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Court of Appeal ruling in BUAV judicial review

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Introduction

Readers will recall (*Journal of Animal Welfare Law*, December 2007) that, last July, the BUAV was partially successful in its judicial review against the chief inspector (animal procedures) (a Home Office official). The Court of Appeal has now given judgment in the case,¹ on appeal from Mr Justice Mitting's decision.²

Animal experiments in the UK are regulated by the Home Office under the Animals (Scientific Procedures) Act 1986 ("the Act"). Licensing decisions are made in the name of the Secretary of State for the Home Department.

A few years ago, the BUAV placed an undercover investigator at Cambridge University, where brain research for Parkinson's disease, stroke and other neurological diseases is carried out on marmosets (new world monkeys). Over a 10-month period, she filmed extensively and obtained copies of huge amounts of documents not normally available to the public. These included the three project licences – which set out in considerable detail what could be done to the animals, the scientific rationale and the necessary ameliorative measures – and post-operative care sheets.

She witnessed marmosets being deliberately brain damaged. Many were subjected to a number of operations, including craniotomies (where their skulls were sawn open before parts of their brains were removed to induce strokes or have poisons injected into the brain). They were then forced to undergo various cognitive tasks, under a severe water restriction regime, over several months. A number of them died or had to be euthanised on welfare grounds.

Marmosets were left unattended for periods of up to 15 hours, even immediately post-surgery.

¹ *Secretary of State for the Home Department v Campaign to End All Animal Experiments (trading as BUAV)* [2008] EWCA Civ 417 (23 April 2008), see www.bailii.org/ew/cases/EWCA/Civ/2008/417.html.

² *R(BUAV) v Secretary of State for the Home Department*, 27 July 2007, see www.bailii.org/ew/cases/EWHC/Admin/2007/1964.html.

This is despite guidance issued by the Home Office and the Royal College of Veterinary Surgeons which requires emergency veterinary cover to be available at all times,³ which necessarily means that someone must be on site to alert the vet when there is a problem.

Following publication by the BUAV of its report of the investigation, the Secretary of State appointed the chief inspector to carry out an investigation into the regulatory decisions which had been made. Contrary to the promise made to Parliament a few years ago, he declined to involve his advisory body, the Animals Procedures Committee (APC), in the investigation. Under section 18 of the Act, inspectors have a duty to advise the Home Secretary on licensing decisions and to police performance of licences. The chief inspector was therefore investigating the performance of his own inspectors. With limited exceptions, he reported that all was well on the regulatory front.

There were two main grounds in the judicial review brought by the BUAV, relating to (1) the Home Office's assessment of the severity of the procedures; and (2) the post-operative care arrangements.

Ground 1: assessment of severity

a) The issues

Under section 5(4) of the Act, a cost:benefit test has to be met before a licence is granted:

“In determining whether and on what terms to grant a project licence the Secretary of State shall weigh the likely adverse effects on the animals concerned against the benefit likely to accrue as a result of the programme to be specified in the licence.”

In relation to another of the grounds, Mr Justice Mitting ruled that “adverse effects” did not include death. It was confined to the suffering of live animals. The BUAV did not appeal this ruling.

The Secretary of State issues guidance about the assessment of suffering and other matters.⁴ The guidance has to be approved by Parliament

³ Guidance for Named Veterinary Surgeons employed in Scientific Procedure Establishments, 2004.

⁴ Guidance on the Operation of the Animals (Scientific Procedures) Act 1986, 2000.

and the APC.⁵ Project licences are often divided into protocols, which themselves comprise a series of experimental procedures. Under the guidance, protocols are given a severity limit and licences a severity band, in each case “mild”, “moderate” or “substantial”. Severity limits are intended to put an upper limit on the level of permissible suffering, and severity bands constitute the “cost” element of the cost:benefit test. The definition of “substantial” is:

“Protocols that may result in a major departure from the animal’s usual state of health or well-being. These include: acute toxicity procedures where significant morbidity or death is an endpoint; some efficacy tests of antimicrobial agents and vaccines; major surgery; and some models of disease, where welfare may be seriously compromised. If it is expected that even one animal would suffer substantial effects, the procedure would merit a ‘substantial’ severity limit (emphasis added).”⁶

The correct assessment of suffering is important for a number of reasons, the most obvious being that, if it is underestimated, the cost:benefit test is fatally distorted.

None of the Cambridge protocols (or the licences themselves) was described as “substantial”. The BUAV argued that this was irrational and therefore, in judicial review terms, unlawful. “Substantial” is the worst level of suffering the Home Office permits, but not the worst which can be envisaged – it says it does not license procedures causing “severe pain or distress which cannot be alleviated”.⁷

It emerged during the High Court proceedings that the Home Office adopts a so-called “relative” approach to the “substantial”

⁵ Under section 21.

⁶ Paragraph 5.42. The definition of “moderate” is: “Regarded as moderate include toxicity tests (which do not involve lethal endpoints) and many surgical procedures (provided that suffering is controlled and minimised by effective post-operative analgesia and care). Protocols that have the potential to cause greater suffering but include controls which minimise severity, or terminate the protocol before the animal shows more than moderate adverse effects, may also be classed within the moderate severity limit.”

⁷ Paragraph 5.42 of the guidance.

category. It only assigns a “substantial” label to a “small subset” of the most severe experiments it licenses. This explains why each year the annual Home Office statistics show the same small percentage – 2% – of projects described as “substantial”. The Home Office illustrated its approach by pointing to other Parkinsonian experiments it licenses, involving the injection of the neurotoxin MPTP. These experiments are labelled “substantial”. In the words of the then chief inspector:⁸

“This model produces, even with treatment, persistent, severely disabling and distressing clinical signs (with rigidity, tremor, and paucity of spontaneous movements being the main hallmarks of the condition) requiring a prolonged period of intensive care and leaving residual neurological damage requiring high-dependence special-care thereafter ... producing devastating welfare costs.”

The Home Office argument in effect was that, *because* licensed experiments such as the MPTP ones cause greater suffering than the Cambridge ones (as the BUAV accepted), the latter *could not* be described as “substantial” as well. The BUAV argued that the fact that other licensed experiments might cause even greater suffering was irrelevant. The proper comparator is an animal in its usual state of health or well-being, not an animal in the worst possible condition permitted by the Act.

The Home Office maintained that it was to an animal’s benefit that an experiment should be given a lower severity rating, because that would limit its suffering. The BUAV disputed this. If a licence narrative in fact permits researchers to do things to an animal which in fact cause a major departure from its usual state of health or well-being, it is of no comfort to the animal that this is considered only “moderate” suffering.

b) Mr Justice Mitting’s decision

Mr Justice Mitting gave short shrift to the relative approach: “A ‘major departure’ from an animal’s state of health or well-being is a serious, significant or important departure, not ‘the most serious, significant or important departure which could lawfully be licensed’.”⁹

⁸ His witness statement in the case.

⁹ Paragraph 40.

Applying the test to the Cambridge protocols he considered, the judge said that the chief inspector was clearly wrong not to describe them as “substantial”. In particular, the fact that the protocols required animals to be killed prematurely in the event of particular symptoms was a clear indicator of the severity of the experiments. He pointed to the fact that the final sentence of the definition of “substantial” says: “If it is expected that even one animal would suffer substantial effects, the procedure would merit a ‘substantial’ severity limit.” (This is known as the “single-animal-test”.)

