MEDIA WATCH

"**The Technical Board of Appeal decision in the *Oncomouse* case**", *European Intellectual Property Review,* Volume 28(1), 2006
David Thomas and Georgina A. Richards discuss the Board's decision to narrow the scope of the patent to mice.

"**The ethics of research involving animals: a review of the Nuffield Council on Bioethics report from an antivivisectionist perspective**", *ATLA*, December 2005
David Thomas

EUROPEAN DEVELOPMENTS

MEPs demand action on bear farms

A European Parliament resolution calling on China to ban the farming of bears for their bile was passed in January. The Resolution was approved by more than half of the Parliament's 732 members, with cross-party support, making it official European Parliament policy.

Asiatic Black Bears (Moon bears) are incarcerated in tiny wire cages with rusting metal catheters implanted in their abdomens through which bile is extracted for use in traditional medicines. The procedure causes extreme agony. Although the Chinese Government has closed down some farms, there are still more than 7,000 bears imprisoned in cages on over 200 farms across China. Moon bears can expect to live up to 30 years in the wild, but life expectancy falls to 10-12 years for caged bears.

The Resolution has been forwarded to the European Commission, the Council of Ministers and the Member States.

European Commission launches Action Plan

Also in January, the European Commission (DG Health and Consumer Protection) launched an Action Plan on the Protection and Welfare of Animals, the overall aim of which is to promote animal welfare over the next five years. It set out the following primary objectives:

- to give a clearer direction to EU animal welfare policies,
- to continue the promotion of high animal welfare standards,
- to provide better focus for the allocation of resources,
- to support future trends in animal welfare research,
- to continue to seek alternative solutions to animal testing,
- to ensure a more consistent and coordinated approach to animal welfare across all EU policy areas.

Welfare of non-native species

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Rarely a week passes without some mention of alien or non-native species. Some, such as rabbits, have been in the UK for centuries, others, such as the grey squirrel, are more recent arrivals. Some were deliberately brought here, while others arrived by chance.[26]

In recent years, it has become increasingly apparent that some non-native species, the invasive ones, come at a cost. Sometimes the cost is so high that the particular species must be totally eradicated to protect threatened native species[27] and to fulfil the UK's obligations under the United Nations Convention on Biological Diversity.[28]

Indeed, it may appear that much of the legislation relating to non-native species is somewhat draconian. It is, for example, a criminal offence under the Wildlife and

[26] See Yalden, D., "The History of Mammalien Introduction in the UK", a paper given at "Mammaliens – A One Day Conference on the Problems Caused by Non-native British Mammals" on 23 February 2002, p. 35.
[27] See Martin, B., "Culling of non-native species", *Journal of Animal Welfare Law*, November 2005, pp. 12-15.
[28] Entered into force in 1993.

Countryside Act 1981 (the "Act") to release any alien animal into the wild. This has major implications for animal welfare. Where such an animal is found injured, and is taken into captivity for treatment, which proves successful, any attempt to re-release back into the wild will constitute the offence. The present article will consider just this situation. It will examine the relevant sections of Part I of the Act, and will seek to identify those actions which are lawful, and others which, if undertaken, could result in the actor(s) being prosecuted. Finally, it will discuss proposed reforms to the Act.

Section 14 of the Act makes it a criminal offence for any person to release, or allow to escape into the wild, any alien species of animal or any animal included in Part I of Schedule 9 to the Act. For example, if a person took a grey squirrel with a non-fatal injury to his veterinary surgeon he would expect it to be treated, and set free once it had recovered. He would not expect it to be put down. Yet, under the current law, this is the only thing that could happen to the animal. This is because, although the law does not forbid veterinary treatment, it is an offence to release the squirrel back into the wild. Furthermore, under the Grey Squirrels (Prohibition of Importation and Keeping) Order 1937,[29] it is an offence even to keep the creature. A similar situation would arise in the case of an injured American mink, now that the Mink Keeping (Prohibition) (England) Order 2004[30] has been made.

