

To breed, or not to breed, that is the question: The Supreme Court of Norway rules on breeding dogs with extreme conformation

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Introduction

It is well-established that extreme conformation in dogs is a serious animal welfare issue.⁴ Extreme physical features – such as short-muzzles, no tail or shortened legs– inhibit functional behaviours and place dogs with such features at a much higher risk of suffering poor health and welfare than those with a phenotype closer to their natural canine ancestors.⁵ In 2020 the Norwegian Society for the Protection of Animals (NSPA) brought a civil action against the Norwegian Kennel Club (NKK), two breed clubs (the Cavalier King Charles Spaniel Club and the Bulldog Club) and six breeders, to test whether continued breeding of Cavalier King Charles Spaniels (Cavaliers) and English Bulldogs (Bulldogs) in Norway was unlawful under Norwegian animal welfare legislation. These two breeds have a high risk of serious health issues related to their conformation. In 2023, the Norwegian Supreme Court delivered its judgment prohibiting any further breeding of Cavaliers in Norway but allowing breeding of

Bulldogs within certain parameters.⁶

The case highlights a growing interest in using legal mechanisms to address the problem of extreme conformation in dogs.⁷ The courts' interpretation of the Norwegian Animal Welfare Act 2009 provides valuable points of reflection for other jurisdictions who are looking to improve the efficacy of their laws or to introduce legislation to address this issue. In the UK, whilst some legislation regulating dog breeding exists, it lacks the scope and clarity needed to ensure proper protection for dogs and their offspring,⁸ with key stakeholders united in recognising the need for reform.⁹ This commentary considers some key features of the judgment of the Norwegian Supreme Court that have particular significance for the development of UK law and policy.

Background

The NSPA argued that human selective breeding had altered the typical genomes of

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4 R. Packer and D. O'Neill (eds), *Health and Welfare of Brachycephalic (Flat-Faced) Companion Animals: A Complete Guide for Veterinary and Animal Professionals* (Taylor & Francis Group 2021)

5 For a definition of extreme conformation in dogs see: ICECDogs, 'Extreme Conformation' (ICECDogs, Undated) <<https://www.icecdogs.com/home/extreme-conformation>> Accessed 14 March 2024

6 Case no. 23-004643SIV-HRET (Supreme Court of Norway) (10.10.23). Available at: <<https://www.domstol.no/globalassets/upload/hret/avgjorelser/2023/oktober/hr-2023-1901-a.pdf>> Accessed 14 March 2024 It must be noted that no English translation appears to exist yet. Both this judgment and the Court of Appeal judgment were accessed via Google translate.

7 See e.g. in the UK, the advent of the Legal Advisory Group on Extreme Conformation in Dogs: <<https://www.alaw.org.uk/companion-animals/extreme-dog-conformation>> Accessed 14 March 2024 (of which the authors are part, along with expert witness for the NSPA, Dr Rowena Packer); Eurogroup for Animals, 'Extreme breeding in Europe – Mapping of legislation' (Eurogroup for Animals, November, 2023) <https://www.eurogroupforanimals.org/files/eurogroup-foranimals/2023-11/2023_11_30_Extreme%20breeding%20in%20Europe%20-%20Mapping%20of%20legislation%20FINAL.pdf> Accessed on 14 March 2024

8 H. Howe and T. Katamine, 'Using the law to address extreme conformation in dogs: is a breed specific breeding ban the answer?' (2023) 7 UK Journal of Animal Law 52

9 Lord Trees and others, 'Strengthening legislation around dog breeding' (2023) 193(3) Veterinary Record 116-117

these breeds at a Norwegian population level in such a way as to compromise their welfare. This, they argued, was contrary to s.25 Animal Welfare Act 2009¹⁰ and any future breeding of dogs of these breeds should therefore be prohibited.¹¹ Section 25 (as amended) states that:

"Section 25. Breeding

Persons who keep animals, breeders, breeding organisations and breed clubs shall through breeding promote characteristics which produce robust animals which function well and have good health.