He gave the Home Office permission to appeal on ground 1, recognising the importance of the issues raised (particularly the relative approach argument).

c) The Court of Appeal decision

In its written submissions and initially at the hearing, the Home Office unequivocally maintained that the relative approach was correct. However, during his reply at the hearing, the Home Office’s counsel claimed that this was not their position. He was “ashamed” of the passage in the written submissions which indicated the opposite. He was no doubt taking his lead from comments by the judges at the hearing that the relative approach was unsustainable.

Lord Justice May gave the only substantive judgment. On the relativity question he said:

“If the Secretary of State, by reserving the ‘substantial’ severity limit for the most severe procedures only without proper reference to the text of paragraph 5.42, excludes from that classification procedures which ought upon proper scientific judgment to fall within it, he is necessarily wrong to do so.”¹⁰

In other words, the relative approach was wrong. The judge continued that “[i]t is beyond the competence of this Court on the material before it to say whether the Secretary of State does this or not.” In fact, the evidence was crystal clear that this was the Secretary of State’s approach. Moreover, contrary to May LJ’s view, the fact that the chief inspector had not spelt out in his report that he had adopted the relative approach is surely irrelevant. Where a public official makes a decision and later explains, in court proceedings attacking

the decision, the legal approach that his department takes in the area in question, there must be a very strong presumption that that is the approach which he has taken in this case.

The Home Office continued to maintain in the Court of Appeal that it was legally irrelevant to the assessment of severity that a protocol foresaw that marmosets might experience symptoms of such a nature (persistent epilepsy, persistent inability to self-care, severe skin infection and so forth in this case) that they would have to be killed before their intended use in the experiment was complete. One of the Home Office’s arguments was that early intervention would prevent suffering becoming “substantial”. May LJ said: “The fact that [humane killing] is anticipated is a relevant part of the large picture, but no more.”¹¹ This was not a ringing endorsement of Mitting J’s ruling that the anticipated need to euthanise was a “clear indicator” of substantial severity, but it was nevertheless a clear rejection of the Home Office position.

The Court thought that Mr Justice Mitting was wrong to say that the single-animal test necessarily required a “substantial” rating for the Cambridge protocols he considered. Its reasoning included the assertion that the fact that a small number of animals died or were euthanised prematurely (because of the adverse effects they were experiencing) did not mean that this was expected at the outset.

This is a surprising conclusion on the evidence. For example, 4% of animals died or were euthanised under the stroke protocol and the chief inspector did not say in his report that this was unexpected.

May LJ did reject the Home Office’s argument that it was better for laboratory animals for a lower severity rating to be given.

Ground 2: post-operative care

a) The issues

There is an overriding duty on licensees under the Act to keep suffering to a minimum at all times, irrespective of what they are permitted to do to animals and irrespective of how this is categorised in terms of severity.¹² If necessary, animals must immediately be euthanised to prevent further suffering. The question was

¹¹ Paragraph 53.

¹² See, for example, sections 6(6) and 10(2) (and the conditions made under section 10).

¹⁰ Paragraph 67.

whether the care arrangements at Cambridge, particularly post-operatively, were such that this duty could be met.

The experts instructed by the parties agreed that, on the basis of post-operative records relating to 15 particular marmosets put in evidence by the BUAV, the care regime was inadequate. For example, Agar was left just a few hours after an operation to her brain and while still hypothermic (i.e. with a low body temperature). She was dead when next observed 15 hours later. Another brain-damaged marmoset, Pinocchio, was left unattended for 14 hours after collapsing earlier in the day and was also found dead the next morning. A third marmoset, Tweety, had no movement in his legs and had weak circulation in the lower half of his body following surgery to his abdomen. He was then left overnight for 11 hours and was recorded as “barely conscious” when first observed the following morning. He was euthanised an hour later. There were a number of similar examples.

There was also uncontradicted evidence that some marmosets received no pain relief after operations to their brains – the experts said, not surprisingly, that pain relief was essential. Other marmosets with unresolved post-operative seizures were given extremely high doses of valium and left until the following morning, without their temperature being checked (as the experts said was essential).

However, the chief inspector made the general statement that he had seen other documents, without however asserting that they cast a different light on welfare for the case studies before the Court. He failed to disclose them, even to the Home Office’s own expert. More importantly, he also said that he believed licensees when they told him, in the course of an investigation which could have resulted in their losing their licences, that they had attended out-of-hours, even though they did not record their observations. The claims, if true, meant that the licensees operated a different system of record-keeping during the night than during the day, despite the confusion this would cause. Daytime records were very detailed, for example extending to an absence of change since the previous observation. The two experts were strongly critical of a dual system, if it existed. The claims of out-of-hours attendance were, in fact, very general and did not relate to any of the case studies.

The chief inspector claimed that he was entitled to look at things in the round. He had visited

the establishment on several occasions and observed the standards of care. He had looked at the records of all the marmosets undergoing procedures. He had paid particular attention to observations recorded first thing in the morning and had not seen any indication of welfare problems overnight.

On this last point, the records before the Court in fact showed a number of new symptoms observed at the first morning observation, indicating that there had been welfare problems overnight which could have been avoided by earlier intervention. Moreover, even when an animal’s condition appears unchanged in the morning this does not mean that it has not experienced symptoms (such as pain or seizures) overnight. Self-evidently, it cannot articulate what it has experienced, underlining the need for proper supervision.

b) Mr Justice Mitting’s decision

Mr Justice Mitting dealt only cursorily with this issue in his judgment. He held that the chief inspector was entitled to believe the licensees about out-of-hours attendance and his conclusion that the care arrangements were satisfactory was therefore not irrational.

The BUAV obtained permission to appeal from the Court of Appeal on the basis that the generalities in which the chief inspector dealt provided no answer to the documented examples of poor post-operative care. It also argued that the issue is of general importance because inspectors cannot fulfil their regulatory duty of ensuring that suffering is kept to a minimum if they simply accept the inevitably self-serving claims of licensees that they attend out-of-hours as appropriate. Inspectors must be able to follow a consistent and documented audit trail; otherwise a system of statutory regulation in effect becomes one of self-regulation.

c) The Court of Appeal decision

May LJ fairly set out the BUAV’s case. He noted that the assertions of out-of-hours unrecorded monitoring were “uncorroborated and unparticularised and made long after the event”. However, he concluded:

“The judge was certainly not obliged to reject the fact that the chief inspector had seen more documents than the post-operative sheets. Positive reporting only at night may not have been best practice, but the main question was whether the

animals were in fact properly cared for. It was, I think, properly open to the chief inspector to conclude in general that they were, despite the absence of full records, upon his acceptance that unrecorded monitoring did occur (which is not, I think, intrinsically unlikely) and that positive reports were made if there was something positive to report. Further a process which checked daytime records for consistency was capable of contributing to the overall judgement. The general conclusion that care was adequate is not vitiated by reference to a relatively small number of individual animals, not all of whom featured in the review because material available only to the claimants was not then available to the chief inspector.”¹³

In fact, the evidence before the Court related to dozens of marmosets, whether by reference to individual case records or protocols. May LJ was wrong to say that “material available only to the claimants was not then [at the time of his review] available to the chief inspector”. The chief inspector had access to all the records the BUAV had. The BUAV continues to maintain that the care arrangements at Cambridge were wholly inadequate. The Court of Appeal has not decided the contrary, any more than it has decided that the chief inspector had been correct to assign “moderate” severity limits – the function of the court on this type of evidence-based issue in judicial review is simply to consider whether a public authority has reached an irrational conclusion, not to say what the correct conclusion is.

