

# Cases, Updates & Materials

## **Babusia and Bonnie – Hope in Ukraine**

My policing career began with patrolling the streets of Hastings and ended managing a joint agency counter terrorism and serious crime team covering international ports in the UK. My first interaction with Ukraine was via a serious crime operation in partnership with Interpol in 2008. From 2015, I'd been working mostly with the Greek Police when the opportunity arose to work with Naturewatch Foundation on its Ukraine projects. This saw me embark on a series of journeys via planes, trains (wonderfully cheap and reliable), and automobiles (all with broken windscreens) around this captivating country.

Naturewatch Foundation, based in Cheltenham UK, started advancing animal welfare thirty years ago and, from 1994, began helping animals across Ukraine. The charity's projects initially covered helping stray and shelter companion animals, as well as wild animals in captivity. In 2018, I began training police officers and animal groups about the relevance of animal welfare and cruelty within domestic relationships, families, and communities. I had reached thirteen cities before war broke out on 24th February 2022.

## **Police training in Ukraine**

There are as many patrol police officers in Ukraine as there are in the whole of the UK, but with two thirds of the population. The country still operates with school police officers who engage not just with children, but with the wider community. These were the obvious teams to aim our training at. Normally when training, I'd work with a lawyer who specialises in animal law, and we'd cover what the legislation said plus why enforcement mattered, not just for the animals but also for the human victims affected.

I would discuss animal crime scenes, forensics and then create some exercises for the officers to talk them through how to deal with an ani-

mal crime case. I found there was a positive engagement from so many and they took away the message that when you protect animals, you protect people.

## **New laws**

As well as the training work, I quickly realised there was a need to progress new laws. There are various codes to Ukrainian legislation, including the administrative code covering the responsibility of animal ownership and the criminal code covering criminal abuse. Article 299 allows for sentencing of offenders for up to eight years, with higher sentences of between five and eight reserved for those who kill more than one animal or commit the crime in front of children. As far as I know, this is the only criminal code that recognises the impact of children being exposed to animal violence. Following our training, we saw a large increase in offences under Article 299 being recorded and then prosecuted.

Article 300 of the criminal code covers any conduct that is likely to incite or encourage animal abuse. One such case in Volnyansk concerned a gang operating on the Russian VKontakte (ВКонтакте) social media platform. The gang were killing and torturing animals online where viewers paid to watch the abuse for sexual motivation. The cyber-crime unit of Zaporizhzhya Police gathered the evidence necessary to prosecute those involved and they were sent to jail. In November 2021, President Zelenskyy signed off a new law, 2351, that filled some of the animal welfare gaps and, with Naturewatch Foundation, we were proud to contribute to the content and the campaign to pass this legislation.

## **Law 2351**

This act criminalises sexual abuse against animals due to the link with violent behaviour. It also lowers the age of criminal responsibility to 16 and bans euthanasia as a means of population control.

The law covers additional requirements for handling agricultural animals, prohibits the use of sick, injured, weak equids, and extends legislation relating to wild animals and plants listed in the Red Book of Ukraine and CITES.

## The war year

On 24th February 2022 so much changed for the animals of Ukraine. Initially, companion animals were bundled into any carrier that was available and evacuated, or sadly abandoned as human owners fled. Many, of course, tragically perished under bombardment or because food and water supplies were cut off.

At Naturewatch Foundation we used our knowledge of the country to brief the international animal aid effort and run our own missions to the Polish and Romanian borders. We also continued the spay/neuter project started in 2013, as we knew that without effective population control, we would be shoring up problems for the future.

Every week, every month seemed exhausting, but we knew it was far worse for those whose home is Ukraine. We were reminded of this regularly when we talked to Natalie, our representative in Kharkiv who had to leave her home with a small child and rescue animals for a safer location.

## Hope

What we are seeing now, though, is some hope. For so many years the lives of animals in Ukraine were unseen outside of the country. Now, images of the love and compassion held for animal companions from Kharkiv to Kyiv have been transmitted across media channels and the world has witnessed the animal-human bond in the most extreme of circumstances.

One elderly lady, or babusia (бабуся)<sup>1</sup>, made a

<sup>1</sup> <https://gbr01.safelinks.protection.outlook.com/?url=https%3A%2F%2F1plus1.ua%2Fru%2Ftsn%2Fnovyny%2Fbabusa-hustkou-obmotala-golovu-so-backi-sob-ta-ne-lakalasa-postriliv-istoria-marii-uhim-ivni-z-gorenki-foto-akoi-obletilo-socmerezii&data=05%7C01%7C%7C705286a3aed04a5bc9c608db1995089f%7C84df9e7fe9f640afb435aaaaaaaaaaaa%7C1%7C0%7C638131900113857568%7CUnknown%7CTWFpbGZsb3d8eyJWljiMC4wL->

headscarf that matched her own to wrap around her dog Bonnie's head as she was terrified of the bombing. For me, it's one of the most iconic images of the first year of war (for photo click on the link footnote 1).

What also offers hope is how so many now work collaboratively, with excellent projects at Eurogroup for Animals, across the UPAW network that provides food aid, with Animal ID that tags dogs and UAnimals which stepped up to new levels of care. There's also so many volunteer organisations that deserve mention, such as Tailed Banda, who rescued the dogs from Borodyanka, and Antares, which work with rescue dogs to find people and animals trapped under rubble.

When the war ends, I believe the animals of Ukraine will finally be in a better place because people cared.

**Mark Randell, Campaign Manager Naturewatch Foundation, and retired Detective Inspector (Special Branch), UK Police.**

## Hunting Trophy (Import Prohibition) Bill

The Hunting Trophy (Import Prohibition) Bill was introduced to the House of Commons in 2022 and aims to prohibit the import of hunting trophies into Great Britain. It underwent the First Reading at the House of Lords and was approved for passage to second reading in March 2023. No date has been set as of this article as to when the second reading will commence, however the Government has confirmed that they will continue to support the Bill in the Lords.

