 sq miles) area of south-west Wales, intended to stop the spread of bovine Tuberculosis ("TB").

The case was an appeal against the decision of Lloyd Jones J dated 16 April 2010 (**EWHC 768 (Admin), [2010] N.P.C. 45 [2010]**) whereby he refused an application by the Badger Trust ("the appellants") to quash an order made by the Minister for Rural Affairs ("the Minister") on behalf of the Welsh Ministers ("the respondents"). The Minister had made **The Tuberculosis Eradication (Wales) Order 2009 (2009 No.2614 (W.212)**, ("the Order") pursuant to the **Animal Health Act 1981** ('the Act') on 28 September 2009. The Order came into force on 21 October 2009 and authorized the respondents to carry out a non-selective cull of badgers in Wales.

Grounds of Appeal
The Badger Trust appealed to the court on the following grounds. (1) **Section 21(2)(b)** of the Act permits an order for the destruction of a wild species to be made if it would "substantially reduce" the incidence of disease. It was submitted that the interpretation adopted by the Welsh Assembly set too low a threshold. The government was expecting a mere 9 percent reduction in bovine TB; the appellants argued that could not be construed as substantial. (2) When using a discretion to make a decision under **s.21(2)**, it was necessary to carry out a balancing exercise between the benefit to cattle and the harm to badgers. The Minister had not undertaken such an exercise. (3) The basis of the consultation and decision-making was an Intensive Action Pilot Area (IAPA), but the subsequent order was erroneously made to the whole of Wales.

Judgment
Lady Justice Smith and Lord Justice Stanley Burnton found in favour of the appellants on Grounds 1 and 2, with Lord Justice Pill dissenting. All three of their Lordships found for the appellants on Ground 3.

(1) On the evidence, a badger cull produced a net reduction in the incidence of bovine TB of 9 per cent. The word "substantial" could only be construed in context, which in this case was that there had to be either elimination or a substantial reduction. The size of the reduction had to be considered against the total and a reduction of 9 percent was a reduction from 100 per cent to 91 percent. As a matter of ordinary language, such a reduction could not be construed as substantial.

(2) Consideration of relevant matters was necessary before the discretionary power to make an order could be properly exercised. Whilst not an exhaustive list the Minister should have had regard to the following factors: (a) the nature and extent of the adverse effects of killing a large number of badgers; (b) whether the benefits from the proposed cull outweighed those adverse effects; (c) even if there were to be an expected reduction in the

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incidence of bovine TB in cattle within the cull area, the Minister should also consider the increase which was to be expected outside the cull area due to the perturbation effect; (d) the uncertainties inherent in the assessment of the likely effect of a cull and (e) the cumulative or synergistic way in which other cattle control methods she intended to deploy might interact with the cull so as to produce a beneficial effect greater than that of the cull alone. In the instant case, the minister had not given a reasoned decision; she had simply made the order.

(3) The assembly was wrong to make an order for the whole of Wales when it consulted on the basis of a pilot area. This was the crucial failure in the government's case. In his judgment, Lord Justice Pill said that power devolved to the Welsh assembly government would need to be exercised on a regional basis within Wales and not made subject to a single regime which applies throughout the country.

Accordingly the Order was quashed. The Welsh Assembly has indicated that they will accept Court of Appeal's decision and will not appeal to the Supreme Court.

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R (on the application of Petsafe Ltd) v The Welsh Ministers [2010] EWHC 2908 (Admin) 16th November 2010

Background
Judicial Review proceedings were brought by a manufacturer and distributer of pet products, Petsafe Ltd and The Electronic Collar Manufacturer's Association, ('the claimants") against the Welsh Ministers, ("the defendants") to quash the **Animal Welfare (Electronic Collars) (Wales) Regulations 2010**, ("the Regulations"). Section 12 **Animal Welfare Act 2006**, ("the Act"), had empowered the defendants to make relevant regulations for the purpose of promoting the welfare of animals for which a person was responsible, as well as the progeny of such animals. Regulation 2 of the 2010 regulations prohibited the use on cats and dogs of any electronic collar designed to administer an electric shock.

Grounds for Judicial Review
The claimants submitted that the Regulations:
(1) Represented an unjustified deprivation of their possessions and a breach of the right to peaceful enjoyment of property, pursuant to Article 1 of the First Protocol ECHR;

(2) Represented an unjustified restriction on the free movement of goods contrary to Article 34 of Treaty on the Function of the European Union;

(3) Were Wednesbury unreasonable and perverse;

(4) Were ultra vires because Reg. 2(1)(a) and (b) – prohibitions on attaching and causing an electronic collar to be attached to a cat or dog – are not restricted in the application to animals "for which a person is responsible" as required by s12 of the Act.

(5) Lead to perverse consequences, namely in respect of Reg. 2(1)(c) which prohibits a person to be responsible for a cat or dog to which an electronic tag is attached. Criminal liability is attached to anyone who is responsible for an animal, irrespective of the reason why the person is taking responsibility. Thus someone who is ordered to remove an electronic collar could face criminal charges.