Conclusion

On the positive side, the Court’s rejection of the relative approach has significant implications. As explained above, the issue has direct relevance to the operation of the key cost:benefit test under the Act. More proposed programmes of experiments should in future be regarded as “substantial” and that should mean that fewer licences are granted. In addition, experiments of substantial severity on primates are referred to the APC and more primate experiments should in future therefore receive this additional level of scrutiny. Finally, there should be greater transparency in the statistics – the BUAV has always maintained that considerably more than 2% of experiments should be categorised as “substantial”, if that term is applied correctly. That is crucial for

¹³ Paragraph 80.

informed public debate about animal experiments.

It is also welcome that the Court recognised that the fact that a protocol anticipates that an animal may have to be euthanised prematurely because of the adverse effects it is experiencing is relevant to the categorisation of severity, contrary to the Home Office’s approach. And the Court rightly rejected the Home Office’s spurious argument that it is better for laboratory animals for a lower severity rating to be given.

Despite these positive aspects, the judgment is in many ways disturbing. The judges were not prepared to engage with the evidence. In relation to ground 2, May LJ said that “these essentially factual questions are at the very fringe of what is appropriate for a court to consider on a judicial review application”.¹⁴ He was similarly unimpressed with ground 1, even though he recognised (grudgingly) that it involved in part the proper interpretation of statutory guidance. As Mr Justice Mitting recognised, the guidance is one of the few pieces of information available to the public and Parliament about the way animal experiments are regulated in this country and it is important that it is applied properly.

The BUAV always accepted, of course, that it is not for a court on a judicial review to substitute its own view for that of an expert public official, all the more so when the subject matter is highly technical and calls in large part for the exercise of judgement rather than fact finding.

However, none of that relieves the court from having to carry out its constitutional function on an irrationality challenge when there is substantial and uncontradicted documentary evidence, backed up in important respects by independent experts for both parties, pointing to at least a *prima facie* case of systemic unlawful practice. Much damning evidence was ignored by the judgment.

In relation to the care arrangements, May LJ complained that the BUAV’s written submissions “contain many pages of dense factual material about individual marmosets”.¹⁵ All the evidence was documented, uncontradicted and tied carefully to the errors of law for which the BUAV contended. Most

¹⁴ Paragraph 75.

¹⁵ And yet said: “The general conclusion that care was adequate is not vitiated by reference to a relatively small number of individual animals”.

of the Home Office's response was threadbare and wholly unconvincing. But the judge made it clear during the hearing that the Court was not prepared to descend into detail. How, then, could it properly rule on allegations of irrationality?

It is inconceivable that a court would adopt the same approach in a human rights case. Lord Justice Moses even exclaimed during the hearing that Home Office officials were simply trying to do their best to allay public concern about animal experiments. If that is the court's starting-point, it is not surprising that it will not look critically at evidence, however supportive of an allegation of irrationality and systemic unlawful practice.

In fact, the need for proper judicial scrutiny is all the more important with issues normally hidden from public view (like animal experiments), where the Government has, as here, refused an independent inquiry and the victims cannot articulate their concerns. It is in fact noteworthy that five judges previously involved (including two different Court of Appeal judges) considered that the cases raised issues of public importance; unfortunately, the judges who heard the appeal appear not to have agreed.

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Pit bull terriers and the Dangerous Dogs Act 1991

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In 1991, the Dangerous Dogs Act was passed as a reaction to a number of serious incidents where people had been killed or seriously injured by dogs. The Government was under severe pressure to take some action, especially since the abolition of the dog registration scheme in the Local Government Act 1988 meant that there was no way of ascertaining who held what dogs, or in what numbers. Furthermore, many dogs were being imported into the country for, inter alia, dog-fighting. These were mostly American pit bull terriers, dogs which were responsible for some of the more tragic incidents. This article will discuss the Act, explore some of the problems caused by it, and ways in which it has proved useful, particularly with regard to controlling the numbers of pit bull terriers.

The main reason for passing the Act was to prevent people possessing, or having custody

of, dogs belonging to types bred for fighting.¹⁶ This included, inter alia, "any dog of the type known as the pit bull terrier".¹⁷ However, this resulted in an immediate problem because, being cross-bred, the dogs could not be registered with the Kennel Club, nor was there a standard of points by which to identify them. Yet, under section 7, it became a summary offence to own such an animal.¹⁸ Furthermore, after the appointed day,¹⁹ unless the exemption applied,²⁰ all such dogs had to be humanely destroyed.

Many owners were granted a certificate of exemption for their pets. However, there were strict conditions of eligibility, which included neutering, permanent identification and insurance. The dog had to be kept in a secure place and be muzzled and on a lead when in a public place.²¹ This at least provided responsible owners with an opportunity to keep their pets, although things could still go horribly wrong. In *Bates v Director of Public Prosecutions*²² because the dog was in its owner's car it had not been muzzled or put on a lead.²³ The prosecution established that a private car on the highway did fall within the definition of "a public place" and the dog had to be destroyed.²⁴

As stated above, the legislation applies to "any dog of the type known as the pit bull terrier" but soon after it came into force it became obvious just how ambiguous this definition could be. Not all owners applied for the exemption, because they did not think their pet would be classed as this breed. Furthermore, the burden of proof is reversed²⁵ so that it is the owners who must establish, to the satisfaction of the court, that the dog is not a pit bull type. Again, this led to some appallingly unjust results and, indeed, a large number of dogs were held on "death row" for months, sometimes years until, eventually, it was

¹⁶ Dangerous Dogs Act 1991, long title.

¹⁷ Section 1(1)(a).

¹⁸ Punishable by up to 6 months imprisonment and/or a fine not exceeding level 5 on the standard scale, or both.

¹⁹ Section 3.

²⁰ Section 5.

²¹ The Dangerous Dogs Compensation and Exemption Schemes Order 1991, SI 1991/1744, as amended by SIs 1991/2297 and 1991/2636.

²² (1993) 157 JP 1004.

²³ Contrary to section 1(2)(d).

²⁴ In another case, the owner took off the dog's muzzle in a public place because it was vomiting. The dog was destroyed.

²⁵ Section 5(5).

decided²⁶ that a court could use both the American Dog Breeder Association's standard of points and the dog's own behavioural characteristics to determine whether or not it was a pit bull.

The Act continued to cause concern and in February 1996 the Dangerous Dogs (Amendment) Bill was published in the House of Lords, a result of a recommendation of a House of Lord's Select Committee. Representations had also been made to the influential Home Office Committee which was looking at the operation of the legislation. The Dangerous Dogs (Amendment) Act 1997 modified destruction orders, contingent destruction orders and destruction orders otherwise than on a conviction and, from then on, a death sentence was not the automatic fate of the dog.

