

Cases, Updates & Materials

Recent work of the Scottish Animal Welfare Commission

On 9 October 2023, the Scottish Animal Welfare Commission ("SAWC") published its review of the Scottish Government's activities affecting the welfare of animals as sentient beings.¹ SAWC's review focuses on the Scottish Government's 2022-2023 programme, and provides a helpful overview of recent legislative and policy developments in animal welfare in Scotland. The main piece of legislation affecting animals which was passed by the Scottish Parliament this year is the Hunting with Dogs (Scotland) Act 2023.² The previous legislation applicable in this area, the Protection of Wild Mammals (Scotland) Act 2002, was controversial and challenged in the courts.³ Recommendations for reform were made in a judge-led review in 2016.⁴ To strengthen the law on the hunting of wild mammals by restricting the circumstances in which such hunting can lawfully take place, the Hunting with Dogs (Scotland) Act 2023 was passed in January this year. Hunting a wild mammal with a dog is a specific offence under section 1 of the 2023 Act, but this is subject to various exceptions such as: managing wild mammals above ground, or foxes below ground; falconry, game shooting and deer stalking; or environmental benefit.

¹ Scottish Animal Welfare Commission, Review of Scottish Government Activity affecting the Welfare of Animals, as Sentient Beings (9 October 2023) <<https://www.gov.scot/publications/animal-welfare-scottish-government-activity-scottish-animal-welfare-commission-review/pages/2/>> last accessed 10 December 2023

² 2023 asp 1, available at: <<https://www.legislation.gov.uk/asp/2023/1/enacted>> last accessed 10 December 2023

³ See for example *Adams v Scottish Ministers* 2004 SC 665 and *Whaley v Lord Advocate* 2007 UKHL 53.

⁴ The Rt Hon Lord Bonyon, Report of the Review of the Protection of Wild Mammals (Scotland) Act 2002, (21 November 2016), <<https://www.gov.scot/publications/report-review-protection-wild-mammals-scotland-act-2002/documents/>> last accessed 10 December 2023

In other recent work, SAWC has published a position paper on the welfare of wildlife, which is a useful read for anyone who would like to learn more about some topical issues in this area, such as terminology of "pests" and "vermin", human-wildlife conflicts, and how best to assess animal welfare in the wild context.⁵

Dog welfare focus in new Scottish Parliament Bill

In June this year, the Welfare of Dogs (Scotland) Bill was introduced by Christine Grahame MSP. The key features of the Bill are: (i) it provides for the Scottish Ministers to prepare a code of good practice on keeping dogs as pets; (ii) it introduces a written certificate to be completed by a new owner before buying a dog or puppy; and (iii) a new register of puppy litters bred by unlicensed breeders is to be introduced, to provide for greater transparency of breeding carried on outside licensing requirements. The Bill is designed to encourage a more responsible approach to dog ownership and improve the welfare of dogs throughout their lives.⁶ Over recent years, there has been an increase in dog ownership in Scotland, including the rise of "pandemic puppies",⁷ therefore legislative efforts to increase public understanding and awareness of the responsibilities of dog ownership are welcome. The Bill's progress can be followed online. It is currently at stage 1, where the relevant Scottish Parliament committee examines the general principles of the Bill and seeks views and comments.⁸ The Scottish Ani-

⁵ Scottish Animal Welfare Commission (29 August 2023), Wildlife and animal welfare: position, <<https://www.gov.scot/publications/scottish-animal-welfare-commission-position-on-wildlife-and-animal-welfare-august-2023/>> last accessed 10 December 2023

⁶ Scottish Parliamentary Corporate Body, Welfare of Dogs (Scotland) Bill Policy Memorandum, <<https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/welfare-of-dogs-scotland-bill/policy-memorandum-accessible.pdf>> last accessed 10 December 2023

⁷ *ibid* 3-4

⁸ The Scottish Parliament, Welfare of Dogs (Scot-

mal Welfare Commission's response to the Bill, dated 11 August 2023, is also available to read online.⁹

Charlotte Edgar, Legal Correspondent Scotland

Animals (Low-Welfare Activities Abroad) Act 2023

The UK continues to deliver on its plan to build its reputation as a world leader in animal welfare standards.¹⁰ The Animals (Low-Welfare Activities Abroad) Act 2023 (the "Act") received royal assent on 18 September 2023.¹¹ The Act aims to protect animals from being exploited, abused or killed for entertainment outside the UK by prohibiting the sale and advertising in England and Northern Ireland ("NI") of specific activities with such animals. Hopefully, Scotland and Wales will follow suit.