The Judgment
In the Queen's Bench division of the High Court, His Honour Judge Beatson ruled:
(1) Any interference with Article 1 was justifiable because the prohibition on the use of electronic collars was aimed at the promotion of animal welfare;

(2) Article 34 was engaged, but any interference with trade was proportional and necessary. The court considered that ***R (on the application of Countryside Alliance v Attorney General*** offered a useful comparison, where the House of Lords ruled that any impediment on trade between Member States
was a minor and unintended consequence;

(3) Given that there are other alternative and more effective methods of training or controlling animals, which did not require any negative physical impact, and sought to address the underlying causes of the unwanted behaviour, the Regulations were not Wednesbury unreasonable or perverse. Furthermore, the defendants' decision to ban electronic collars was made after a full consultation with relevant experts and the democratically accountable and elected National Assembly for Wales approved the decision.

(4) Regulation 2(1) (a) and (b) were not ultra vires s.12 of the Act because they should be construed as referring to animals for which a person was responsible.

(5) The claimants' submissions on Regulation 2(1)(c) represented an "excessively literal construction" and in reality, was neither Wednesbury unreasonable nor perverse.

The claimant's application for Judicial Review was therefore refused.

(1) James John Gray (Senior) (2) Julie Cordelia Gray (3) Jodie June Keet (formerly Gray) (4) Cordelia Gray (5) James John Gray (Junior) v Royal Society for the Prevention of Cruelty to Animals (2010)

Background to the Appeal
The appellants appealed against their convictions of 8th May 2009 before District Judge Vickers, for a number of animal cruelty offences. James (senior) and Julie Gray were husband and wife; Jodie, Cordelia and James (junior) were their children. All the appellants had been convicted with two offences under the **Animal Welfare Act 2006**, ("the Act"). The first appellant ("the father") and fifth appellant ("the son"), who was 14 at the time of the matters complained of, were each convicted for a further nine offences under the Act. The appeal concerned whether the RSPCA had proved all the necessary elements of each offence to the criminal standard in respect of each appellant.

Facts
The father ran a horse business at Spindle farm in Amersham, Buckinghamshire, which was visited by the police and the RSPCA. Upon inspection, horses and donkeys were found at the premises in poor conditions. Many were sick, injured and malnourished. Horse carcasses and bones were found around the site. Some animals were euthanased and over 100 equines were seized and removed.

The Judgment
Judge Tyrer and two lay magistrates at the Crown Court in Aylesbury held: For the RSPCA to succeed with charge under s4 of the Act, they had to show to the standard of criminal proof that: (a) the animals in question were protected animals under s2 of the Act; (b) that the particular appellant either knew or ought to have known that his act or failure would cause an animal to suffer or would be likely to do so (c) that the suffering was unnecessary.

Whilst there was a great deal of case law on the meaning of s1(1)(a) od the **Protection of Animals Act 1911**, the court found that this case law was no longer relevant to the 2006 Act. Section 4 is clear and given in the alternative.

To prove an offence under s.9 of the Act, the RSPCA had to show to the standard of criminal proof *inter alia*, that the appellant had a responsibility for the animal under s3 of the Act. This responsibility can be on a temporary or permanent basis; it includes being in charge of an animal and specifically includes that ownership of an animal carries responsibility for that animal with it.

If a child under 16 is responsible for an animal, those who have actual care and control of that child are also responsible for that animal. Contrary to the son's submissions, there is no ambiguity in Parliament's intention: the purpose of section 3(4) is to extend responsibility for an under 16 to both the under 16 and those who have care and control over him.

An offence under s.9 is committed when a person responsible for an animal fails to take all or some of those steps which that would have been taken by a reasonably competent and humane person in all of the circumstances to meet that animal's needs to the extent required of good practice. When he knew or did not know, may be one of the circumstances to be considered when determining what steps a reasonably competent and humane person would do in his position. What is reasonable is an objective question.

When section 9 statements were read without protest or requests for examination of witnesses from the appellants, the court is entitled to treat such evidence as agreed.

Conclusions
The court preferred the expert evidence of the respondent RSPCA to the appellants'. The RSPCA expert witness was clear, had a total grasp of case, demonstrated abundant and obvious expertise, was able to better argue and research his evidence and destroyed the appellant witnesses' contrary arguments.

The appeals by the first to fourth appellants were dismissed and the appeal by the fifth appellant son was allowed in part.

- The court found that the RSPCA had proved its case against all the appellants for the two offences. They had all been responsible for the animals and had known what was happening on the premises but had taken no action to alleviate it.

- In respect of the father, all nine further convictions were upheld regarding the state of the carcasses or horses. The RSPCA had proved that he had failed to exercise reasonable care and supervision in respect of protection or had caused unnecessary suffering.

- Seven similar convictions were upheld for the son. Two of the original convictions were dismissed, as he had been absent from the yard at the relevant time.