This Bill was introduced to help protect animals listed by the internationally agreed Convention on International Trade in Endangered Species (CITES). The list is also enacted into UK law via the Wildlife Trade Regulations, where the list can be found at Annexes A and B. The Bill will ban the import of trophies hunted from around 6,000 species including many big cats, elephants, rhinos, various species of bears, and sea mammals. Many of these animals are en-

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jAwMDAiLCJQljoiv2luMzliLCJBTiI6lk1haWwiLCJX-VCl6Mn0%3D%7C3000%7C%7C%7C&sdata=1g-mcznArVSPe6G1mnu8S3G16Ukf371t9u1w5AX-As7U4%3D&reserved=0



dangered species and this Bill comes along at the same time as other Bills which aim to improve the international treatment of animals. For example, the Animals (Low-Welfare Activities Abroad) Bill is currently in the Lords for the second reading, which will provide the ability for our government to ban the sale and advertising of activities abroad which involve low standards of welfare for animals.

The Bill defines a hunting trophy as the body of an animal or any recognisable part or derivative of an animal that has been obtained by the person through hunting the animal and is being obtained for personal use. Personal use is not to include consumption of the animal. The aim of a hunting trophy is for the person to have the body and/or body part as a souvenir of the hunt itself, with the main aim being to display it. It also states that it does not matter whether or not the body, part or derivative has been processed in any way.

This Bill is therefore likely to have an effect on current legislation, most notably the Ivory Act

which prohibits dealing in ivory products within the UK. The current act relates to commercial trade of ivory products, yet The Hunting Trophy (Import Prohibition) Bill will likely impact the import and export of any ivory products for personal use. No clear definitions have been agreed yet, so it is unknown how this Bill will impact on current legislation, however it is interesting to consider just how far reaching the definition of a 'hunting trophy' could be.

This Bill also sets out that an Advisory Board should be set up to advise the Secretary of State on any questions that relate to the Bill once it is enacted. They should also be able to provide advice on any matter relating to the hunting trophies which are derived from animals that are endangered, or are likely to become, endangered. This would therefore suggest that the Bill aims to protect species that are not only classified as endangered, but also protect species that are near threatened or vulnerable. It is up to the Secretary of State to decide who should be appointed. The Advisory Board should consist of up to 3 people and the Secretary of State must

consider what expertise these people have when it comes to the import of hunting trophies.

We shall continue to monitor this Bill as it progresses through the Lords and provide you with updates. If you wish to follow along yourself, then you can find a link to the Bill at the government website here <https://bills.parliament.uk/bills/3202/stages>.

### **MBR Acres Ltd and others v Free the MBR Beagles (formerly Stop Animal Cruelty Huntingdon) and others [2022] EWHC 3338 (KB)**

In 2021, the court granted an injunction to MBR Acres Limited to impose restrictions on the activities of Free the MBR Beagles and other protesters. The matter was returned to court in 2022 as the Claimants wished to add further restrictions to the injunction order. The injunction was put in place to prevent protestors from obstructing or otherwise interfering with vehicles which were traveling to and from the MBR Acres premises. However the Claimants argued that further restrictions were needed to stop protestors from personally targeting 'protected persons', which included employees of MBR Acres, suppliers, and contractors that attended the MBR property. There were allegations of harassment from protestors, which included shouting at staff as they entered or left the MBR property, shouting expletives, throwing items over the boundary fences and attempting to break into the personal home of one of the managing directors of a contractor company, Impex.

His Honorable Justice Nicklin dismissed the application to vary the injunction order, stating that the evidence provided by the claimants was not sufficient enough to warrant further restrictions on the protestors' right to protest. The Claimant's did not have enough evidence to prove exactly which named Defendant did which alleged act, and while the Judge agreed that some of the acts were very serious (such as attempting to break into someone's private home), the Claimant's could not prove who in the protest group actually did this. A number of arrests had been made by the police for unlawful activity by some of the protestors, but this evidence had not been provided to the court and therefore the Judge could not comment on which of the de-

fendants acted unlawfully and which protestors were simply exercising their right to a peaceful assembly. His decision was largely supported by the evidence of the Superintendent who dealt with the protestors of Camp Beagle and others, who stated in his evidence that many of the protestors were very cooperative and respectful of the current injunction, and that it was only a small select few who wished to take their actions further. The Judge therefore decided that the unlawful acts of a few individuals should not be used to punish the larger collective of peaceful protestors who were exercising their right to a lawful and peaceful protest. The Judge also made it clear that any unlawful activities should be dealt with by the police, so that injunctions could be imposed against specific individuals as a direct consequence of their unlawful activity.

The Judge stated that to grant the amended injunction as requested by the Claimant's would risk bringing into force an injunction that would limit the activities of anyone who came near the property, whether they were a protestor or not. The Judge felt that this would not only be a step too far given the weak evidence provided by the Claimants, it was an injunction that had not been sought by the Claimant's application and so could not be considered at this hearing.

**Taylor Mcleod is a qualified solicitor based in Hertfordshire, where she lives with her husband and house rabbit. She has been an advocate for animal welfare and animal rights throughout her life, and is now using her new found love of long-distance running to raise funds and awareness for multiple animal welfare organisations.**

### **Hunting with Dogs (Scotland) Act 2023**

The Hunting with Dogs (Scotland) Act 2023 ("the Act") repeals and replaces the Protection of Wild Mammals (Scotland) Act 2002 ("2002 Act"), which makes it an offence to hunt a wild mammal using a dog in Scotland except in limited specified circumstances<sup>2</sup>.

<sup>2</sup> THE SCOTTISH GOVERNMENT, 2023. Explanatory Notes. [online]. Edinburgh: The Scottish Government. Available from <https://www.legislation.gov.uk/asp/2023/1/notes/contents> [Accessed 4 May 2023].



Many will be more familiar with reference to the hunting of wild mammals with dogs in the context of 'fox hunting'; large en masse organised hunts with foxes, hares, and other wild mammals being chased and killed by packs of dogs.