What's prohibited under the Act?

Under the Act, it is an offence to sell, or offer or arrange to sell, in England and NI, the right to observe or participate in an activity outside the UK involving a vertebrate animal.¹² The specific activities will be described in "activity regulations" made by the "appropriate national authority" (for England, the Secretary of State; for NI, the Department of Agriculture, Environment and Rural Affairs). It is also an offence to print, publish or distribute, or cause to be printed, published or distributed, advertisements for "low-welfare" animal activities in England and NI.¹³ Advertisements in publications (other than

in-flight magazines) printed outside England and NI whose principal market does not include England and NI are exempt from the publishing and distribution offences.¹⁴ Advertisements distributed electronically by persons who do not carry on business in England or NI,¹⁵ and the sale of publications to a member of the public, are exempt from the distribution offence.¹⁶ It is a defence to the printing and distribution offences if a person did not know and had no reason to suspect that the non-compliant advertisement would be published.¹⁷

Whether an activity is "low-welfare" depends on whether the condition or treatment of an animal would be an offence under the "appropriate national legislation" (i.e., the Animal Welfare Act 2006 and the Welfare of Animals Act (Northern Ireland) 2011).¹⁸ These statutes make it an offence to commit an act of cruelty to an animal (e.g., causing unnecessary suffering and mutilating) and include provisions surrounding an animal's welfare needs (e.g., suitable environment and diet).

What's next?

The UK Government must now identify the specific activities the sale or advertising of which would constitute an offence. These should include activities where animals are "kept in captivity or confinement, subjected to cruel and brutal training methods, forced to take selfies or are ridden, drugged and de-clawed."¹⁹ To do this, the Act permits the UK Government to enact secondary legislation applying bans to the sale, offering for sale and advertisement of

land) Bill, <<https://www.parliament.scot/bills-and-laws/bills/welfare-of-dogs-scotland-bill/stage-1#topOfNav>> last accessed 10 December 2023

⁹ See Published Responses to the Welfare of Dogs (Scotland) Bill available here: <https://yourviews.parliament.scot/raine/ecbegff1/consultation/published_select_respondent> last accessed 10 December 2023

¹⁰ <https://www.gov.uk/government/news/uk-to-lead-the-way-on-animal-welfare-through-flagship-new-action-plan>

¹¹ <https://www.legislation.gov.uk/ukpga/2023/45/enacted>

¹² Section 1 of the Animals (Low-Welfare Activities Abroad) Act 2023

¹³ Section 2 of the Animals (Low-Welfare Activities

Abroad) Act 2023

¹⁴ Section 2(5) of the Animals (Low-Welfare Activities Abroad) Act 2023

¹⁵ Section 2(6) of the Animals (Low-Welfare Activities Abroad) Act 2023

¹⁶ Section 2(7) of the Animals (Low-Welfare Activities Abroad) Act 2023

¹⁷ Section 2(8) of the Animals (Low-Welfare Activities Abroad) Act 2023

¹⁸ Section 1(3) of the Animals (Low-Welfare Activities Abroad) Act 2023

¹⁹ <https://www.gov.uk/government/news/legislation-to-clamp-down-on-cruel-animal-experiences-abroad>



such activities.²⁰ To ensure appropriate regulations exist for different species, the UK Government will consult with various animal organisations and industry stakeholders.

This Act is a crucial step towards helping animals used in the name of tourism. If enforced appropriately, it could steer the tourism market towards ethical animal activities and save animals in low-welfare activities from further abuse.

The Hunting Trophies (Import Prohibition) Bill

The Hunting Trophies (Import Prohibition) Bill (the "Bill") did not pass before the end of the parliamentary session on 7 November 2023. This is a blow to endangered species abroad: if it had been successful, the Bill would have banned the importation into the UK of hunting trophies from animals of conservation concern.

²⁰ Section 5 of the Animals (Low-Welfare Activities Abroad) Act 2023

What does the Bill prohibit and why is it necessary?