No breeding, including through methods of gene technology, shall be carried out which: alters genes in such a way that they influence the physical or mental functions of animals negatively, or pass on such genes, reduces the ability of animals to engage in natural behaviour, or raises general ethical concerns.

Animals with genes as cited in the second paragraph shall not be used for further breeding.

The King may issue regulations on breeding in accordance with the principles in this section, including on breeding activity within breeding organisations and breed clubs."

At first instance, the Oslo District Court in 2022 found in favour of the NSPA.¹² The court agreed that any future breeding of both Cavaliers and Bulldogs was unlawful due to the high predisposition of these breeds to significant health issues. In the case of the Cavalier, particular attention was given to Chiari-like malformation and Syringomyelia, incurable and painful disorders resulting from the brain cavity of the skull being too small for the brain and often requiring long-term pain medication, surgery and even euthanasia¹³ In the Bulldog, the fo-

cus was brachycephalic obstructive airway syndrome (BOAS), which results in the reduced passage of air through the upper airways, but consideration was also given to difficulties of reproducing naturally.¹⁴ No further breeding of either breed was permitted, even for the purpose of addressing the problematic traits. The NKK appealed against this ruling to the Court of Appeal who in turn upheld the breeding ban for Cavaliers but overturned the District Court's ban on breeding Bulldogs.¹⁵ Both parties then submitted appeals to the Supreme Court against the Court of Appeal's ruling; the NKK appealed the decision to uphold the Cavalier breeding ban and the NSPA appealed against the decision not to implement a ban on breeding Bulldogs.

The judgment of the Norwegian Supreme Court

By a majority, the Supreme Court upheld the decision of the lower courts that future breeding of Cavaliers should be banned due to the high prevalence of health issues within the breed. Furthermore, the Supreme Court considered that there was no reasonable prospect of developing any framework for breeding that could allow for significant health improvements in future generations of Cavaliers, within a reasonable timeframe.¹⁶ However, the decision of the court does not provide an outright ban on all breeding from a Cavalier, meaning that a Cavalier may still be used in breeding provided the other parent is not also a Cavalier.¹⁷

With respect to the Bulldog, the Supreme Court's decision was also not unanimous. However, the majority felt that, whilst there were indisputable welfare issues with the breed, it was lawful to continue breeding Bulldogs provided this is done within a clear framework which ensures breeding minimises the incidence of dogs suffering extreme BOAS.¹⁸ This framework includes carrying

10 Animal Welfare Act 2009, s.25(2)

11 Ibid s.25(3)

12 Case no. 20-169475TVI-TOSL/04 (23.1.22) (Oslo District Court) Available at: <<https://www.nkk.no/getfile.php/132461749-1643631871/Dokumenter/2020%20Stevning/Dom%20i%20sivil%20sak%20-%20Dyrebeskyttelsen-NKK.pdf>> Accessed 14 March 2024. An English translation prepared by the NKK is on file with the authors.

13 Ibid 30-36

14 Ibid 36-41

15 Case no: 22-043798ASD-BORG01 (18.11.22) (Borgarting Court of Appeal) Available at: <<https://www.nkk.no/getfile.php/132709165-1673001813/Dokumenter/2020%20Stevning/Dom%20i%20sivil%20sak%20BLR%20-%20Dyrebeskyttelsen-NKK.pdf>> Accessed 14 March 2024

16 (n 3) [144]

17 Ibid [143]

18 Ibid [174]



out all health tests and screening as set out by new guidelines for the breed provided by the NKK.¹⁹ As regards BOAS, this requires that only Bulldogs receiving the lowest (i.e. least affected) grades (0 or 1) following a respiratory function test may be bred from. As detailed by the court, this Respiratory Function Grading Scheme²⁰ (RFGS) rates dogs from 0 (clinically unaffected as defined by that test) to 3 (severely clinically affected, with severe impact on respiratory function) following a 'stress' test involving a 3-minute walk/trot at 4mph.²¹ Any breeding of Bulldogs which is outside of this framework would be regarded as illegal.