In 2007, pit bull terriers were once again back in the news. On New Year's Day, Ellie Lawrenson died of injuries²⁷ inflicted by her uncle's pit bull terrier, a family pet, though known to be dangerous. The dog was destroyed and her uncle was prosecuted under the Dangerous Dogs Act 1991. He pleaded guilty and received a custodial sentence. Many other owners²⁸ took their dogs to the police who carried out further investigations; prosecutions will follow.

In February, the Birmingham police answered a 999 call about a dog fight. They found some 26 people²⁹ who had been watching two pit bull terriers fight each other for over an hour and a half,³⁰ inflicting and receiving such severe injuries that one died because of them and the other had to be humanely destroyed. The entire fight had been video-recorded. The legal proceedings were complex and the trial was held before a district judge who was damning in his judgment. This was the most important trial concerning dog fighting to be heard in an English court since 1867, with prosecutions brought under both the Protection of Animals Act 1911 and the Dangerous Dogs Act 1991,

²⁶ In *R v Knightsbridge Crown Court ex parte Dunne* [1993] 4 All ER 491 and *Brock v Director of Public Prosecutions* [1994] 1 WLR 296 – see discussion in *Queen v Haringey Magistrates Court ex parte Jeanette Cragg* [1996] EWHC 162 (Admin).

²⁷ *The Times*, 4 September 2007.

²⁸ In Liverpool, where the tragedy occurred.

²⁹ The most populated fight in recent times.

³⁰ This is one of the longest fights the RSPCA is aware of.

the latter being used for the possession offences, of which there were a number.³¹

The Dangerous Dogs Act 1991 was used, inter alia, to help secure successful convictions in Operation Lace, run by the Special Operations Unit of the RSPCA. Acting on information, 17 properties were entered³² and a number of pit bull terriers were seized together with other items³³ linking the dogs to fighting. There were nine prosecutions; all the defendants were convicted, most receiving custodial sentences, although some of these were suspended, and all were disqualified from keeping dogs for a number of years.

In August 2007, there was a Panorama Special³⁴ on dangerous dogs. It looked at, inter alia, the smuggling of pit bull terriers into the UK. In Eire, where the dogs are still legal, the Farmers Boys are major breeders and produce many champion fighters. The smuggled dogs pass through parts of the border that are porous into Northern Ireland and from there can move into mainland Britain. If challenged, they masquerade under names such as "Irish staffies" or "Long-legged staffies", with the show version of pit bulls tending to be called "American staffies". They also come in from Finland and the Balkan States. Some of the dogs seized in Birmingham came from Croatia, others from Northern Ireland. Occasionally even sperm is imported.³⁵

The Dangerous Dogs Act 1991 was initially important in greatly reducing the numbers of pit bull terriers in the UK, because it was when owners were granted a certificate of exemption that dogs could continue to be lawfully kept, and they had to be neutered. All the rest were supposed to be humanely destroyed. Even for the certified dogs it was, however, until amended, something of a blunt instrument so that many dogs suffered "miscarriages of justice". Furthermore, because the main provisions applied to possession, it did not strengthen the law on dog fighting, although the section 5 provisions regarding seizure, entry of premises and evidence have proved

³¹ See *RSPCA v Hussain and others* (2007) (unreported) – better known as the Alum Rock cases. Some appeals are pending.

³² Again in Birmingham in 2007.

³³ Such as treadmills, breaking sticks and videos of dog fights in Pakistan.

³⁴ Broadcast on 30 August 2007 at 9pm on BBC One.

³⁵ Information provided to the author by a member of the RSPCA's Special Operations Unit.

useful. Events in 2007 have again focused attention on these dogs, exposing dramatically both how dangerous they can be while, at the same time, often subjected to horrific abuse themselves. Their numbers have now grown again,³⁶ although there have been some successful prosecutions and, indeed, the 1991 Act will continue to play a small, though vital, role in their control.

MEDIA WATCH

“**Hunting high and low for clarity**”, Solicitors Journal, Vol. 152, No 8, 2008

Tim Ryan provides an appraisal of the Hunting Act 2004.

“**The hunt goes on**”, New Law Journal, Vol. 158, No 7304, 2008

Neil Parpworth reviews the decision in *R(on the application of Countryside Alliance and others) v Attorney General and another* (see below).

UK CASE LAW

*R (on the application of Countryside Alliance and others) v Attorney General and another*³⁷

The House of Lords rejected an appeal against a decision³⁸ that the Hunting Act 2004 was not inconsistent with the EC Treaty or incompatible with the European Convention on Human Rights. Regarding the latter, the appellants had argued that the hunting ban infringed their rights under:

- Article 8 (the right to private and family life), as it affected their private life, lifestyle and the use of their home, and would result in loss of livelihood.
- Article 11 (freedom of assembly and association), in relation to the restriction upon their ability to assemble and hunt foxes.
- Article 1 of the First Protocol (the right to peaceful enjoyment of property rights).
- Article 14 (prohibition on discrimination), as it subjected them to adverse treatment

³⁶ Ibid, to the extent that there is now no real need to smuggle them in.

³⁷[2007] UKHL 52.

³⁸*R(Countryside Alliance and others) v HM Attorney General and the Secretary of State for the Environment, Food and Rural Affairs; Derwin and others v HM Attorney General and the Secretary of State for the Environment, Food and Rural Affairs* [2006] EWCA Civ 817.

on grounds of their “other” status compared to those who did not hunt.

The submissions in relation to all of the above were rejected. In summary, the Court held that Articles 8 and 11 were not engaged and that even if they were any interference was justified as it was in accordance with the law and necessary in a democratic society and proportionate to the end it sought to achieve. Similarly, in relation to Article 1 of the First Protocol, it was held that although the Act did restrict the use to which certain property could be put, again this was justifiable and in accordance with the judgment of Parliament. Finally, their Lordships considered that Article 14 was not engaged, as any adverse treatment could not be linked to any personal characteristic of the appellants.

In relation to the EC Treaty the appellants argued that the Act was inconsistent with Article 28 (quantitative restrictions on imports and measures having equivalent effect) and Article 49 (freedom to provide services). They sought references to the European Court of Justice on whether a national measure prohibiting the economic activity of hunting engaged Article 28 where the prohibition had the effect of diminishing the market for a product used for that activity and therefore reduced cross-border trade; alternatively whether it engaged Article 49 where the consequence of the prohibition was to prevent providers of hunting-related services from providing such services. Whilst their Lordships considered that the engagement of Articles 28 and 49 was not entirely clear, they declined to seek a preliminary ruling from the European Court as the hunting restriction was justified on grounds of public policy under Article 30 (justifying restrictions on imports on grounds including public policy and public morality) and Article 46 (similar provisions relating to public policy).