Currently, British people can bring hunting trophies such as ivory horns and stuffed lion heads into the UK as long as they have the correct import and export permits.²¹ According to a report published by the All-Party Parliamentary Group, since the 1980s, approximately 25,000 hunting trophies have been brought into the UK by British hunters.²²

The Bill proposed prohibiting the importation of hunting trophies from animal species listed in Annexes A and B of the 'Principal Wildlife Trade Regulation' (a retained EU law), which are either threatened with extinction or overly exploited and require trade control. Establishing a ban on the importation into the UK of hunting trophies

²¹ See the Convention on International Trade in Endangered Species of Wild Fauna which is implemented through the EU Wildlife Trade Regulations.

²² Trophy Hunting & Britain: The Case for a Ban A report of the All-Party Parliamentary Group on Banning Trophy Hunting dated 29 June 2022

of these endangered and exploited species is one way the UK can play its part in putting a stop to the killing of these species in the name of sport.

Why did it fail to pass?

Despite the Bill having the support of over 80% of the British public²³ and the support of the UK Government (having already passed through the House of Commons with only minor amendments), the Bill was allowed to be frustrated by a small group of pro-hunting members of the House of Lords. This is because the Bill was a Private Member's Bill ("PMB"), as opposed to a Government Bill. PMBs require approval from both the House of Commons and the House of Lords before the end of a parliamentary session to become law. With the timing restrictions in mind, the pro-hunting members tabled over 60 amendments at the Committee Stage. They flagged that the profits from trophy hunting are essential to fund conservation projects ultimately protecting endangered species and that the Bill "may be misconceived as some form of neocolonialism" by attempting to strip communities of their right to independently govern their wildlife management practices.²⁴ The Lords requested for each amendment to be debated individually causing time to run out and the Bill to fail at the end of the parliamentary session on 7 November 2023.

The UK Government has missed an opportunity to confirm its reputation as a world leader in animal welfare standards. It is hopeful that the Bill is re-introduced as a Government Bill so that it will not be subject to processes and timings associated with a PMB.

Online Safety Act 2023

The UK continues to maintain its reputation as a world leader in animal welfare standards and now also aims to be the "safest place in the world to be online".²⁵ The Online Safety Act 2023

²³ Survation carried out a poll of 1020 respondents in March 2021 on behalf of the APPG on Banning Trophy Hunting

²⁴ <https://hansard.parliament.uk/lords/2023-09-12/debates/DCC57FBE-241C-4FC3-BB4D-407604F836DB/HuntingTrophies>

²⁵ <https://www.gov.uk/government/news/on->

(the "Act"), which received royal assent on 26 October 2023,²⁶ aims to protect children from harmful online content and give adults greater control over what they see online. The Act imposes new obligations on certain technology companies to keep the internet an animal cruelty safe place.

How are animals included in the Act?

Every year, many animals are tortured online for clicks and social media is a facilitator of this. A recent example of this was uncovered in BBC's investigation *Hunting the Monkey Torturers*, which found that Facebook was hosting numerous monkey torture groups.²⁷ This investigation sparked public outcry and paved the way for animal cruelty content to be included in the Act.

Under the Act, in-scope technology companies²⁸ (e.g., social media platforms and search services that are based anywhere in the world with a significant number of UK users or which target the UK market) are required to proactively remove "priority offences" content from their platforms.²⁹ "Priority offences" include those that would constitute an offence under section 4(1) of the Animal Welfare Act 2006, relating to causing unnecessary suffering to an animal.³⁰ Further, to protect children online, in-scope technology companies also have a duty to carry out risk assessments relating to, and include provisions in their terms of services or publicly available statements specifying how, children in various age groups are protected from encountering, "priority content that is harmful to children".³¹ "Priority content that is harmful to children" includes content that depicts real or realistic serious violence against or injury of an

line-animal-cruelty-activity-to-be-removed-from-social-media-platforms

²⁶ <https://bills.parliament.uk/bills/3137/stages>

²⁷ <https://www.bbc.co.uk/news/extra/lot1dl-WVS5/hunting-the-monkey-torturers>

²⁸ Part 2 of the Online Safety Act 2023

²⁹ See for example, section 10 of the Online Safety Act 2023

³⁰ Section 38 of Schedule 7 of the Online Safety Act 2023

³¹ See for example, sections 11(6)(b)(ii) and 12(9)(b) of the Online Safety Act 2023

animal.³²

How will the Act be enforced?