A minority of the Supreme Court disagreed with the reasoning on both Cavaliers and Bulldogs, arguing that s.25 was not intended to apply to long-established breeds of animals, only to newly created breeds, such as 'cats without fur'.²² For the minority, as Cavaliers and Bulldogs were longstanding breeds, the

legislation did not operate to prohibit further breeding of dogs of both breeds, irrespective of harm.²³

Commentary

Prohibiting breeding at breed or population level

The headline feature of the judgment was the complete ban of any future breeding between pairs of Cavaliers in Norway. Judge Østensen Berglund, with whom Judge Hellerslia and Judge Bull agreed, found the prevalence of the identified disorders to be so high in the population that the breed was beyond the point at which any framework for breeding could provide redress.²⁴ This is a welcome outcome given the expert evidence before the court of the improbability of reducing the serious conformation-related risks to dogs of this breed without outcrossing. Prohibition on breeding within certain breeds may further alienate breeders and owners and bring problems of enforcement, potentially requir-

¹⁹ Ibid [163]

²⁰ Kennel Club, 'Respiratory Function Grading Scheme', Available at: <<https://www.thekennelclub.org.uk/rfgs>> Accessed 10 March 2024.

²¹ (n 3) [149-151]

²² Ibid [197]

²³ Ibid [200-202]

²⁴ Ibid [144]

ing supplementary restrictions such as a ban on ownership and the importation of relevant dog breeds, to avoid circumvention.²⁵ It remains, nevertheless, a useful option where there is sufficient evidence that this is the only way to improve dog welfare within a reasonable timeframe. Hopefully, with careful monitoring of the impact of the ban on Cavaliers, one potentially valuable outcome of this case for other jurisdictions is the opportunity to assess the level of success of this type of intervention.

The breeding ban on Cavaliers and the restrictions on breeding Bulldogs were only possible because s.25 was found to be capable of applying to an entire breed. Rejecting the interpretation of the legislation as applying only to individual dogs, the Supreme Court was unanimous in agreeing with the lower courts that the wording of s.25 indicated application at population level and nothing in the preparatory material indicated otherwise.²⁶ This is significant because welfare legislation is often understood as, by its very nature, operating primarily to protect individual animals rather than groups or classes of animals.²⁷ Yet, where a population share characteristics which are likely to similarly impact upon the welfare of a substantial proportion of individuals, then taking a view that legal protections can operate at this broader level is likely to be much more effective than attempting to tackle the problem on an individual, case by case, basis. Interpreting the legislation as applying at a breed level may be particularly useful in the context of polygenic traits associated with extreme conformation where parent animals that may not yet have developed severe forms of conditions linked to their extreme conformation (eg BOAS) are likely to still go on to produce unhealthy offspring affected

with both the extreme conformation and the linked disorders.²⁸ The judgment presents a provocation to other jurisdictions with similar legislation to consider whether application at population level is also a plausible interpretation of their laws, presenting a much wider challenge to current breeding practices.

Physical functions and natural behaviour

The Supreme Court interpretation of 'influencing physical or mental functions negatively' and 'natural behaviour' is instructive, as these represent crucial domains of welfare. A negative influence on physical or mental functions will be indicated by pain or abnormal discomfort, with a routine need for surgical or medical interventions indicating breeding that breaches this section.²⁹ Despite apparently accepting the District Court's view that 'natural behaviour' includes 'stimulating activities, exercise and rest',³⁰ the Supreme Court substituted an approach which assessed the exercise tolerance of a Bulldog by reference to their historical use in bullfighting and oxen hunting, with one which requires natural behaviour to be assessed at the present time, recognising that these dogs are now companion animals.³¹ In our view, the latter approach is preferable, provided 'natural' is interpreted as requiring a comparison between the typical capacities of the breed and those of dogs with more moderate conformation. Similarly, care must be taken to avoid deeming as 'natural' those behaviours that may accord with some modern humans' desire for a sedentary companion, but which reflect poor innate health in those dogs.³²