*The Royal Society for the Prevention of Cruelty to Animals v (1) Salahi Munur (2) Aysen Munur*³⁹

The respondents had been convicted and sentenced for offences under section 8(1) of the Wildlife and Countryside Act 1981 (relating to keeping a bird in a cage not sufficient to permit it to stretch its wings freely). The appellants made an application for forfeiture of the birds in question pursuant to section 21(6) of the Act, which provides that when a person is convicted

³⁹[2008] EWHC 199 (Admin).

of an offence under section 8(1) the court *shall* order forfeiture of any bird, nest, egg, other animal, plant or thing in respect of which the offence was committed; and (2) *may* order the forfeiture of any vehicle, animal, weapon or other thing used to commit the offence. The magistrates hearing the application concluded that the mandatory provisions did not apply to the birds because it was the cages and not the birds which gave rise to the offences and therefore it was the cages which fell within section 21(6)(a). On appeal Cooke J stated “[i]t seems to me that a plain and straightforward reading of the two subsections means that the offence is committed in respect of both the birds and the cage. It is the conjunction of the keeping of the birds and keeping them in the cage which produces the offence. It follows that in my judgment there is no doubt that the magistrates were required under subsection (6)(a) to order the forfeiture of the two birds in question.” The appeal was therefore allowed.

*Burrington v Royal Society for the Prevention of Cruelty to Animals*⁴⁰

The appellant appealed against the dismissal of his appeal against conviction on two summonses alleging cruelty to animals contrary to the Protection of Animals Act 1911 (section 1(1)(a)). He complained that he had not been given reasonable information about the nature of the charges he faced. It was held that although the summonses were defective in failing to give sufficient information as to the nature of the allegations, the appellant had the benefit at an early stage of a detailed report from an expert setting out the findings in relation to each animal referred to in the summonses. It could not therefore be said that the allegations were vague or uncertain.

A further ground of appeal was that the Crown Court ought to have found an abuse of process or excluded a witness’s evidence as unreliable where there had been a conference involving that witness prior to the trial. The facts were that after receiving an anonymous tip-off a veterinary surgeon had examined the sheep in question for the RSPCA and reported that many of them were in a chronic condition and suffering serious infections. Before the hearing the RSPCA held a conference attended by its solicitor, two of its inspectors and the veterinary surgeon. Before the appeal to the Crown Court the RSPCA held a further conference involving the veterinary surgeon. The appellant argued that the RSPCA’s actions

amounted to an abuse of process and the conferences amounted to illegitimate witness coaching and/or rehearsal. On appeal the Court held that the veterinary surgeon was primarily an expert witness and it was entirely proper and desirable for the legal team to have pre-trial conferences with such witnesses to utilise their expertise to best advantage. However, the veterinary surgeon was to some extent a witness of fact and therefore the lawyers had to be vigilant to ensure that they did not influence his independent recollection of events.

EC CASE LAW

*Court of Justice rules on the interpretation of Community provisions concerning the transport of animals*⁴¹

The Directive on the protection of animals during transport⁴² is intended to harmonise travelling times and rest periods, feeding and watering intervals, and space allowances for certain types of animal, while contributing to the elimination of technical barriers to trade in live animals and to allowing market organisations to operate smoothly. Inter alia, it includes general provisions on the space which must be provided for porcine animals. The national instrument transposing the Directive in Denmark contained more detailed provisions in this regard. Danske Svineproducenter, a professional body for pig producers in Denmark, brought an action against the Ministry of Justice on the ground that certain provisions of the national legislation were unlawful.

The Court ruled that national rules such as those at issue, comprising figures for the animal compartment height in order that transporters may refer to more precise standards than those set out in the Directive, may fall within the margin of discretion conferred on the Member States by Article 249 of the EC Treaty, on condition that those rules comply with the objective pursued by that Directive, of protecting animals during transport, and do not prevent attainment of the other objectives pursued by it of eliminating technical barriers to trade in live animals and allowing market organisations to operate smoothly. It is for the national court to

⁴¹ Case C-491/06 *Danske Svineproducenter v Justitsministeriet* [2008], not yet published in the ECR.

⁴² Council Directive 91/628/EEC of 19 November 1991 on the protection of animals during transport, OJ 191 L 340, p. 17.

⁴⁰[2008] EWHC 946 (Admin).

establish whether those rules comply with those principles.

Production of foie gras: the legal situation

Penny Morgan

Comparative psychologist

Background information

Foie gras, produced from ducks and geese as part of the gourmet tradition of south-west France, where 90% of the product is produced and consumed, involves cruel and inhumane practices.

At a few months old, geese and ducks are “locked” into small wire cages, too small to permit turning or preening, and force fed immense quantities of food three to five times a day, over a period of 12-15 days for ducks and 15-21 days for geese, prior to slaughter.

A metal tube is thrust as much as five inches down their throats (often rupturing or puncturing their gullets causing them to bleed to death) so that the mashed corn and oil mixture can be directly inserted into their gullets; in just a few seconds, they are forced to consume the equivalent of one-third to one-fourth of their own body weight each day.

The birds’ physical condition deteriorates rapidly. Duck livers have to expand to around six times normal size only to qualify as foie gras, goose livers by over three times normal size, and both may increase even more. Changes in hepatocytes and other liver cells are considerable, with large fat globules developing in the cells – hepatic steatosis. Liver function is impaired. Intubation leads to oesophageal distension, increased heat production, panting and semi-liquid faeces. They are scarcely able to stand or even breathe normally. Behavioural changes are evident in avoidance behaviour towards the person feeding them, and the feeding procedure as a whole.

Approximately 24 million ducks and 500,000 geese undergo this procedure annually. Mortality rates are high.

In 2005, France produced 18,450 tons of foie gras, 75% of the world's estimated total production. More than 95% was duck liver, the rest goose liver. Hungary is the world's second largest producer. Other producing countries are

Belgium, Bulgaria and Spain, all members of the EU.

Production has been outlawed in 13 EU Member States including the UK. Outside the EU, Norway, South Africa and Switzerland ban production, while the City of Chicago and Israel have both prohibited the sale of foie gras. A similar attempt was made by Councillor Paul Blanchard in York,⁴³ followed by an Early Day Motion by York MP Hugh Bayley.⁴⁴

Nevertheless, even though **production** is outlawed in the UK, French and Hungarian foie gras products are sold in the UK (and other European countries).

Legal situation

The Council of Europe's European Convention for the protection of animals kept for farming purposes of 1976 contains relevant provisions. Article 3 states that “[a]nimals shall be housed and provided with food, water and care, in a manner which ... is appropriate to their physiological and ethological needs”, and Article 6 that “[n]o animal shall be provided with food or liquid in a manner ... which may cause unnecessary suffering or injury.”

In 1998, the EU Scientific Committee on Animal Health and Animal Welfare (SCAHAW) produced a report entitled “Welfare aspects of the production of foie gras in ducks and geese”.⁴⁵ It stated, in particular, that “force feeding, as currently practised, is detrimental to the welfare of the birds”.⁴⁶ Also, referring to the increasing industrialisation and profitability of the process, “[t]hese modifications have been introduced without paying attention to animal welfare considerations”, and “animal welfare ... has deteriorated”.⁴⁷

The need to keep the birds in social groups, and prohibit the use of cramped individual cages currently in use, was recognised.⁴⁸

The report also calls for further research to develop alternative techniques that do not require force feeding for the production of foie gras.⁴⁹

⁴³Aitchison, G. “Bid to ban foie gras continues”, 9 May 2007, see www.yorkpress.co.uk.