The Act provides the Office of Communications (“OFCOM”) wide powers to enforce provisions of the Act - ranging from imposing fines of up to the greater of £18 mil or 10% of a company’s global annual revenue³³ to initiating criminal proceedings against senior managers who deliberately destroy or withhold information or who fail to ensure compliance with information requests from OFCOM.³⁴ OFCOM must now provide guidance and set out codes of practice for how in-scope companies can comply with their duties under the Act. This will be done in three phases over the next two years, along with a public consultation period for each phase.³⁵

The inclusion of animal cruelty as an offence in the Act is a crucial step towards helping animals that are abused online for entertainment purposes. By targeting the online facilitators of views, the Act will hopefully restrict the online animal abuse market from continuing to operate.

XL Bully Dogs

A sad Christmas for American XL Bully dogs and their owners. Following a number of attacks by American XL Bully dogs (“XL Bully”), on 31 October 2023, the UK Government added the XL Bully to the list of dogs banned under the Dangerous Dogs Act 1991 (as amended in 1997) by issuing The Dangerous Dogs (Designated Types) (England and Wales) Order 2023. The new law aims to protect the public by creating conditions that will eventually remove XL Bully-type dogs from England and Wales, and imposing conditions on owners who wish to keep their XL Bully-type dog.

What are the legal implications?

The new law will come into effect in two stages.

³² Section 62(7) of the Online Safety Act 2023

³³ Schedule 13 of the Online Safety Act 2023

³⁴ Section 110 of the Online Safety Act 2023

³⁵ <https://www.ofcom.org.uk/online-safety/information-for-industry/roadmap-to-regulation>

From 31 December 2023,³⁶ it will be illegal to sell, abandon (or let stray), give away or breed an XL Bully. It will also be illegal to walk an XL Bully in a public place (which includes common parts of a building containing two or more separate dwellings)³⁷ without a lead and muzzle. From 1 February 2024,³⁸ it will be illegal to own an XL Bully unless the dog is registered on the Index of Exempt Dogs.³⁹ If an XL Bully is not exempted before 1 February 2024, it will need to be euthanised and the UK Government is offering keepers £200 in compensation towards the cost of euthanasia. The police will have the power to seize non-exempt dogs they suspect could be an XL Bully.⁴⁰ These rules also apply to animal rescue centres and shelters.

To prevent an XL Bully from being euthanised (or seized by the police), the owner must get a Certificate of Exemption. The UK Government has published guidance on how to get an XL Bully exempted, which requires (amongst other things) getting third party public liability insurance cover for the XL Bully, neutering the XL Bully, getting the XL Bully microchipped and paying a £92.40 fee for each XL Bully.⁴¹

What is an XL Bully?

The “type”, rather than the breed of dog, is the key concern.⁴² That is, the prohibited “types” are identified depending on the physical characteristics of the dog, rather than their genetics. The UK Government has published an official definition of XL Bully, which includes detailed descriptions regarding (amongst other things) height, head, teeth, neck and coat.⁴³ One of the most important factors is the height re-

³⁶ Article 1(2) of The Dangerous Dogs (Designated Types) (England and Wales) Order 2023

³⁷ Section 10(2) of the Dangerous Dogs Act 1991

³⁸ Article 3 of The Dangerous Dogs (Designated Types) (England and Wales) Order 2023 and section 1(3) of the Dangerous Dogs Act 1991

³⁹ Section 1(5) of the Dangerous Dogs Act 1991

⁴⁰ Section 5 of the Dangerous Dogs Act 1991

⁴¹ <https://www.gov.uk/guidance/prepare-for-the-ban-on-xl-bully-dogs>

⁴² Section 1(a) of the Dangerous Dogs Act 1991

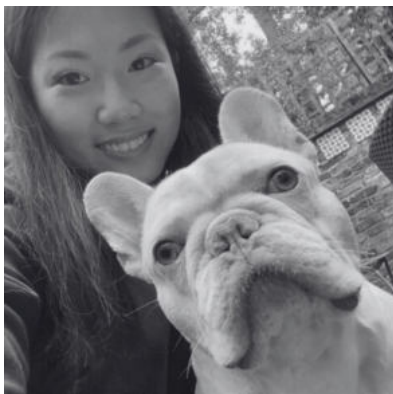
⁴³ <https://www.gov.uk/government/publications/official-definition-of-an-xl-bully-dog/official-definition-of-an-xl-bully-dog>

quirement. If the dog is below 51cm at the withers (for a male) or 48cm at the withers (for a female), then it will not be classified as an XL Bully. If the dog is above this height, the dog will only be classified as an XL Bully if a “substantial”⁴⁴ number of the other characteristics are met. If an owner is unsure about whether their dog is an XL Bully, the UK Government has advised taking a precautionary approach.⁴⁵