The Supreme Court's interpretation of the way these concepts applied to the facts in front of them was relatively weak compared to that of the District Court. Like the District Court and the Court of Appeal, the Supreme Court agreed that the identified conditions suffered by Cavaliers negatively affect their physical and mental functions and their natural behav-

25 See, e.g. 'The Netherlands' in: Eurogroup for Animals, 'Extreme breeding in Europe – Mapping of legislation' (Eurogroup for Animals, November, 2023) 12,15 <https://www.eurogroupforanimals.org/files/eurogroupforanimals/2023-11/2023_11_30_Extreme%20breeding%20in%20Europe%20-%20Mapping%20of%20legislation%20FINAL.pdf> Accessed on 14 March 2024

26 (n3) [88] [92]

27 (n. 9) 29. See also, M. Radford, *Animal Welfare Law in Britain – Regulation and Responsibility* (OUP, 2005) 261, 269; F. Lundmark and others, 'One animal is no animal' – the consequences of measuring animal welfare at herd level' in D. Dumitras, I. Jitea and S. Aerts (eds), *Know Your Food – Food Ethics and Innovation* (Wageningen Academic Publishers, 2015) 31

28 (n3) [86-87]

29 *Ibid* [112-113]

30 (n9) 20, 54

31 (n3) [116]

32 R. Packer, 'Flat-Faced Fandom: Why do people love brachycephalic dogs and keep coming back for more?' in Packer and O'Neill (n 1)

our.³³ As regards Bulldogs, the Supreme Court were clear that the presence of BOAS at RFGS grades 2 and 3 breached these provisions.³⁴ These are dogs who show moderate to severe stertor (respiratory noise) and inspiratory effort (effort to breathe in) after limited exercise, as well as dyspnoea (shortness of breath), with cyanosis (blue colouration from lack of oxygen) and syncope (loss of consciousness) also present at grade 3.³⁵ However, unlike the District Court, the Supreme Court found that neither BOAS grade 0 nor grade 1 had sufficient negative impact on physical or mental function or natural behaviours to violate s.25, even when other impacts of BOAS, such as poor heat regulation, are considered.³⁶ They did, however, acknowledge grade 1 as very close to being unlawful.³⁷

As regards birthing problems, the Supreme Court found the evidence that this was conformation-related to be unclear. When coupled with the proposed breeding programme, the high proportion of caesarean sections was insufficient to substantiate a full breeding ban.³⁸ Unfortunately, the Supreme Court felt unable to address the wider health problems to which the Bulldog is prone.³⁹ The adversarial legal process may be ill-suited to holistic assessment of the kind of complex issues relevant to the case, but the failure to consider the myriad afflictions associated with the Bulldog conformation remains a major limitation of the judgment.

Managing risks and balancing interests

Central to the majority reasoning was the court's view of acceptable risk, which the Supreme Court framed in a way that is (largely) to be welcomed, even though their application was less robust than the District Court. Notably, the interpretation of s.25 is explicitly guided by the recognition that animals have intrinsic value, irrespective of their value to humans.⁴⁰ This requires a high level of protection for animals against unnecessary stresses

and strains, especially those caused by humans.⁴¹ There are, therefore, no grounds in the AWA 2009 for protecting human aesthetic preferences in breeding⁴² and the threshold at which risk of harm from breeding will violate s.25 is not high, at least for companion animals.⁴³ If an hereditary condition breaches s.25 then further breeding within that breed is prohibited even if the objective is to improve breed health, although dogs may still be used in breeding for the purpose of out-crossing.⁴⁴ Whether a breeding programme within the breed will be considered unlawful or not, turns on the estimated length of time it will take to reduce the incidence of affected dogs and the degree to which those afflictions breach the provisions of 25(2).⁴⁵ Significantly, a breeding programme which takes many years was deemed not acceptable, hence a ban on further breeding of Cavaliers was required, since significant improvement could not be achieved in the short term.⁴⁶