Even where there is no legislation forbidding the keeping of the species concerned, the situation is little better. For example, an injured sika deer could be kept in captivity while it was being treated. However, it could not be released back into the wild when it had recovered. This is an undesirable situation for a wild animal to find itself in, unless the injuries it has sustained are so severe as to make it incapable of surviving in the wild, although recovered. No problems arise if a non-native animal is so seriously injured that it must be humanely destroyed.[31]

The problem regarding non-native birds is even more convoluted. Section 1(1) of the Act makes it an offence intentionally to kill, injure or take any wild bird. However, section 4(2)(b) provides a defence to the offence of killing if the accused "shows that the bird had been so seriously disabled otherwise than by his unlawful act that there was no reasonable chance of its recovery". In other words, the bird has been mortally wounded, but not by the accused. Furthermore, section 4(2)(a) provides a defence for a person accused of taking any wild bird, if he can show that he did not disable it, and was taking it solely to treat it, the bird to be released when sufficiently recovered.

A bizarre situation then arises where any non-native bird or bird listed in Part I of Schedule 9, found slightly injured, is taken to a vet for treatment which would ensure its recovery. Because the bird is non-native or so listed, it cannot be released back into the wild. But it is also a criminal offence under section 1(1) to kill it. To exacerbate matters even further, the defences provided in section 4(2)(a) and (b) do not seem to apply.

Again, a case study will demonstrate the problem. A person finds a wild ring-necked parakeet with a broken wing. He takes it to a vet. In effect, a crime has been committed. He has intentionally taken a wild bird, an offence under section 1(1). The bird cannot be released back into the wild as this is an offence under section 14 (1). Furthermore, if the vet decides, therefore, to humanely destroy it, he too will be committing a criminal offence, under section 1(1), as he will have intentionally killed a wild bird which would have survived its injury.

The statutory defences cannot be relied on by any of the protagonists. Although the

[29] Statutory Instrument 1937/478.
[30] Statutory Instrument 2004/100.
[31] See Fasham, M. and Trumper, K., "Review of non-native species, legislation and guidance", P328 DEFRA NNS review V5.doc, 2001, p. 42.

person can show that he did not injure the bird, and was taking it to the vet for treatment, it cannot be released back into the wild when sufficiently recovered. So he cannot put forward the section 4(2)(a) defence. The vet cannot rely on section 4(2)(b), because if a person kills any wild bird, humane destruction included, he must show "that the bird had been so seriously disabled otherwise than by his unlawful act that there was no reasonable chance of its recovering", which, in this case, there was.

Perhaps an entirely new provision in section 4 is required, to the effect that a person is not guilty of an offence if he takes an alien wild bird solely for the purpose of tending it and a licence to release it is issued when it is recovered, or if he humanely destroys it following failure to obtain such a licence.

Under section 16(4)(c) of the Act, licences can be granted to effect re-release into the wild of rehabilitated alien species. The problem here is that currently there is only one licence available, and that relates to the release of muntjac deer. Presumably this means that all other non-native animals or those listed in Schedule 9 and finding themselves in this situation "should be destroyed or … kept in secure accommodation until they die of natural causes".[32] The reason given for this approach is the adverse ecological impacts of release. Given that a licensing system is already in place, perhaps it could be put to better use if each release was considered on a case-by-case basis. For example, there would seem little point in refusing to re-release a grey squirrel into the wild in a location where it could do little damage to forestry and where it was far from the habitats of red squirrels.[33] With American mink, the situation is arguably different as these animals are very aggressive and destructive to so much wildlife. A further point is that the current system runs counter to section 10(3)(b) which requires an animal to be released when it is no longer disabled.

In addition to better use being made of the licensing system, section 14 could be amended. This could be to the effect that a person would not be guilty of an offence if he released back into the wild any non-native species of animal, or an animal listed in Part I of Schedule 9, which has been injured, brought in for treatment and, when no longer disabled, set free under the provisions of a licence.