There are concerns that the new law could lead to many XL Bully dogs being abandoned and euthanised. According to figures recently released by Defra, over 4,000 exemption applications had been received by 18 December 2023.⁴⁶ An application for an interim injunction by campaign group, Don't Ban Me, Licence Me (LicenceMe Group Ltd), was unsuccessful on 20 December 2023. However, permission was granted for a judicial review hearing.

This is undoubtedly a stressful period for owners, vets and animal shelters.

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⁴⁴ <https://www.gov.uk/government/publications/official-definition-of-an-xl-bully-dog/official-definition-of-an-xl-bully-dog>

⁴⁵ <https://www.gov.uk/guidance/prepare-for-the-ban-on-xl-bully-dogs>

⁴⁶ <https://www.gov.uk/government/news/owners-urged-to-take-action-as-xl-bully-dog-deadline-approaches>

High Court rejects challenge to government guidance on broiler chicken welfare

Introduction

Chicken is the most popular meat in the world, and it is predicted by the OECD and FAO that the number of chickens raised and slaughtered for food worldwide (currently 74 billion) is likely to rise to 85 billion by 2032.¹ Modern meat chickens have been genetically selected to grow very fast, leading to them being termed “Frankenchickens” by animal welfare campaigners.² In recent months, there has been increasing attention paid to farming practices for broiler chickens (also known as meat chickens) in the UK and abroad. In May 2023, Poultry World reported that over 350 companies in Europe and the UK have signed up to the Better Chicken Commitment,³ a set of standards for broiler welfare which is intended to improve practices within the chicken meat industry.⁴ The European Commission announced that by the end of 2023, EU animal welfare legislation will be reviewed to bring it up to date with the latest scientific evidence.⁵ This review will include Directive 2007/43/EC,⁶ known as the Broilers Directive.

¹ Kenny Torrella, 'Chickens are taking over the planet', (Vox, 4 August 2023) <<https://www.vox.com/future-perfect/2023/8/4/23818952/chicken-meat-forecast-predictions-beef-pork-oecd-fao>>, accessed September 2023

² Linsey Smith, 'Frankenchicken, farming and the cost of living crisis' (BBC News, 8 September 2023) <<https://www.bbc.co.uk/news/uk-england-lincolnshire-66721642>>, accessed September 2023

³ Tony Mcdougal, 'Support growing for Better Chicken Commitment across Europe', (Poultry World, 12 May 2023), <<https://www.poultryworld.net/the-industry/markets-2/support-growing-for-better-chicken-commitment-across-europe/>>, accessed September 2023

⁴ See <https://betterchickencommitment.com/uk/>

⁵ The European Commission, 'Revision of the animal welfare legislation' (Directorate-General for Health and Food Safety, undated) <https://food.ec.europa.eu/animals/animal-welfare/evaluations-and-impact-assessment/revision-animal-welfare-legislation_en#:~:text=The%20Farm%20to%20Fork%20Strategy,with%20the%20latest%20scientific%20evidence.>, accessed September 2023

⁶ *ibid*

In light of these developments, the judicial review raised by The Humane League against the Secretary of State, challenging the Code of Practice on broiler welfare,⁷ is timely (*R (The Humane League UK) v Secretary of State for Environment, Food and Rural Affairs* [2023] EWHC 1243 (Admin)). On 24 May 2023, Sir Ross Cranston, sitting as a High Court judge, dismissed the case.

The main issues in the judicial review

The Humane League argued that the Secretary of State had misinterpreted the requirements of paragraph 29 of the Welfare of Farmed Animal (England) Regulations 2007, which provide that: “animals may only be kept for farming purposes if it can reasonably be expected, on the basis of their genotype or phenotype, that they can be kept without any detrimental effect on their health or welfare.” The Humane League claimed that the UK Code of Practice for broilers is unlawful as it takes into account irrelevant considerations. It was also argued that the Secretary of State acted irrationally in the conclusions she reached about broiler welfare. Readers who are familiar with public law will appreciate that the legal tests for unreasonableness and irrationality in decision-making are high.