The level of protection and acceptable risk is also mediated through the precautionary principle, meaning that preventative action should be taken to protect animals from unnecessary stresses and strains even where uncertainty exists about the degree of harm experienced.⁴⁷ Where experts disagree, the precautionary principle enables a lower burden of proof to be met when establishing that harm.⁴⁸ The Supreme Court agreed with the lower courts that the evidence relating to Cavaliers was such that, at 15%, the risk of symptomatic CM was so high (coupled with the lack of plausible options for improvement) that a ban was required. Whereas the position with Bulldogs was not so clear, especially regarding the incidence of BOAS in the Bulldog population and the possibility of reducing this via a breeding programme.

The District Court presented a much more robust assessment of the risk to welfare and placed the threshold of harm much lower than the Court of Appeal and Supreme Court. For

33 (n 3) [144]
 34 Ibid [162]
 35 Ibid [151-152]; (n17)
 36 Ibid [161]
 37 Ibid
 38 Ibid [171-172]
 39 Ibid [171, 173]
 40 Animal Welfare Act 2009, s. 25(3)

41 (n3) [77-81]
 42 Ibid [119]
 43 Ibid [113] [120]
 44 Ibid [143-144]
 45 Ibid [98]
 46 Ibid [144]
 47 Ibid [80-81]
 48 Ibid [121]



the District Court, even RFGS grade 0 BOAS would still present an unjustifiably serious risk that offspring would suffer unacceptably.⁴⁹ Whilst on the one hand such a precautionary approach is laudable given the real potential for serious harm to dogs, on the other, a legal restriction on human liberty should be evidence-based and proportionate to the harm. Extending the prohibition on breeding too far may overly restrict the opportunities for breeders who prioritise health to return the breeds to better conformation and so unnecessarily alienate breeders and consumers. Given some expert evidence that a breeding programme within the breed was potentially capable of reducing the incidence of severe BOAS,⁵⁰ it was understandable that the Supreme Court felt that a more proportionate response to the risk was to closely regulate breeding, rather than to ban it entirely.

The value of screening and the Respiratory Function Grading Scheme

All three courts placed significant weight on

⁴⁹ (n9) 55
⁵⁰ (n3) [164]

disorder screening as a way of assessing both the risks posed to offspring and of the chances of improving breed health. Evidence that no screening tests were available for CM in Cavaliers, was highly relevant to the ban, whilst the existence of the RFGS was clearly central to the ruling allowing the continued breeding of Bulldogs. As regards BOAS in Bulldogs, the Supreme Court agreed with the Court of Appeal that the RFGS can underpin a reduction of BOAS in the population if only dogs with the lowest (least affected') scores are used in breeding. However, they noted, that BOAS is a complex, hereditary and progressive disease and that offspring of parents with low BOAS scores may themselves still score highly (i.e. poorly) on the RFGS.⁵¹ The Supreme Court acknowledged the lack of clear evidence that a breeding programme would reduce the proportion of dogs with BOAS grades 2 and 3 from being born.⁵² They also felt a timeframe of 5-10 years was unacceptably long before significant improvement was seen.⁵³

⁵¹ Ibid [115] [157]
⁵² Ibid [164]
⁵³ Ibid

Despite these reservations, the Supreme Court felt that allowing breeding of Bulldogs graded 0 or 1 presented a proportionate response to the risks as presented. It was a borderline call whether breeding from dogs graded 1 was compatible with the legislation. On balance, the majority felt it was probable that a reduction in the number of dogs most seriously affected by BOAS could still be achieved if grade 1 dogs continued to be used in breeding.⁵⁴ In this, the Supreme Court approach is preferable to the Court of Appeal, as the latter were willing to permit one parent to be grade 2.