The problem of the release of rehabilitated non-native species has been considered by the Department for the Environment, Food and Rural Affairs (DEFRA).[34] It is fully aware "there is an animal welfare dilemma"[35] regarding re-release into the wild. Furthermore, it recognises the fact that "[e]uthanasia of animals that are likely to fully recover their health is publicly unacceptable in cases where … release back into the wild would cause no ecological impact…".[36]

It is minded to do something. Two options to amend the current licensing system are being considered. The first would be to use individual licences, to apply to each particular case. The second option is "to adopt the use of a general licence to allow the re-release of certain rehabilitated non-native species subject to certain conditions".[37]

Conclusion

An examination of the relevant sections of Part I of the Act has revealed deficiencies in the legislation relating to the welfare of non-native species. A serious dilemma exists in relation to the welfare of alien animals other than birds, but the situation is even worse when dealing with non-native birds.

However, some suggested changes to the law have been put forward as to how these dilemmas might be resolved. These include

[32] Ibid, p.42
[33] Ibid, p.42

[34] See "Review of non-native species policy", a report of a DEFRA Working Group, 2003, p. 89, and "Review of Part I of the Wildlife and Countryside Act 1981", DEFRA, 2004, p. 41.
[35] "Review of Part I of the Wildlife and Countryside Act 1981", DEFRA, 2004, p. 41.
[36] Ibid, p.41
[37] Ibid. p.41

possibly introducing a new provision in section 4, an alteration to the licensing system and the amendment of section 14.

DEFRA has made it quite clear that it is fully aware of the problems and of the need for reform. Indeed, in its recent review of Part I of the Act,[38] it has put forward a positive proposal, which, if adopted, should ameliorate the situation. However, until the amended Part I has been passed into law, it will not be possible to assess exactly what has been achieved.

Killing of dolphins and other cetaceans as "bycatch"

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Few animals inspire as much public affection across the EU as dolphins. And yet still the battered and bloodied bodies of these beautiful mammals shame the beaches of South-west England and Northern France each winter, sacrifices to the European Common Fisheries Policy (CFP) and the European Commission's dilatory processes.

Around 2,500 dolphins and other cetaceans are thought to be killed by pair trawler nets in the Western Channel every year. The pitiful carcasses that cause such public outrage on the South-west coast are but a fraction of the total killing, since it is estimated that less than 10% of cetaceans that die as a result of contact with fishing nets are washed ashore. Pair trawlers fishing for sea bass are thought likely to be the most frequent culprits.

Pair trawling is the practice of towing a huge net (which can be large enough to contain the Sydney Opera House) between two boats. Although the mesh nearest to the boats is wide enough to allow dolphins to escape, the mesh at the bottom of the net is much finer. As the net is towed through the water, the wanted fish, as well as "bycatch" (unwanted fish, cetaceans and other sea creatures), are gathered at the bottom of the net ready to be hauled out of the water. The wanted fish are kept; the bycatch are swept roughly back into the sea.

Washed-up cetacean carcasses are often found to have broken beaks, jaws or teeth, bloody scarring and torn fins. Once a dolphin has become entangled in a net and is unable to rise for air, it will panic and thrash around furiously in an attempt to break free. Eventually it will run out of oxygen, suffocate and die. Thus, the death of dolphins and porpoises in fishing nets is not only a conservation issue, but also a critical welfare matter.

The relevant legislation

The UK Government is under an obligation to address the bycatching of small cetaceans pursuant to the EU Habitats Directive[39] and the Agreement on the Conservation of Small Mammals of the Baltic and North Seas ("ASCOBANS").[40] At the third meeting of the parties to ASCOBANS in 2001 a resolution was passed calling on the competent fisheries authorities to ensure that the total "anthropogenic removal" (a euphemism for killing) of marine mammals was below 1.7% of the best estimate of abundance, and to work towards bringing that figure down to below 1%.

The UK Government's domestic law power to act to protect cetaceans includes powers to prohibit all or specified fishing in any specified area (Sea Fish Conservation Act 1967, sections 5 and 5A). That power is ostensibly very wide, allowing for that ban to cover both UK and non-UK boats fishing within 200 nautical miles of the UK coast.

[38] Ibid. p.41

[39] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22.7.1992, p.7, Article 12(4) of which requires Member States to establish a system to monitor the incidental killing of (among other animals) cetaceans and, in the light of the information gathered, to take further measures to ensure that incidental capture and killing do not have a significant negative impact on the species concerned.

[40] Entered into force in 1994.