

such large profit, and with only fines threatening large corporations, there is a substantial risk that many organisations simply “price in” the costs of being convicted for wildlife habitat destruction into their operating model.

If wildlife advocates are convinced that fines are satisfactory, then larger sums should be available to and used by judges when sentencing. It is noted that the UK GDPR provides for maximum fines of £17.5 million or 4% of annual global (whichever is greater), for abuses of personal data committed by organisations, yet we choose not to afford the same punishment for destruction of our natural habitats. If fines are insufficient, there are custodial sentences available under both the WCA and the CHSR and decision-making level management at organisations should perhaps face the risk of penalty fines and, in severe cases, custodial sentences, where they knowingly commit wildlife crime under the guise of their corporations. This would act as a greater deterrent against corporate management supervising wildlife offences from behind the safety of the corporate veil, and could already be brought against company officers, as both the WCA and the CHSR provide that prosecution can be brought against such officers where wildlife crime is committed with the consent, convenience or due to the neglect of company directors.

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Judicial review of wild bird culling in Wales

The High Court of England and Wales recently handed down its decision on Wild Justice’s judicial review of the Welsh Government’s lethal control regime of wild birds in *Wild Justice v Natural Resources Wales* [2021] EWHC 35 (Admin). Whilst Wild Justice were unsuccessful in their challenge, the decision nevertheless contains some positive silver linings for wildlife welfare advocates.

Facts

Natural Resources Wales (NRW) is the Welsh public authority with delegated responsibility for various public functions, including the licensing of management activities in respect of wild birds pursuant to the Wildlife and Countryside Act 1981 (WCA). Section 1(1) WCA provides that, unless authorised by a relevant authority, it is a criminal offence for a person to intentionally kill, injure or take a wild bird or take, damage or destroy any wild bird nest or egg.

NRW had used its powers under section 16 WCA to issue several licences which amounted to a derogation to the protections of section 1. These licences permitted authorised persons (being certain land owners) to take or kill six species of wild bird as specified in the licence (namely carrion crow, magpie, jackdaw, feral pigeon, wood pigeon and Canada goose). Under section 16 WCA, activity under the licences had to be for a specified purpose. The stated purpose of the licences varied from protecting land, crops and property from serious risk of damage to conservation of other species wild birds. NRW stated the latter purpose was required to protect birds including curlew, as birds such as carrion crow can prey upon curlew eggs and chicks and there are thought to be less than 400 pairs of curlew left in Wales.

Challenge

Wild Justice (WJ) brought judicial review challenging the issue of the three general licences on three separate grounds:



1. Each licence must specify the particular circumstances in which it can be used to permit culling of wild birds;
2. NRW must first itself that there are no other satisfactory alternatives to address the relevant problem each time a licence is used to justify killing wild birds; and
3. Positive evidence was required to justify us of the licences to kill birds instead of mere absence of evidence pointing to another satisfactory solution.

Ground one – Specified Circumstances

WJ cited section 16(5)(A) WCA which requires that the licence shall specify both the circumstances in which action may be taken against wild birds and conditions which must be fulfilled before action can be taken. WJ argued that merely setting out the purpose of the licence wasn't sufficient as NRW must go further to prescribe which particular species can be culled based upon what threat they posed. WJ used crows and magpies as an example as such birds didn't pose a threat

to every species of threatened bird set out in the licence, therefore it would be wrong to permit culling of crows and/or magpies on the basis of protecting a species they do not threaten. NRW countered by arguing that section 16(5)(A) WCA was met because each licence set out the birds against which the licence may be used, permitted actions and methods, authorised persons and unauthorised locations.

HH Judge Jarman QC, presiding over the case, agreed with NRW. The High Court found that it would be difficult for the wording of each licence to be sufficiently drawn to cover every circumstance in which the statutory purpose for culling birds would be satisfied and that NRW had satisfied the test in section 16(5)(A) WCA by requiring that the action was for the statutory purposes and complied with the other limitations NRW had highlighted. The court cited *RSPCA v Cundey* to state that the better approach to ensure that lethal control was being used for proper purposes stipulated by the licence was to prosecute persons who were caught killing birds not in pursuit of a licenced purpose on a case by

case basis.

Ground Two – No Satisfactory Alternatives

WJ argued that pursuant to section 16(1A)(a) WCA, NRW could not issue a licence permitting lethal control of birds unless it was first established that there was no satisfactory alternative to taking such measure. WJ argued that the wording of the licences effectively permitted lethal control as first resort and the licences should instead require authorised persons first exhaust other solutions satisfactory to resolve the stated problem before resorting to lethal control. NRW adduced a wealth of evidence demonstrating proper consideration of whether, for each problem addressed by the licences, the issue could be resolved without utilising lethal control. NRW further argued that the meaning of section 16(1A)(a) WCA was that it must be satisfied that it is appropriate to grant a licence allowing for lethal control generally, not whether it is necessary to use such control in every case where a risk of harm arises.

The High Court again agreed with NRW, finding that the wording in section 16(1A)(a) does not require general licences to determine whether lethal control is appropriate for every case where a risk arises as such an interpretation would lead to general licences becoming 'unworkable'. The High Court did stress the need for NRW to rationally act on substantive evidence before it in deciding that there was no satisfactory alternative less harmful than lethal control when deciding what derogations are required to resolve the issue addressed by the licence, however that NRW had done this on the facts before it.

Ground Three – Requirement for Positive Evidence

WJ's final argument asserted that the WCA required NRW to have positive evidence that all other less harmful solutions are not satisfactory to resolve the problem addressed by the licence, instead of relying on the mere lack of any evidence of another solution which properly addresses the problem. NRW argued that they had properly assessed that the evidence and found there was weak or marginal proof that non-lethal control measures were effective and proportionate to the risk. The High Court agreed

with NRW's assessment on the fact, deciding that it has not been made out on the facts that NRW decision was irrational.

Conclusion and outcomes

Notwithstanding the Court upholding the licences, the decision contained several positive points for both WJ and wildlife welfare advocates more generally. Firstly, the High Court suggested that in future, NRW should consider imposing conditions on its licences requiring authorised persons to use reasonable efforts to achieve the relevant purpose using lawful methods not covered by the licence unless their use would be impractical, before resorting to lethal control.

Secondly the High Court confirmed that the licences could only be used to take or kill birds where the birds posed a present danger to the issue at hand. This restricts the ambit in which wild birds could be killed instead of justifying birds to be culled in all circumstances. Thirdly and finally, NRW were successful in defending the judicial review largely due to the comprehensive and robust evidence forming the basis for their decision making. This point was noted by both WJ and the Court, and indicates that authorities must base their decision making on substantial evidence and the Court will scrutinise the robustness of such evidence when determining whether lethal control has been properly licenced.

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