⁴⁴EDM No 1247, 30 March 2007.

⁴⁵16 December 1998.

⁴⁶P. 65.

⁴⁷P. 66.

⁴⁸P. 68.

⁴⁹P. 68.

In a minority opinion Dr D.J. Alexander stated that the only recommendation that the Committee could properly make was that force feeding of ducks and geese should stop and that this could best be achieved by the prohibition of the production, importation, distribution and sale of foie gras.⁵⁰

In 1999 the Standing Committee established pursuant to Article 9 of the abovementioned Council of Europe Convention adopted a recommendation concerning muscovy ducks and hybrids of muscovy and domestic ducks.⁵¹

Article 16(2) states: “Methods of feeding and feed additives which cause distress, injury or disease to the ducks or may result in development of physical or physiological conditions detrimental to their health and welfare shall not be permitted.”

However, Article 24(2) states: “It has been agreed that until new scientific evidence on alternative methods and their welfare aspects is available, the production of foie gras should be carried out only where it is current practice and then only in accordance with standards laid down in domestic law”. This dilutes all the preceding recommendations and erodes any real responsibility to research acceptable methods of welfare and production.

In 2000, in a written answer to questions posed by Caroline Lucas MEP, then Commissioner David Byrne stated: “All Member States have implemented Directive 98/58/EC concerning the protection of animals kept for farming purpose into their national legislation. However, it should be mentioned that a ban on force feeding is neither foreseen by Directive 98/58/EC nor by the recommendations mentioned above.”⁵²

In 2001, in response to a question by Professor Sir Neil MacCormick about whether the “production of foie gras by force feeding was compatible with any reasonable conception of animal welfare”, Byrne replied “[a]t present the Commission does not envisage any proposals to oblige changes in feeding practices” and

recalled the abovementioned Council of Europe recommendation which states that the

production of foie gras should be carried out only where it is current practice.⁵³

The recommendation and Mr Bryne’s replies suggest that production of foie gras should be allowed to continue where it is current practice. In spite of SCAHAW’s **own** findings that the welfare of the birds deteriorated as economic considerations assumed ever greater priority, it attempted to justify the practice on the grounds that foie gras had a long tradition at festive events in France, was being more frequently consumed, and needed to be produced in order to satisfy consumer demand. Great play is made of the fact that the production of foie gras is a traditional activity, however most production nowadays involves a mechanised, factory system which has little to do with traditional farming methods. While it would take 5 minutes to force feed a bird by hand, it takes about 45-60 seconds with an electric motor to assist the process, and pneumatic systems enable the food to be forced into the bird in just 2-3 seconds. Note, too, that the offending countries need only act in accordance with domestic, not EC, law.

Such an attempt to justify the practice, overriding any welfare issues, in areas where it has been undertaken for a period of time, is morally very dubious. Furthermore, whilst such “cultural protection” exists for some Member States, there is scarcely any incentive to research humane alternatives as recommended by SCAHAW.

Directive 98/58/EC concerning the protection of animals kept for farming purposes⁵⁴ gives general rules for the protection of animals of all species kept for the production of food, wool, skin or fur or for other farming purposes, based on the European Convention for the protection of animals kept for farming purposes and reflecting the so-called “Five Freedoms” as adopted by the Farm Animal Welfare Council:⁵⁵

- Freedom from hunger and thirst – access to fresh water and a diet for full health and vigour.
- Freedom from discomfort – an appropriate environment with shelter and comfortable rest area.

⁵⁰p. 69.

⁵¹22 June 1999.

⁵²Joint answer to written questions E-2183/00 and E-2618/00, 11 September 2000.

⁵³Answer to written question E-1654/01, 12 June 2001.

⁵⁴20 July 1998, OJ L 221, 8.8.1998, p. 23.

⁵⁵See www.fawc.org.uk.

- Freedom from pain, injury and disease – by prevention or rapid diagnosis and treatment.
- Freedom to express normal behaviour – adequate space and facilities, and company of the animal's own kind.
- Freedom from fear and distress – conditions and treatment which avoid mental suffering.

The production of foie gras breaches four and, arguably, all five freedoms.

Free trade law

The UK Government has argued, in reply to an online petition calling for a ban,⁵⁶ that “a unilateral ban on welfare grounds would not be legal. World trade rules prevent a ban on imports simply on the grounds of welfare standards in producer countries. Similarly, the rules governing the EU require Member States to allow the free circulation of goods.”⁵⁷ However, as regards world trade rules, the European Commission now accepts that the public morality exception in the General Agreement on Tariffs and Trade can be used to justify trade restrictive measures where there is concern about animal welfare standards in third countries, and indeed this is the basis for the ban on the sale/import of animal-tested cosmetics in the EU from 2009/2013. As regards EC law, derogations may be made to protect, inter alia, the life and health of animals. Case law indicates that a national measure, such as a requirement for a licence attesting to a product's conformity with Directive 98/58/EC, may be acceptable if necessary to ensure compliance with national animal welfare law.⁵⁸

Conclusion

The torture of animals should not be a matter of personal dietary choice, to indulge the appetites of gourmands; other products are banned from sale because of the way they are made – the gratuitous suffering involved means that foie gras should be added to that list.

The UK Government should attempt to use the derogation provided under EC free trade law in order to prevent the sale of this product.

⁵⁶www.banfoiegras.org.uk.

⁵⁷Response to the petition from the Prime Minister's office, 6 June 2007.

⁵⁸See, e.g. Case 40/82 *Commission v UK* [1984] ECR 283.

Non-domesticated animals in travelling circuses: the report of the Chairman of the Circus Working Group

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Background

In March 2006 the Department for the Environment, Food and Rural Affairs (DEFRA) announced its intention to issue regulations under the Animal Welfare Act 2006⁵⁹ to ban the use of certain non-domesticated animals in travelling circuses when their welfare needs cannot be met.⁶⁰ Section 12(6) of the Act requires that, prior to issuing any regulations, “the appropriate national authority shall consult such persons appearing to the authority to represent any interests concerned”. It was under the auspices of section 12(6), therefore, that the Circus Working Group (CWG) was convened in June 2006 with the remit of providing evidence to DEFRA as to whether the welfare needs of the animals in question could be properly met in a travelling circus environment.

The DEFRA consultation

The consultation did not consider performance and training methods on the basis that any practices deemed cruel could be prosecuted under the Animal Welfare Act. Thus the CWG limited its inquiry to housing, transportation and behavioural needs of non-domesticated species. Additionally the CWG was invited to consider the future consequences for animals if deemed unsuitable for a circus environment, the time spent in temporary accommodation and touring, and the ability of the industry to meet the costs of higher welfare standards.⁶¹

The report

The report drew upon the findings of three participating sub-groups – the Academic Panel

⁵⁹Section 12(1) allows the “appropriate national authority” to issue regulations to “make such provisions as the authority thinks fit for the purpose of promoting the welfare of animals”.

⁶⁰Hansard, 8 March 2006, col. 60 WS.