Such traditional 'countryside pursuits' or 'sports' are generally no longer viewed as acceptable in Scotland. Indeed, the former Minister for Environment, Biodiversity and Land Reform Mairi McAllan, stated when she introduced the Hunting with Dogs (Scotland) Bill to the Scottish Parliament in February 2022, "I want to make it clear that chasing and killing a mammal with a dog, for sport or otherwise, has no place in modern Scotland – indeed it has been illegal for twenty years."<sup>3</sup>

The Act broadly replicates the provisions of the 2002 Act but makes certain modifications to fur-

ther limit the circumstances in which it is permitted to hunt a wild mammal using a dog and to prohibit trail hunting (the practice of directing a dog to find and follow an animal-based scent laid for that purpose) except under limited circumstances. It also aims to address deficiencies of the 2002 Act, in particular with regard to the inconsistencies and ambiguities in the wording of the 2002 Act.<sup>4</sup>

A person commits an offence under the Act if they hunt a wild mammal using a dog or knowingly cause or permit such an offence to be committed, and none of the exceptions set out in the Act apply. For the purposes of the Act, a wild mammal is defined as any mammal (other than human) which is living in a wild state, is of a species recognised as living in a wild state in the British Isles or has been deliberately released from temporary or permanent human control and is not a rat, mouse, or living under

<sup>3</sup> THE SCOTTISH GOVERNMENT, 2022. Hunting with Dogs Bill introduced to parliament. [online]. Edinburgh: The Scottish Government. Available from: <https://www.gov.scot/news/hunting-with-dogs-bill-introduced-to-parliament/> [Accessed 1 March 2023].

<sup>4</sup> THE SCOTTISH GOVERNMENT, 2023. Explanatory Notes. [online]. Edinburgh: The Scottish Government. Available from <https://www.legislation.gov.uk/asp/2023/1/notes/contents> [Accessed 4 May 2023].

temporary or permanent human control.<sup>5</sup> This appears to demonstrate a shift in attitude from the 2002 Act which defined foxes, hares, minks, stoats, and weasels as “pest species”. The definition from the new Act, however, means that it remains lawful to hunt rats and mice using as many dogs as the person so wishes.

The exceptions referred to relate to the management of wild mammals above ground (section 3), the management of foxes below ground (section 5), for falconry, game shooting, and deer stalking purposes (section 6), relieving the suffering of injured wild mammals (section 7), searching for dead wild mammals (section 8), and for environmental benefit (section 9). Some of the exceptions drew criticism during Bill discussions, particularly those set out in sections 6 and 9 of the Act.

Sections 3, 6, 7, 8, 9 of the Act restrict the number of dogs that can be used under the exemptions to a maximum of two, although licences to use more than two dogs for the management of wild mammals above ground (section 3) and for environmental benefit (section 9) can be applied for under sections 4 and 10 of the Act.

Only one dog is permitted for the management of foxes below ground under section 5 of the Act.

The licensing process requires an application to be submitted to the “relevant authority”<sup>6</sup> which is the Scottish Ministers in terms of the Act or NatureScot if functions are delegated by the Ministers to them, which is likely.

Any licence granted under sections 3 or 9 must be granted to a particular person or category of persons, must relate to a particular species of wild mammal, and the relevant authority may only permit the use of the minimum number of dogs it is satisfied will be effective in achieving the intended purpose.

Importantly, licenses for activities using more than two dogs under sections 3 and 9 must not be granted unless the relevant authority is satisfied, for section 3, that there is no other solu-

tion which would be effective in achieving the intended purpose<sup>7</sup>, or for section 10, that killing, capturing or observing the wild mammal will contribute towards a significant or long-term environmental benefit and there is no other solution which would be effective in achieving the intended purpose<sup>8</sup>.

A licence for section 3 activity may be granted for a maximum period of 14 days which must fall within a period of 6 consecutive months<sup>9</sup>, and a licence for section 9 activity for a maximum period of two years, which must fall within a period of two consecutive years<sup>10</sup>.

In terms of trail hunting, the Act makes it an offence for a person to engage or participate in trail hunting unless the dog is being trained for a lawful purpose and where such training involves no more than two dogs<sup>11</sup>.

The penalty for unlawfully hunting a wild mammal using a dog where none of the exceptions apply (section 1) is up to 12 months imprisonment or a fine not exceeding £40,000 (or both) on summary conviction, or up to 5 years imprisonment or a fine (or both) on conviction on indictment<sup>12</sup>. The same summary penalties apply to the cause or permit offence under section 2 of the Act<sup>13</sup> and to the offence of trail hunting under section 14 of the Act.

The Act has not yet been rolled out but is expected to be later in 2023.

The new Act has prompted calls in England to follow suit and strengthen the Hunting Act 2004 to overcome loopholes identified in that legisla-

<sup>5</sup> Hunting with Dogs (Scotland) Act 2023 Act a.s.p. 1, section 1(3)

<sup>6</sup> Hunting with Dogs (Scotland) Act 2023 Act a.s.p. 1, sections 4(6) and 10(6).

<sup>7</sup> Hunting with Dogs (Scotland) Act 2023 Act a.s.p. 1, section 4(4)(c)

<sup>8</sup> Hunting with Dogs (Scotland) Act 2023 Act a.s.p. 1, section 10(4)(c)

<sup>9</sup> Hunting with Dogs (Scotland) Act 2023 Act a.s.p. 1, section 4(4)(g)

<sup>10</sup> Hunting with Dogs (Scotland) Act 2023 Act a.s.p. 1, section 10(4)(g)

<sup>11</sup> Hunting with Dogs (Scotland) Act 2023 Act a.s.p. 1, sections 14 and 16

<sup>12</sup> Hunting with Dogs (Scotland) Act 2023 Act a.s.p. 1, section 1(2)

<sup>13</sup> Hunting with Dogs (Scotland) Act 2023 Act a.s.p. 1, section 2(3)

tion<sup>14</sup> which allow organised hunts to continue. Foxhunting, hare hunting, and stag hunting by both mounted hunts and foot packs remain legal in Northern Ireland<sup>15</sup>, despite calls by animal welfare charities for a complete ban.

