

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

The Hunting Act: human rights and EC law challenges

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Introduction

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

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

also banned. In this article, "hunting" refers to hunting with dogs.

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

There were ten individual claimants, including a huntsman with stag hounds, a professional terrierman, the owner of a livery yard business, a farrier, hare coursing greyhound trainers, a landowner who allowed hunting over his land, the master of a beagle pack and a person who claimed his social and family life revolved around hunting. They argued that the Act breached their rights under one or more of the articles of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), including in particular Article 8 (right to respect for private life and the home), Article 11 (freedom of assembly and association), Article 1 of the First Protocol ("IP1") (right to possessions) and Article 14 (prohibition on discrimination).

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

Article 8 ECHR: engagement and interference

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

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

¹⁴ In the form of the Attorney-General and the Secretary of State for Food, the Environment and Rural Affairs.

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

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

Article 11 ECHR: engagement

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

Article 1P1 ECHR: engagement and interference

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

It was common ground that there was interference with some claimants' physical or real estate possessions, such that the Government had to provide justification. The Court thought that the interference constituted mainly if not entirely control

rather than deprivation, which meant that there was unlikely to be a right to compensation (there is none under the Act). It also held that loss of the opportunity to earn income (as opposed to the goodwill of a business) was not a "possession".

Article 14 ECHR: engagement

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

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

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

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

Article 28: engagement

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

¹⁵ [2004] SC CS 127.

¹⁶ [2004] 1 AC 983.

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

Article 49: engagement

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

Justification and proportionality (ECHR and Treaty)

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

The claimants’ essential argument was that the Government could not justify a hunting ban because there was insufficient scientific evidence, in relation to the various quarry species, that the use of dogs caused more suffering than other methods of the population control which was said to be necessary. They made much of the fact that the Government’s preferred solution had been to register hunts if they could meet the

twin tests of utility (population control) and least suffering, not the outright ban (subject to exemptions) which Parliament enacted. They also argued that the exemptions regime created unjustifiable anomalies.

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

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

Conclusion

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

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

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