The evidence in the case was that 95% of fast-growing broiler chickens are raised conventionally in large, closed buildings with a maximum stocking density (weight of birds per square metre) of 39kg.⁸ 39kg per square metre is the maximum stocking density permitted by the Broilers Directive.⁹ Fast-growing chickens

reach slaughter weight of 2.2kg in 5-6 weeks.¹⁰ One billion meat chickens are slaughtered in the UK every year, and the value of the UK industry is approximately £2.4 billion.¹¹

The most significant broiler welfare evidence in the case took the form of an RSPCA report entitled: “Eat. Sit. Suffer. Repeat. The Life of a Typical Meat Chicken”, published in 2020.¹² Significantly, this report notes that “...the most commonly used genetics do not adequately safeguard chicken welfare and are not consistent with ensuring the vast majority of chickens live a good life or even have a life worth living.”¹³ In his judgment, Sir Ross Cranston quoted from the executive summary of the RSPCA report, which states that genetic selection of broiler chickens “has been reported to be responsible for contributing to not only the most, but also the most severe, welfare problems seen in broilers today...”.¹⁴ Such welfare issues, as noted in the judgment, include: heart conditions, leg fractures, ulcers and lesions to the feet, as well as reductions in natural behaviours such as foraging, dustbathing and perching.¹⁵

The Secretary of State argued that there is no scientific consensus that fast-growing broiler breeds cannot be kept without detriment to their welfare.¹⁶ For example, some studies suggest that environmental conditions, such as lower stocking densities, and straw bale or step platforms, can improve the welfare of fast-growing breeds.¹⁷ Sir Ross Cranston noted that in forming this view, the Secretary of State had reviewed the relevant literature and taken expert advice. Therefore, his Lordship decided

7 Department for Environment, Food & Rural Affairs, ‘Code of practice for the welfare of meat chickens and meat breeding chickens’ (UK Government, 26 March 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/694013/meat-chicken-code-march2018.pdf>, accessed September 2023

8 *R (The Humane League UK) v Secretary of State for Environment, Food and Rural Affairs* [2023] EWHC 1243 (Admin), para 14

9 Council Directive 2007/43/EC of 28 June 2007 laying down minimum rules for the protection of chickens kept for meat production, Article 3(4), <eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32007L0043>, accessed September 2023

10 *R (The Humane League UK) v Secretary of State for Environment, Food and Rural Affairs* [2023] EWHC 1243 (Admin), para 15

11 *ibid*, para 13

12 RSPCA, ‘Eat. Sit. Suffer. Repeat. The Life of a Typical Meat Chicken’ (RSPCA, 2020), <<https://www.rspca.org.uk/webContent/staticImages/BroilerCampaign/EatSit-SufferRepeat.pdf>>, accessed September 2023

13 *ibid*, page 31

14 *R (The Humane League UK) v Secretary of State for Environment, Food and Rural Affairs* [2023] EWHC 1243 (Admin), para 18

15 *ibid*, paras 19 and 20

16 *ibid*, para 77

17 *ibid*

that the Secretary of State had not acted contrary to her legal duties in preparing the Code of Practice for broiler welfare.¹⁸ It is noteworthy that the RSPCA report takes a different view to the Secretary of State: "While changes to the birds' environment can lead to improvements in welfare, a failure to consider the birds' genetics means that any such improvement in welfare will be, at best, modest."¹⁹

Conclusion

Where the evidence demonstrates that fast-growing broiler breeds experience welfare issues as a consequence of their genetics, it can be argued that these breeds do not meet the legal requirements of the Welfare of Farmed Animal (England) Regulations 2007. When a fast-growing broiler breed cannot be kept without "any" detriment to its welfare, as a consequence of its genotype or phenotype, it would be unlawful for this breed to be kept for farming purposes.

The Humane League has filed an application to appeal the decision.

18 *ibid*, para 102

19 RSPCA, 'Eat. Sit. Suffer. Repeat. The Life of a Typical Meat Chicken' (RSPCA, 2020), page 11, <<https://www.rspca.org.uk/webContent/staticImages/BroilerCampaign/EatSitSufferRepeat.pdf>>, accessed September 2023