**Hannah L Moneagle, Director & Solicitor – Grampian Community Law Centre, Member of A-Law Scottish Steering Group & Wildlife Working Group**

## **Recent activities of the Scottish Animal Welfare Commission**

The Scottish Animal Welfare Commission ("SAWC") was created to provide scientific and ethical advice to government, focusing particularly on the protection of wild and companion animals.<sup>16</sup> The SAWC has had a busy year so far, publishing reports on the welfare of greyhounds used for racing in Scotland (28 February 2023), acoustic deterrent devices in salmon farming (6 March 2023), and handheld remote-controlled training devices (e-collars) for dog training (11 April 2023). These reports are publicly available on the SAWC's website.<sup>17</sup>

SAWC's report into greyhound racing in Scotland acknowledges the welfare issues which can affect greyhounds, including the conditions for rearing puppies, the risk of injury or death during racing, limited social interactions in kennels, and the risk of neglect and poor veterinary care at the end of their racing career.<sup>18</sup> The re-

port makes various recommendations, such as the need for veterinary oversight at independent tracks and the collection of data on injuries and fatalities, as well as the introduction of an independent regulatory scheme to ensure greyhound welfare.<sup>19</sup>

Acoustic deterrent devices are devices which transmit loud, mid-frequency sound from a fish farm into the surrounding seawater.<sup>20</sup> They are used to deter predators such as seals which could pose a threat to farmed fish welfare. SAWC's report examining these devices concludes that they may be justifiable in circumstances where there is no satisfactory alternative, however the use of such devices should be targeted to minimise harm to cetaceans.<sup>21</sup> SAWC recommends that alternative strategies to deter seals should be used wherever possible, such as strengthened netting, altered sea-pen designs, and the exploration of new technology.<sup>22</sup>

E-collars can be defined as training devices used for dogs, cats and other companion ani-

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on the welfare of greyhounds used for racing in Scotland, (The Scottish Government, March 2023), <<https://www.gov.scot/binaries/content/documents/gov-scot/publications/independent-report/2023/03/report-welfare-greyhounds-used-racing-scotland-scottish-animal-welfare-commission/documents/report-welfare-greyhounds-used-racing-scotland/report-welfare-greyhounds-used-racing-scotland/govscot%3Adocument/report-welfare-greyhounds-used-racing-scotland.pdf>> last accessed 1 May 2023. 23

19        *ibid* 24

20        Scottish Animal Welfare Commission, Report on the use of acoustic deterrent devices (ADDs) in salmon farming to control predation by seals and their wider effects on wildlife, (The Scottish Government, March 2023), <<https://www.gov.scot/binaries/content/documents/govscot/publications/independent-report/2023/03/report-use-acoustic-deterrent-devices-adds-salmon-farming-control-predation-seals-wider-effects-wildlife-scottish-animal-welfare-commission/documents/report-use-acoustic-deterrent-devices-adds-salmon-farming-control-predation-seals-wider-effects-wildlife-scottish-animal-welfare-commission/govscot%3Adocument/report-use-acoustic-deterrent-devices-adds-salmon-farming-control-predation-seals-wider-effects-wildlife-scottish-animal-welfare-commission.pdf>> last accessed 1 May 2023, 6

21        *ibid* 20

22        *ibid*

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14        LEAGUE AGAINST CRUEL SPORTS (LACS), 2023. Tell the Environment Secretary to act now and ban hunting. [online]. LACS: Godalming. Available from: [https://takeaction.league.org.uk/page/122282/action/1?utm\\_source=twitter&utm\\_medium=organic&utm\\_campaign=-defra\\_action&utm\\_id=defra\\_ban\\_hunting&utm\\_content=Media+](https://takeaction.league.org.uk/page/122282/action/1?utm_source=twitter&utm_medium=organic&utm_campaign=-defra_action&utm_id=defra_ban_hunting&utm_content=Media+) [Accessed: 4 May 2023].

15        LEAGUE AGAINST CRUEL SPORTS (LACS), 2023. It's time to ban hunting with dogs. [online]. LACS: Godalming. Available from: <https://www.league.org.uk/what-we-do/northern-ireland-campaigns/nihunting-shame/its-time-to-ban-hunting-with-dogs/> [Accessed 4 May 2023].

16        Scottish Government, 'Scottish Animal Welfare Commission' < <https://www.gov.scot/groups/scottish-animal-welfare-commission/>> last accessed 1 May 2023

17        *ibid*

18        Scottish Animal Welfare Commission, Report



mals, which involve the application of an electric current to the skin (also known as 'shock collars').<sup>23</sup> Currently, e-collars are widely available for purchase and use, and there is evidence that they can cause pain and distress to companion animals, as well as long-term adverse behavioural and welfare effects.<sup>24</sup> SAWC's report concludes that maintaining the status quo presents a significant and unacceptable risk to dog

welfare.<sup>25</sup> Various options could be pursued to address this, such as restricting the use of e-collars to trainers only, or for the purpose of preventing particular behaviour (such as livestock worrying), or a complete ban.<sup>26</sup> On the basis of the available evidence, SAWC recommends a ban on e-collars in Scotland.<sup>27</sup>

### **Wildlife Management and Muirburn (Scotland) Bill**

The Wildlife Management and Muirburn (Scotland) Bill<sup>28</sup> (the "Bill") was introduced in the Scottish Parliament on 21 March 2023.<sup>29</sup> It pro-

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23 Scottish Animal Welfare Commission, Report on the use of handheld remote-controlled training devices (e-collars) in dog training, (The Scottish Government, April 2023), <<https://www.gov.scot/binaries/content/documents/govscot/publications/independent-report/2023/04/report-use-handheld-remote-controlled-training-devices-e-collars-dog-training-scottish-animal-welfare-commission/documents/report-use-handheld-remote-controlled-training-devices-e-collars-dog-training-scottish-animal-welfare-commission/report-use-handheld-remote-controlled-training-devices-e-collars-dog-training-scottish-animal-welfare-commission/govscot%3Adocument/report-use-handheld-remote-controlled-training-devices-e-collars-dog-training-scottish-animal-welfare-commission.pdf>> last accessed 1 May 2023, 4

24 *ibid* 43

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25 *ibid*

26 *ibid* 43-45

27 *ibid* 45

28 SP Bill 24 Wildlife Management and Muirburn (Scotland) Bill [as introduced] session 6 (2023)

29 The Scottish Parliament, Bills and Laws: Wildlife Management and Muirburn (Scotland) Bill, <<https://www.parliament.scot/bills-and-laws/bills/wildlife-management-and-muirburn-scotland-bill/introduced>> last accessed 1 May 2023



vides for the licensing of activities such as the use of certain wildlife traps, the killing or taking of wild birds and mammals on grouse moors, and muirburn, which is the intentional setting fire to heather or vegetation as a land management practice.<sup>30</sup> The Bill is designed to create a stronger regulatory scheme for the management of Scottish grouse moors.