However, whilst it is relatively unsurprising that the Supreme Court found breeding grade 0 Bulldogs to be within the rules, the inclusion of grade 1 dogs is more difficult to accept, given the finding that these dogs demonstrate breathing obstruction audible with a stethoscope as result of walking for 3-minutes.⁵⁵ It is notable that, having weighed the evidence before them, the Supreme Court appears to reject the view that grade 1 dogs can be described as 'clinically unaffected', albeit still not finding that grade 1 reached the threshold to violate s.25.⁵⁶ As such, we consider it unfortunate that the Supreme Court permitted the ongoing use of grade 1 dogs in breeding, and prefer the finding of the District Court that, as these dogs demonstrate compromised respiratory function, they should not be included in future breeding programmes.⁵⁷ Nevertheless, the Supreme Court stipulated that there must be monitoring of the success – or otherwise – of the new NKK breeding programme for Bulldogs and there is an expectation by the court that results are to be seen within 5 years. This will be too long for many dogs, but it is, at least, a step in the right direction.

Given the Supreme Court was offered a plausible way of improving the breed without outcrossing, it is understandable that they chose this approach. Yet, the value of testing for disorders associated with extreme conformation is highly contested. A test such as the RFGS is only focused on one disorder, ignoring the myriad others linked to brachyce-

phalic conformation which also significantly compromise welfare in these dogs. It is disappointing that attention was so focused on whether tests and breeding programmes can bring down proportional grades 2 and 3, when grade 1 arguably still remains problematic for the welfare of dogs. It is also a shame that the Supreme Court seem to accept the goal as an unspecified reduction in grades 2 and 3, rather than clearer and more measurable objectives. Moreover, as the court heard, the Bulldog population may simply already be too compromised to improve the breed without outcrossing.⁵⁸

Significance for UK law

Is a breed ban possible?

So how is this relevant to UK law? Several commentators have noted that the case is interesting for the UK because UK law is basically the same as that of Norway.⁵⁹ The legal position is less straightforward than this suggests but there are some similarities between s.25 of the Norwegian AWA 2009 and the rules governing licensed dog breeders in England and Scotland. In England, Sch. 6, 6(5) of the Animal Welfare (Licensing of Activities Involving Animals) Regulations 2018 states that: 'No dog may be kept for breeding if it can reasonably be expected, on the basis of its genotype, phenotype or state of health, that breeding from it could have a detrimental effect on its health or welfare or the health or welfare of its offspring.' Licensed breeders are required to take 'all reasonable steps' only to breed from dogs that are in 'good physical and genetic health' and 'fit for function.'⁶⁰ The latter explicitly includes being able to 'see, breathe normally' and 'to exercise freely'.⁶¹ Like s.25 of the Norwegian AWA 2009, this provision seeks to protect both adult dogs and their progeny from harm resulting from extreme conformation. It is notable however, that unlike the Norwegian legislation, the 2018 Regulations

54 Ibid [165]
55 Ibid [151]
56 Ibid [161]
57 (n 9) 55

58 (n 3) [157]

59 J. Loeb, 'Norway bans breeding of purebred Cavaliers' (2023) 193 *Veterinary Record* 301; K. Clark, 'Bullies, bluetongue and bills: 2023 in review' (2023) 194 *Veterinary Record* 20

60 DEFRA, 'The Animal Welfare (Licensing of Activities Involving Animals) (England) Regulations 2018 - Guidance notes for conditions for breeding dogs' (2018)