⁶¹“Wild animals in travelling circuses: the report of the Chairman of the Circus Working Group”, October 2007, paragraph 2.2. The report is available at www.defra.gov.uk/animalh/welfare/act/circus.htm.

and the Circus Industry and Animal Welfare sub-groups. The latter two sub-groups provided evidence to the Academic Panel, which evaluated it and drew conclusions. The Chair of the whole Group then wrote a report based on the Panel's conclusions, published in October 2007.

Unsurprisingly, given the CWG's terms of reference on admissible evidence (discussed below), the report stated that there was no evidence to suggest that the welfare of the animals in question would be compromised by their use in travelling circuses, and therefore no scientific justification to ban the use of any species. However, the report did recommend that the use of non-domesticated animals in travelling circuses should be subject to licensing requirements. The Government is considering its position.

Commentary

The report is at pains to point out that the numbers of animals involved in the travelling circus industry number fewer than 50. This could be taken in one of two ways. It could be that the potential problem is *de minimis* and should not overly trouble the regulators or, alternatively, the small number of animals involved could provide evidence that the use of performing non-domesticated animals for human amusement is the product of a bygone age. Thus, taking the latter view, there can be little justification for allowing the continued use of animals in travelling circuses when there is even a hint that their well-being is compromised – especially when one considers that the basis of the Animal Welfare Act 2006 itself is the principle of “unnecessary suffering”.⁶²

Unfortunately, it was made very difficult for the Panel to assess well-being. This is because the Government placed an outright prohibition on the use of video evidence, on the basis that “[s]uch evidence can be open to misinterpretation and gives only a snapshot in time” and that any footage could be taken out of context.⁶³

This is doubly disappointing when one considers that on the one hand the Academic Panel lamented that it was “disappointed with the evidence submitted”⁶⁴ and that video

evidence can and does have an enormous impact in the prosecution of offenders in animal suffering cases.⁶⁵ From a lawyer's point of view, the blanket ban on video evidence and its justification run counter to intuition and practice. Courts have no difficulty assessing the value of such evidence when deciding upon its admissibility – if a particular piece of footage could be taken out of context or paint only half of the picture then they are perfectly able to declare that footage inadmissible. It is just unfortunate that the CWG was denied this opportunity from the outset.

Freedom of information

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Introduction

On 25 April Mr Justice Eady gave judgment in a case under the Freedom of Information Act 2000 (“the FoI Act”) about animal experiments.⁶⁶ He allowed the Home Office's appeal against a decision by the Information Tribunal in January in favour of the BUAV.⁶⁷ The Tribunal had in turn allowed the BUAV's appeal against a decision of the Information Commissioner upholding the refusal of the Home Office to provide the bulk of information the BUAV had requested.

The BUAV request, the Home Office response and the statutory regime

In January 2005, soon after the main provisions of the FoI Act came into force, the BUAV requested information contained in five project licences issued under the Animals (Scientific Procedures) Act 1986 (“the 1986 Act”). Project licences set out in detail the objectives of the research, what is to be done to the animals and with what expected adverse effects, what ameliorative measures should be taken and why the use of animals is considered necessary. In other words, the information is designed to enable the Secretary of State for the Home Department to assess whether the various statutory tests for the grant of a licence are met.

⁶⁵Report, para. 4.1.3.

⁶⁶ *Secretary of State for the Home Office [sic] v BUAV and the Information Commissioner* [2008] EWHC 892 (QB), see www.bailii.org/ew/cases/EWHC/QB/2008/892.html.

⁶⁷ *British Union for the Abolition of Vivisection v The Information Commissioner and the Home Office* (EA/2007/0059), 30 January 2008.

⁶²Section 4.

⁶³Lord Rooker, House of Lords' Debates, 23 May 2006, col. GC 176-7.

⁶⁴Report, para. 5.1

The BUAV, mindful of the activities of a tiny number of activists, said the information could be provided on an anonymised basis.

The only reason the BUAV knew about the licences was because the Home Office had published abstracts (summaries) of them. There are two separate regimes under the FoI Act: first, one of compulsory disclosure (subject to various exemptions), under section 1(1)(b), by public authorities of information held by them, pursuant to a request by a member of the public; and, second, one of voluntary disclosure under the publication scheme each public authority must have under section 19 of the FoI Act. Since December 2004 the Home Office has encouraged licence applicants to submit abstracts with their applications. If they do so, the abstract is then published by the Home Office under its publication scheme. Abstracts are normally 2-3 pages long, whereas the licences themselves can exceed 40 pages. A licence is in identical form to a licence application in its final form.

What a public authority voluntarily publishes under its publication scheme cannot, of course, adversely affect what a requester is otherwise entitled to under the compulsory regime. However, the BUAV always suspected that the Home Office introduced the system of abstracts in order to avoid having to disclose *other* information in project licences following requests.

The Home Office released some, very limited information from the project licences in question – for example, their duration and some conditions attached to them – but otherwise rejected the request. It relied on a number of exemptions. One of these was that contained in section 21 of the FoI Act (information accessible by other means). It argued that the withheld information had already been published via the abstracts. Since abstracts are but a brief summary of a licence application, the Home Office was necessarily equating an abstract with the licence to which it related. It is, in fact clear from section 11 that a public authority cannot disclose merely a summary unless this is what a requester asks for (although this has yet to be judicially confirmed). But the Home Office's reliance on section 21 seemed to confirm the intention behind publishing abstracts.

The Home Office also relied on other exemptions, including those under sections 38(1) (health and safety), 41(1) (information provided in confidence), 43(2) (commercial interests) and, crucially for present purposes,

section 44(1)(b) (prohibitions on disclosure under different legislation). In the present context section 44(1)(b) leads one to section 24(1) of the 1986 Act (see below). The Commissioner eventually decided that section 24(1) did apply to all the withheld information and he therefore did not consider whether the other exemptions applied. Nor has the Tribunal or Mr Justice Eady.

Some of the exemptions in the FoI Act are conditional and some absolute. With conditional exemptions, even where information falls within the scope of the exemption it must still be disclosed if the public interest in disclosure outweighs that in withholding the information. Section 44 is an absolute exemption and sections 38 and 43 are conditional exemptions. Section 41 is technically an absolute exemption, but since the law of confidence itself incorporates a public interest test, it is in effect a conditional exemption.

Section 24(1) of the 1986 Act

Section 24(1) provides:

“A person is guilty of an offence if otherwise than for the purposes of discharging his functions under this Act he discloses any information which has been obtained by him in the exercise of those functions and which he knows or has reasonable grounds for believing to have been given in confidence.”

So, the issue was whether the Home Office knew or had reasonable grounds for believing that the withheld information had been given to it in confidence. For a long time, the Home Office appeared to think that section 24(1) added nothing to the section 41(1) exemption – both deal with the concept of confidentiality. It changed its mind relatively late in the proceedings.

Under section 75 of the FoI Act, the Secretary of State for Justice has to review all statutory prohibitions on disclosure and decide whether to repeal or relax them. In 2006, the Minister decided that section 24(1) of the 1986 Act should be retained, at least for the time being.