As set out in the Policy Memorandum, one of the main aims of the Bill is to implement the recommendations of the Grouse Moor Management Review Group, known as “the Werritty review,” by licensing grouse moors to ensure they are managed in an environmentally-sustainable way.<sup>31</sup> There continues to be issues with the illegal use of wildlife traps on grouse moors, affecting protected birds of prey.<sup>32</sup> The new licensing requirements are intended to address raptor persecution in Scotland. The Bill makes various amendments to the Wildlife and Countryside Act 1981 to introduce requirements for trap users to be licensed (ss 12A and 12B), have undertaken an approved training course (s 12C), and for a wildlife trap license number to be displayed or fitted onto the trap (s 12A).

Significantly, the Bill seeks to ban glue traps for rodents by making the purchase and use of such traps (without reasonable excuse) separate offences.<sup>33</sup> The maximum proposed penalties on conviction are up to 12 months imprisonment or a £40,000 fine, or both for lower-level offences and up to 5 years or an unlimited fine for offence

30 SP Bill 24 Wildlife Management and Muirburn (Scotland) Bill [as introduced] session 6 (2023), <<https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/wildlife-management-and-muirburn-scotland-bill/introduced/bill-as-introduced.pdf>> last accessed 1 May 2023, 1

31 Scottish Parliamentary Corporate Body, Wildlife Management and Muirburn (Scotland) Bill Policy Memorandum, <<https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/wildlife-management-and-muirburn-scotland-bill/introduced/accessible-policy-memorandum.pdf>> last accessed 1 May 2023, 2

32 Ibid 12

33 SP Bill 24 Wildlife Management and Muirburn (Scotland) Bill [as introduced] session 6 (2023), <<https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/wildlife-management-and-muirburn-scotland-bill/introduced/bill-as-introduced.pdf>> last accessed 1 May 2023, ss 1 and 2

es on indictment.<sup>34</sup> Glue traps can result in prolonged suffering and are indiscriminate, meaning they are capable of catching non-target species.<sup>35</sup> In putting forward legislation to ban glue traps, the Scottish Government is acting on the recommendation of the Scottish Animal Welfare Commission.<sup>36</sup>

The Bill is currently at stage 1 in the Scottish Parliament, during which time committees will examine the Bill and gather views from the public and interested stakeholders.<sup>37</sup> Stage 1 is expected to be completed by early October this year.<sup>38</sup>

**Charlotte Edgar, A-LAW Legal Correspondent (Scotland).**

### **Animal testing of substances used in cosmetics - the decision in Cruelty Free International v Secretary of State for the Home Department explained**

In this briefing note, we explain – and provide a short analysis of – the decision in *R on the application of Cruelty Free International v Secretary of State for the Home Department* [2023] EWHC 1064 (Admin), handed down by Linden J. on Friday 5 May 2023.

#### **Legal and regulatory framework**

As the judgment explains, the Home Secretary is responsible for the regulation of animal experimentation in Great Britain. She carries out her relevant functions through the Home Office’s Animals in Science Regulation Unit (“ASRU”), which determines licence applications under the Animals (Scientific Procedures) Act 1986

34 Ibid, s 1(3)

35 Scottish Parliamentary Corporate Body, Wildlife Management and Muirburn (Scotland) Bill Policy Memorandum, <<https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/wildlife-management-and-muirburn-scotland-bill/introduced/accessible-policy-memorandum.pdf>> last accessed 1 May 2023, 4

36 Ibid 5

37 The Scottish Parliament, Bills and Laws: Wildlife Management and Muirburn (Scotland) Bill Stage 1 – General Principles, <<https://www.parliament.scot/bills-and-laws/bills/wildlife-management-and-muirburn-scotland-bill/stage-1#topOfNav>> last accessed 1 May 2023

38 Ibid

("ASPA"). ASRU also advised on policy until 2022 when a new Animals in Science Policy and Co-ordination Function unit was established within the Home Office.

The ASPA requires that scientific procedures using animals should only be carried out if the appropriate licences have been granted (these being a personal licence held by a responsible individual, an establishment licence for the relevant laboratory, and a project licence authorising the programme of experimentation or testing). In determining whether to grant a project licence the Secretary of State must carry out a harm/benefit analysis and be satisfied that the proposed project is carried out in accordance with the established principles of replacement, reduction, and refinement, known as the "3Rs".

### **Cosmetics testing ban in the UK**

In 1998, the UK Government announced a de facto ban on the testing of substances used wholly or predominantly as ingredients in cosmetic products by adopting a policy of not granting project licences for such testing. In the previous year, the UK Government had announced a similar de facto ban in respect of animal testing of finished cosmetic products.

Linden J. explained this (at para. 2) as follows:

'From 1998, government policy was that applications for licences for animal testing of cosmetics, or ingredients which are "wholly or primarily" used in such products, would be refused ("the Policy")'. He went on to observe (at para. 67) that: 'In 2010 the then Home Secretary told the House of Commons, in response to a public petition seeking a statutory ban on the testing of cosmetics on animals:

"In 1997-98, the Government secured a voluntary ban on the testing of cosmetic finished products and ingredients on animals in the United Kingdom. We did this because we believed that there was inadequate justification for using animals given the benefits of these products and the alternative tests available. ... We cannot foresee any circumstances under which we would be prepared to issue licenses under the Animals (Scientific Procedures) Act 1986 for testing on cosmetic finished products and ingredients.'

(Our emphasis).

### **Cosmetics testing ban in the EU**

In the meantime, attempts were being made to secure a legislative ban across the EU on using live animals to test finished cosmetic products and cosmetic ingredients, reflecting opposition across civil society to the use of animals for these types of experiments.

It seemed that civil society was being listened to and Council Directive 93/35/EEC was adopted in 1993 setting out a timetable for a ban by 1 January 1998. However, responding to industry concern that manufacturers were not yet ready for a ban, the deadline for implementation was delayed on successive occasions until March 2009 when the EU brought in a ban on animal testing for cosmetic ingredients and the marketing of cosmetic products containing ingredients which have been tested on animals. From March 2013 the ban was extended to the sale of cosmetic products and ingredients tested on animals after that date anywhere in the world.

