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

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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

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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.