The Tribunal decision

The tribunal agreed with the BUAV that one cannot give information “in confidence” within section 24(1) unless the law recognises it as

confidential. The BUAV argued that statements by a House of Lords minister when the bill which became the 1986 Act was going through Parliament supported this conclusion. The leading case on confidentiality is *Coco v Clark*⁶⁸ where Mr Justice Megarry posited a three-stage test:

- (1) the information in question must have the necessary quality of confidence;
- (2) it must have been imparted in circumstances importing an obligation of confidence;
- (3) its unauthorised use would be to the detriment of the person communicating it.

The Home Office, supported by the Commissioner, argued that only the second of these had to be met under section 24(1). The Tribunal said that tests (1) and (3) also had to be met. In addition, as with the general law of confidence, the public interest might require the disclosure of information to which all three *Coco* tests applied.

The Tribunal acknowledged that information identifying an individual could in principle be taken to have been given in confidence on safety grounds, but accepted the BUAV's argument that it could only do so if a causal connection could be shown between disclosure of the particular information and a safety risk. It was not enough to point to some generalised risk for animal researchers.

Tellingly, the Tribunal, which (unlike the BUAV) saw both the abstracts and the licences to which they related, said this about the former:

“[T]he abstracts appear generally to adopt a style and tone intended to persuade the reader as to the value of the proposed experiments. This is in contrast to the style of the licence applications, which are more neutral in tone. This perception of a positive spin having been applied to the published information was increased by the absence from the abstracts of the detail about the experiments themselves.”⁶⁹

This underlines why the BUAV was not content with just the abstracts.

⁶⁸[1969] RPC 41.

⁶⁹ Paragraph 8.

Mr Justice Eady's decision

The judge said that he found interpretation of section 24(1) difficult. He thought that the Tribunal had been wrong to rely on *Coco* as a guide to what is confidential. Citing a number of privacy cases, including the House of Lords decision in *Campbell v MGN Newspapers*,⁷⁰ he said that the test is now one of misuse of private information. He also said that sometimes section 24 could apply even if the information did not have the quality of confidence and was not a commercial secret – but did not explain when.⁷¹

He was influenced by the fact (as he saw it⁷²) that researchers have to supply information to the state; that the Home Office would face practical difficulties in assessing confidentiality because section 24(1) looks back to the time when the information was provided; and that the provision is a penal one.

More positively, the judge went out of his way to show regret for the conclusion he felt compelled to reach. He said:

“There are no doubt many who would agree with BUAV's case that ‘as much as possible of the information needs to be publicly available in order to facilitate public, Parliamentary, and ultimately judicial, scrutiny of performance by the Secretary of State of her statutory duties.’”⁷³

He rightly regarded such scrutiny as impossible under the approach to section 24(1) he adopted.

⁷⁰ [2004] 2 AC 457. The case concerned published photographs of Naomi Campbell taken coming out of a Narcotics Anonymous meeting.

⁷¹ Paragraph 65.

⁷² In fact, licence applicants are under no compulsion to provide information to the state in the way, for example, that every adult citizen is compelled to provide information under the Census Act 1920 or drivers are sometimes compelled to provide information under the Road Traffic Acts. Applicants do have to provide information if they want a licence to conduct animal experiments, but that is no different from myriad other situations where people have to provide information to government if they want permission to do something. An obvious example is where landowners have to provide information to the local authority if they want permission to develop their property – they know that the information they supply will be published. Compulsion in this strictly conditional sense cannot convert non-confidential information into confidential information.

⁷³ Paragraph 61.

Indeed, Dr Jon Richmond, head of the relevant department at the Home Office, had candidly acknowledged in evidence before the Tribunal that judicial scrutiny would be impossible.

The judge also said that “[i]t would appear sensible, so that all those concerned know where they stand, to adopt as the starting point the presumption that the content of applications should be generally available but to allow for confidential schedules to be attached.”⁷⁴ He concluded that, when section 24 was next considered, the decision might well be that it should be repealed or amended in the pursuit of freedom of information.

Commentary

The judge’s general comments are very helpful and the BUAV hopes that the Home Office will take them on board. In the meantime, the BUAV thinks that the judge’s reasoning is flawed in a number of respects and is taking the case to the Court of Appeal. It was due to be heard on 15 July.

Briefly, although linguistically it might be possible to give information “in confidence” when it is not confidential, the judge failed to have proper regard to the context. The 1986 Act sets out a system of statutory regulation (i.e. regulation on behalf of the public) and is therefore far removed from the privacy cases on which the judge relied. There is no reason to think that Parliament intended to allow licence applicants to keep information private when it was not confidential and they would suffer no prejudice from its disclosure. This is particularly so given that the Home Office wrote to all laboratories in December 2004 reminding them that the assurance of blanket confidentiality it had once given no longer applied.⁷⁵ Indeed, both the Home Office and the Information Commissioner expressly said that they were not contending that applicants could choose what to keep secret – and yet the judge acknowledged that this seemed to be the effect of his decision, at least in some (unspecified) circumstances.

The judgement has left the law in a state of uncertainty because it is unclear in what circumstances, save for information being confidential in nature, section 24(1) could bite. The uncertainty is particularly unsatisfactory with a penal provision. It is, in fact, very odd,

⁷⁴ Paragraph 61.

⁷⁵ Following a concession it made after the National Anti-Vivisection Society secured permission to bring a judicial review in 1998, and in light of the impending coming into force of the FoI Act.

in the context of intellectual property, to have criminal liability where there would not be a corresponding civil liability (because the owner of information suffered no loss from its disclosure).⁷⁶

The Home Office, in not seeking costs from the BUAV, has in effect accepted that the case raises important points of principle.

⁷⁶ See *R v Johnstone* [2003] UKHL 28 (especially paragraph 28), cited to the judge but not referred to in his judgment. This is a House of Lords decision on trademarks

What is ALAW?

ALAW is an organisation of lawyers interested in animal protection law. We see our role as pioneering a better legal framework for animals and ensuring that the existing law is applied properly.

We believe that lawyers should, as well as interpreting laws, ask questions about the philosophy underlying them: they have always played a central role in law reform. There is also a real need to educate professionals and the public alike about the law.

Animal cruelty, does not, of course, recognise national boundaries and we are building up a network of lawyers who are interested in animal protection in many different countries.

What ALAW will do

ALAW will:

- take part in consultations and monitor developments in Parliament and in European and other relevant international organisations,
- highlight areas of animal welfare law in need of reform,
- disseminate information about animal welfare law, including through articles, conferences, training and encouraging the establishment of tertiary courses,
- through its members provide advice to NGOs and take appropriate test cases,
- provide support and information exchange for lawyers engaged in animal protection law.

Who can be a member?

Solicitors, trainee solicitors, legal executives, barristers, pupil barristers, judges and legal academics are eligible to join and will receive regular issues of the *Journal of Animal Welfare Law*. Other interested parties can become subscribers to the *Journal* and receive information about conferences and training courses. Membership/subscriber fees: EU – £28.00; rest of the world – £35.00; concessionary (student/retired etc.) – £5.00.

How can you help?

Apart from animal protection law itself, expertise in many other areas is important – for example, public law, civil liberties, environmental health, planning law, freedom of information, civil litigation, media law, company law and charity law.

In addition, lawyers have well-developed general skills such as advocacy and drafting which are useful in many ways. Help with training and contributions to the *Journal* are also welcome.

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