The Cosmetics Regulation was the legislative vehicle that purported to end the sale and marketing of cosmetic products tested on animals and Article 18 sets out the bans on animal testing of cosmetic products and ingredients, and on the marketing within the EU of cosmetic products and ingredients that have been tested on animals, "in order to meet the requirements of this Regulation."

As Linden J. points out (at para. 3):

'However, there was a question at EU level as to how the bans under Article 18 of the Cosmetics Regulation interacted with the more permissive regime, at least in relation to animal testing, under Regulation (EC) No 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals ("REACH").'

In 2014, the European Commission and the European Chemicals Agency issued a Joint Statement clarifying their position that substances used exclusively in cosmetics could not be tested on animals to meet the 'information requirements of the REACH human health endpoints' but could still be tested on animals to estab-

lish worker and environmental safety under the REACH. For substances that had a mixed use, i.e., for cosmetic and non-cosmetic purposes, animal testing would be permitted as before (see judgment, at para. 4).

## UK policy change

Following the Joint Statement, the Home Secretary confirmed (in July 2015) that the UK's policy bans on cosmetics testing would remain in place.

However, the tide began to turn and Linden J. points out (at para. 94) that:

'From the beginning of 2018, establishment licence holders also began to question the Policy. Concerns were expressed that the testing work would be conducted abroad instead, including in other EU countries whose approach was aligned with the EU position, and there were concerns raised about the lack of level playing field across Europe for contract research organisations.'

In response to these concerns, in February 2019 there was a change of policy and ASRU started to issue licences again for animal testing of substances used exclusively or predominantly as ingredients in cosmetic products where such testing was for complying with requirements under the REACH Regulation.

This change of policy was not communicated publicly, (aside from informal discussions with certain establishment license holders) and the public remained unaware that licences were now being granted for animal testing of cosmetics and cosmetic ingredients in Great Britain.

In fact, Cruelty Free International ("CFI") had written to the defendant on 19 November 2020 for clarification of the policy, but there was no reply to this letter (despite chasers) until 3 August 2021 and it was not until this time that the change of policy came to light. The letter to Cruelty Free International stated (as set out at para. 108 of the judgment):

"The Home Office can confirm it has reconsidered its policy, from the approach that was stated in the 2015 Summary Grounds and has sub-

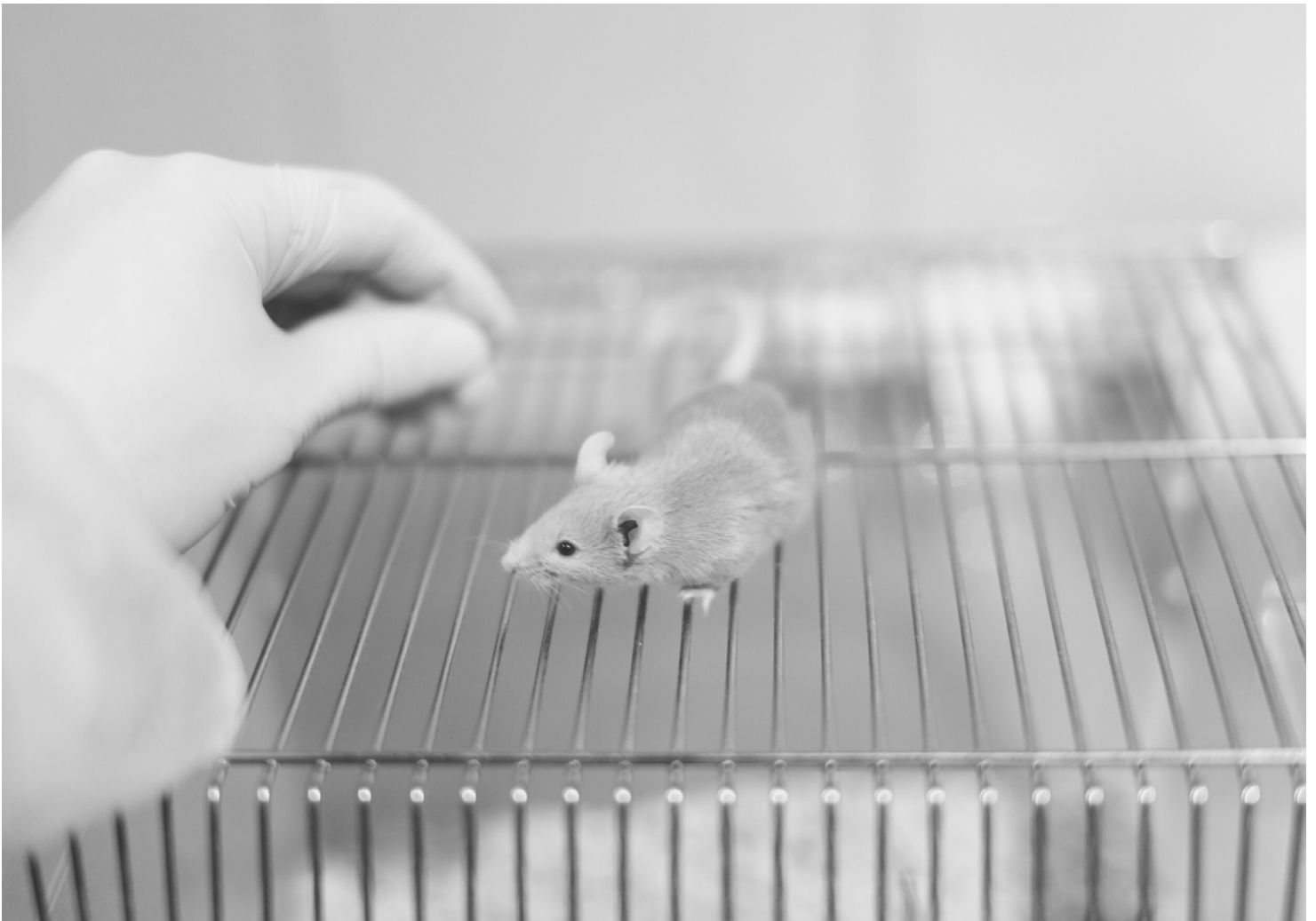
sequently aligned its approach to the Board of Appeal of the European Chemicals Agency in the Symrise case.

The Home Office aims to publicly clarify its position now with the formal publication of an updated policy and regulatory guidance on the regulation of animal testing for regulatory purposes."