61 Ibid.

is limited in coverage, applying only to those who breed dogs commercially.⁶²

It is in respect of Sch. 6,6(5), and its equivalent provision in Scotland,⁶³ that the Supreme Court judgment is most interesting as an aid to interpreting the scope of UK law. However, as discussed in more detail elsewhere,⁶⁴ it is more difficult to see how Sch.6,6(5), and its Scottish counterpart, could be interpreted as applying to an entire breed. The application of the provision only to dogs held by licensed breeders, coupled with a lack of parliamentary intention to extend the reach of this provision to anything other than individual dogs, makes application at breed level unlikely. On this basis, a full prohibition on any further breeding of a particular breed is extremely unlikely under the 2018 Regulations, even if it was deemed desirable. However, it is arguable that Sch. 6,6(5) could extend coverage beyond the individual dog in three ways. First, if a group of dogs share a particular trait that is established to breach the guidance, such as Bulldogs with a particular BOAS grading, then the 2018 Regulations may give rise to a de facto prohibition of breeding from any dog in that category. Secondly, even if Sch. 6,6(5) does not create an outright prohibition of breeding from any dogs in that category, it is almost certainly the case that the 2018 Regulations are capable of creating a presumption that licensed breeders are not permitted to breed from certain categories of dog.⁶⁵ Finally, the standard of care the breeder must meet in order to comply with Sch. 6,6(5) may be more stringent for certain breeds of dog.⁶⁶

Reasonable expectation of harm

The Norway case is perhaps more helpful in interpreting when there should be a 'reasonable expectation of harm' to the parent or offspring,

under Sch.6,6(5). In our view, the assessment of whether a dog can engage in normal canine functions, such as to 'breathe normally', should be treated as though it were the equivalent of the word 'naturally' in the Norwegian legislation and the comparator should be a dog of species-average conformation, not another member of the same breed or type exhibiting an extreme conformation. We would also adopt the precautionary approach to the interpretation of when an expectation of harm is considered 'reasonable'. On this basis, even a relatively low likelihood of harm occurring would still satisfy this requirement, given the potentially serious welfare impacts. We recognise that there is no obligation to employ the precautionary principle in the interpretation of the relevant UK provisions, unlike Norwegian law. Nevertheless, we would argue that a more risk-averse approach better reflects the nature of the interests being balanced here, between dog welfare and human aesthetic preference, and aligns with the welfare objectives of the provision. Ideally, both the 2018 Regulations and the Animal Welfare Act 2006 would explicitly recognise dogs' intrinsic value and prioritise their interests in experiencing good innate health over humans' interests in their looks.

Reforming the AWA 2006

It may be assumed that the Animal Welfare Act 2006, which covers England and Wales, would provide similar protection to that found in the Norwegian AWA 2009. The former has two sections of relevance. The first of these makes it an offence to cause 'unnecessary suffering' to an animal⁶⁷ and the second makes it an offence not to take reasonable steps to meet the needs of an animal for which a person is responsible. The latter includes protection from 'pain, suffering, injury and disease' and ensuring freedom to express 'normal behaviours'.⁶⁸ Similar provisions exist in the equivalent Acts of Scotland and Northern Ireland.⁶⁹ These may well protect some adult dogs with extreme conformation from being used in breeding. However, it is unclear

62 Animal Welfare (Licensing of Activities Involving Animals) Regulations (LAIAR) 2018, Sch. 1, Part 5; Animal Welfare (Licensing of Activities Involving Animals) (Scotland) Regulations 2021, Sch. 1, Part 4

63 Animal Welfare (Licensing of Activities Involving Animals) (Scotland) Regulations 2021, Sch. 6, para. 8(5)

64 (n 5) 57-58

65 The Animal Welfare (Licensing of Activities Involving Animals) (Scotland) Regulations 2021 Guidance for Local Authorities, (2021) 78; (n 5) 59

66 The Animal Welfare (Licensing of Activities Involving Animals) (Scotland) Regulations 2021 Guidance for Local Authorities 77

67 Animal Welfare Act 2006 (AWA 2006), s.4

68 Ibid s. 9

69 Animal Health and Welfare (Scotland) Act 2006, ss. 19 and 24; Animal Welfare Act (Northern Ireland) 2011, ss. 4 and 6

at best whether these protections extend to offspring,⁷⁰ given the explicit exclusion of animals in their foetal or embryonic form from the scope of the Act.⁷¹ In this respect, the AWA 2006 differs markedly from its Norwegian counterpart. The judgment highlights the need for reform of the AWA 2006 to explicitly protect offspring from harmful breeding practices, whilst also drawing attention to some key considerations in shaping those new provisions.