The reference in the letter to the Symrise case (above) related to a number of decisions of the Board of Appeal of the European Chemicals Agency, which issued decisions on 18 August 2020 in cases involving substances manufactured or distributed by the chemicals company Symrise. The Board of Appeal decided that the testing and marketing bans in the Cosmetics Regulation did not apply to animal testing carried out for the purpose of satisfying requirements arising under the REACH Regulation. The REACH Regulation requires manufacturers and distributors of chemical substances in the EU to register those substances with the European Chemicals Agency and ensure that data, obtained from animal or other studies, is obtained with respect to the 'intrinsic properties' of the substance, including safety for human health (including workers manufacturing it) and potential effects on the environment. In that regard, the Board of Appeal stated that, although the REACH Regulation is not concerned with the safety of cosmetic substances for 'end-users' (i.e. people wearing the cosmetics or service providers such as hairdressers), data regarding human health effects is required in order to ensure the safety of manufacturing workers.

In the Symrise cases, the chemicals producer Symrise AG had challenged decisions of the European Chemicals Agency requiring that data be obtained using animal testing with respect to certain cosmetic ingredients. Symrise argued that these requirements were contrary to the bans in the Cosmetics Regulation. This Board of Appeal's decisions have been appealed to the EU General Court, which heard the appeals in November 2022. The General Court's judgment is awaited.

It is worthwhile setting out the comments of the judge in full in respect of the Home Secretary's conduct. He states (at para. 204):



'Although the circular was issued to stakeholders on 22 July 2022, this was 3.5 years after the change of policy. Even then, submitted Mr Bates, the fact that the original Policy was being withdrawn was not made clear. It was only in September 2022 that there was wider notification of the policy change but it was still the case that no general public announcement had been made and, astonishingly, the Defendant has not published its revised position pursuant to section 21 of the ASPA.'

'There is a good deal of force in Mr Bates' criticisms of the way in which the ASRU has gone about changing the Policy and it is plausible that the reasons for this approach included the ones which he suggested (para. 205).

The reasons suggested on behalf by the claimant for this approach included that it was 'politically advantageous to the Home Office given that it enabled Home Office Ministers to avoid public criticism and scrutiny with respect to licensing animal testing of cosmetic ingredients.' (para. 176).

The lack of a public announcement about the change of policy was described by the judge (at para. 219) as 'regrettable.'

### **The legal issues**

#### Ground 4 – Relationship between the REACH Regulation and the testing and marketing bans in the Cosmetics Regulation

The Court's judgment first assessed judicial review ground 4, by which CFI had argued that the testing bans in the Cosmetics Regulation took precedence over any requirement arising under REACH to generate data regarding a registered substance. In that regard, CFI relied on the inclusion in the REACH Regulation of a provision stating that the Regulation was "without prejudice to: ... [the Cosmetics Regulation] as regards testing involving vertebrate animals within the scope of that [Regulation]". CFI noted that the same animal tests for assessing the safe level of human exposure to a substance were relevant both to the safety of the substance for end-users and its safety for manufacturing workers. If

the approach favoured by the European Chemical Agency Board of Appeal and the Home Office were correct, then the testing and marketing bans in the Cosmetics Regulation would be largely deprived of utility, since essentially the same animal tests as were prohibited by the bans would still need to be carried out.

The Judge rejected that argument. In the Judge's view, the testing and marketing bans applied only to testing carried out for demonstrating safety within product safety reports prepared pursuant to the Cosmetics Regulation. Therefore, animal testing carried out for satisfying requirements arising under the REACH Regulation were outside the scope of the bans. Such animal testing could therefore lawfully be licensed within the EU and UK, albeit that the data generated by such testing could not then be relied on in cosmetic product safety reports.

In relation to this, Linden J. states (at para. 150): 'I agree with the Board of Appeal in Symrise that animal testing which is required by REACH is not carried out in order to meet the requirements of the Cosmetics Regulation. This is so even where the ingredient in question is exclusively for use in cosmetics. And I agree with the reasoning of the Board of Appeal which led it to this conclusion.'

Essentially, the judge found that while the Cosmetics Regulation is concerned with the safety of the end product for the user, REACH is concerned with the safety of each chemical substance and its impact on workers and the environment, who are potentially exposed to chemicals in greater concentrations and/or for longer periods of time. The court determined that the Cosmetics Regulation only bans cosmetics testing for the purpose of that regulation and is not intended to ban the testing of cosmetics or their ingredients for other purposes, principally under the REACH Regulation.

#### Grounds 2 and 3 – Lack of consultation and transparency

In relation to judicial review ground 2 (the Home Secretary's failure to consult stakeholders about the prospective change to the policy ban) and judicial review ground 3 (the failure to notify stakeholders and the public of the abandonment or weakening of the policy ban), the

Home Secretary's primary case was that she was legally obliged to abandon any policy of not licensing animal testing of cosmetic ingredients where such testing was for satisfying requirements arising under the REACH Regulation. As discussed further below, the Judge rejected that argument, instead finding that the Home Secretary retained a discretion to refuse to grant licences for animal testing, even where such testing was said to be necessary for satisfying requirements under the REACH Regulation.

Further, the Judge criticised the Home Secretary for a lack of transparency, noting that it was unsatisfactory that the Home Office had allowed the public to remain under a misunderstanding, for a considerable period of time, that animal testing of cosmetic ingredients was not taking place in Great Britain, whereas in fact licences were being granted for such testing since 2019. The Court also found that a letter sent by the Home Office to CFI in August 2021 had been "misleading" in that it suggested that the change in the policy had been made in response to the Symrise decisions in August 2020, whereas in fact the Home Secretary had already effectively decided to cease applying the policy bans from February 2019.

The Court nevertheless dismissed the challenges to the Home Secretary under grounds 2 and 3, finding that her failures to afford transparency, whilst regrettable, were not unlawful. The Judge's reason for that conclusion arose from his analysis of the case law concerning the legitimate expectation of citizens and stakeholders to be consulted and/or notified by a public body about a change in policy. The Court found that, since there had been no express promise to CFI or the public to inform them of changes to the policy, there was no public law 'legitimate expectation' of being informed.