Primarily, the Norway case shows the value of having a law regulating breeding for extreme conformation that clearly protects offspring, irrespective of whether they are bred in a commercial capacity or not. It also indicates the benefits of a rule that can clearly apply at population level. We may not wish to ban entire breeds but the flexibility to regulate breeding from a population – or group wider than the individual – that shares problematic traits is clearly valuable from a welfare perspective when evidence indicates that no other options are available. It is notable that s.25 extends the obligations in the Norwegian Act to all breeders and breed organisations (interpreted as all those involved in breeding) and places them under a positive duty to ensure robust and healthy animals, not simply a negative duty to avoid harmful breeding – we need similar on both counts. Finally, the case suggests that legislation that covers all breeding issues in all animals is potentially problematic as the courts must be aware of the impact on breeders of farmed and captive wild animals, for example, and may be inclined to be overly cautious in their interpretation of relevant provisions. More effective protection for dogs may be achieved, therefore, if reform is restricted to companion animals – or even simply dogs – at least in the beginning.

The RFGS as part of best-practice

The Supreme Court judgment highlights the potential significance of the RFGS in interpreting the scope of UK law. Any proposed use of the RFGS, or other disorder screening, to assess whether a breeder is complying with their licence conditions under Sch.6,6(5)⁷² or

meeting 'best practice' under the AWA 2006, should be treated carefully. Moreover, the decision of the Supreme Court suggests that the current Royal Kennel Club (RKC) guidance on the RFGS in the UK should be amended to make clear that no dog graded 2 or 3 should be bred from. Indeed, there is an argument that the RKC should consider going further and discourage breeding from dogs graded anything other than 0. Whilst the Supreme Court stopped short of banning future breeding from dogs with grade 1 scores, the majority clearly remained concerned that grade 1 dogs are affected by BOAS and pose a risk to any offspring. Given the potential welfare impacts of reduced respiratory capacity on a pregnant bitch and the risk posed to offspring, it is arguable that breeding dogs with BOAS results above grade 0 could amount to a breach of the AWA 2006 and/or of the 2018 Regulations.

Conclusion

It is extremely difficult to read the Supreme Court judgment without feeling relief that future generations of Cavaliers in Norway will have reduced risks of unnecessary suffering, and concern that the same cannot currently be said for Bulldogs. We remain sceptical regarding the success of the proposed NKK breeding programme, given the complexity of the genetics underpinning extreme conformation and the limited gene pool of these breeds, unless outcrossing is incorporated. However, the outcomes of both the ban on breeding Cavaliers and the requirement of monitoring for Bulldogs will provide helpful evidence to inform other jurisdictions' approaches.

Moreover, this case is highly valuable in raising public awareness of the welfare implications of extreme conformation and in driving breed organisations to take appropriate action for those breeds commonly afflicted with extreme conformation. Anything that helps reverse the normalisation of extreme conformation and reminds us that our preference for aesthetics should not take priority over an

to meet the higher standards: DEFRA, 'The Animal Welfare (Licensing of Activities Involving Animals) (England) Regulations 2018 - Guidance notes for conditions for breeding dogs (updated 2023)'

70 (n 5) 57–58

71 AWA 2006, s. 1(2)

72 Outside of any obligations to comply with testing

animals' innate health should be applauded. One of the major problems for dogs is their status – social and legal – as a commodity. As an object of fashion, dogs can be – and commonly are – adapted to our preferences. As a legal 'thing', they lack the requisite personhood to enable protection of their own rights and interests. This case can help inform the much-needed development of welfare laws to protect dogs from the harm of extreme conformation. Perhaps it also makes some contribution to reframing dogs as appropriate subjects of legal concern in their own right, whose species-specific experiences and preferences matter. The characterisation of this kind of harm by the District Court as analogous to child abuse,⁷³ may raise some eyebrows, but may also reflect the beginnings of a shift in the legal status of – at least some – companion animals.