The Court so found even though: (a) ASPA places the Home Secretary under a statutory duty to publish information, to be used as guidance, with regard to how she will determine applications for licences; and (b) the information published by the Home Office, which had still not been modified or withdrawn, stated that the Home Office would not grant project licences for the testing of cosmetics. The Judge found that the relevant text in the published information

applied to animal testing of ingredients as well as finished products. The Judge therefore recognised that the Home Office was not applying its own published guidance, but nevertheless held that the absence of a 'legitimate expectation' on the part of CFI or the public of being informed of any change meant that the failure to modify that published information prior to ceasing to follow it was not in itself unlawful.

### Ground 1

Judicial review ground 1 concerned the application of the harm/benefit analysis. CFI argued that the Home Office was determining applications for project licences to test cosmetic substances on animals by considering the harm/benefit balance in a way that effectively assumed that the substance had to be subjected to testing in order to satisfy the requirements of REACH, without considering the alternative possibility that the substance would no longer be marketed within the EU/UK. CFI's case was essentially that, on a proper application of the harm/benefit test, the Home Office has to consider whether the suffering of the animals could be morally justified by the potential benefits to humans, taking account of the nature of the intended uses of the substance (i.e. cosmetics uses rather than, say, finding a cure for a disease). This ground of challenge was ultimately decided on the factual evidence, the judge accepting witness evidence from Home Office officials that they did consider, as part of the harm/benefit test, whether the suffering of the animals could be justified having regard to the intended human uses of the substance in question.

### **Permission to appeal to the Court of Appeal**

The High Court has itself granted CFI permission to appeal in respect of the dismissal of judicial review ground 4 (i.e. concerning the Home Secretary's interpretation of the interface between the Cosmetics Regulation and REACH, that is the same approach as adopted by the European Chemicals Agency Board of Appeal in the Symrise cases). CFI may apply to the Court of Appeal for permission to appeal on the other grounds of challenge.

### **Resumption of animal testing not the only policy option**

As noted above, the judge rejected the Home Secretary's argument that she had no choice but to cease applying the policy ban, as she was legally required to do so on the basis of her understanding of the legal requirements of the REACH Regulation and its legal relationship with the testing and marketing bans in the Cosmetics Regulation. In relation to this he stated (at para. 117):

'I accept Mr Bates' submission that it would in principle be open to the Defendant to adopt a policy that, whether or not animal testing of ingredients for use in cosmetics is required if they are to be placed on the market and/or is permissible in law, applications for licences to test them on animals will generally not be granted under the ASPA. The consequence would be that where, for example, REACH required animal testing of such ingredients they could not be registered and placed on the market here, but it would be open to the Defendant to take this position as a matter of policy, for example in relation to the question whether, under section 5B(2)(b) "the purposes of the programme of work justify the use of protected animals". The reality is that the Defendant has modified her policy position for pragmatic reasons rather than being driven to do so by Symrise or any legal requirement.'

### **Conclusion**

While the claimant was not successful in this legal challenge, it is nevertheless an important and significant case. It brings to light certain key facts. Firstly, that animal testing for cosmetic purposes is, and has been carried, out in the UK since 2019, with consumers of cosmetic products unaware of the policy change. Secondly, that the reason for the change of policy was not for legal reasons, but political expediency to enable British producers to continue selling their products on the EU market. Thirdly, and perhaps, the most astonishing revelation, is the Home Secretary's lack of transparency about the change of policy. The government appeared to 'want to have their cake and eat it', enabling producers to continue accessing EU markets, while avoiding a public backlash about a roll back on a commitment that had been reiterated publicly over past years, to not issue licences testing of chemicals used wholly or primarily for

ingredients and finished cosmetic products.

This case also raises important questions about our democratic process. Civil society clearly feels strongly about this issue, as evidenced by the huge public support for a ban on the use of animals to test cosmetic ingredients. Whatever the legal position regarding the interface between the Cosmetic Regulation and REACH Regulation (which is still to be determined), the public expectation is likely to be that the 'not tested on animals' label on their cosmetics products, means just that. The lack of transparency and misleading messaging is certainly 'regrettable' and potentially undermines public confidence in the Home Office and policy making process more generally.

The Court has effectively moved the question of whether animal testing for cosmetics related purposes should be licensed in Great Britain back to the political arena. In that regard, as noted above, the Court decided that it is legally open to the Home Secretary to revert to applying the policy ban, including so as to refuse to licence animal testing of cosmetic ingredients which is said to be required for satisfying requirements arising under the REACH Regulation. Equally, the Court has decided that the Cosmetics Regulation does not prohibit the Home Secretary from licensing such testing. It now remains to be seen whether the Home Secretary will revert to applying the policy ban. If she does not do so, this will clearly be a political decision, as she cannot say she is legally required to stop applying the policy ban.

## Chronology

1993	EC adopts Council Directive 93/35/EEC setting out a timetable for a ban on cosmetics testing by 1 January 1998 (in fact not achieved until 2009).
1998	UK policy decision not to grant licences for animal testing of chemicals to be used in cosmetics.
2009	EU legislation banning testing of cosmetics and ingredients banned.
2013	EU ban extended to marketing anywhere in the world of cosmetic products tested on animals.

2014	EU Commission clarify the ban does not include testing for worker and environmental safety under REACH or for chemicals with a mixed use.
2015	Home Secretary confirms that the UK's policy ban on cosmetics testing would remain in place, regardless of the EU position.
2017	European Ombudsman rejected a challenge to the 2014 Joint Statement.
2018	In the UK licence holders raise concern with the Home Office about competitiveness with EU counterparts, in light of the UK policy and divergence with the EU approach.
2019	The EU Commission confirms its' interpretation of the REACH and Cosmetics Regulation interface in a letter to the Claimant. Home Secretary changes the policy in line with the EU approach and grants a licence for testing of chemicals used for cosmetics. There is no public announcement and decision is not communicated to the claimant.
2020	The Board of Appeal of the European Chemicals Agency decides two appeals from a chemicals producer (Symrise AG) against their decisions requiring chemicals testing on ingredients used for cosmetics, required under REACH to satisfy requirements for environmental and worker safety.
2021	Cruelty Free International become aware of the change of policy by a letter citing the Symrise case and compliance with EU law as the reason for the change
2022	Circular about the change in policy issued to stakeholders, 3.5 years after the change of policy had been made.

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