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The Use of Wild Animals in Circuses

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Summary

Five countries – Austria, Costa Rica, Croatia, Israel and Singapore – have already implemented a ban on the use of wild animals in circuses. In 2009 Bolivia went one step further and became the first country in the world to ban the use of all animal acts in circuses. However our Government recently stated that it would not be implementing a ban on the use of wild animals in circuses but would introduce a new licensing system instead. It argued that a ban could be challenged in the courts as disproportionate under the Human Rights Act 1998 and under the recent European Services Directive. This Comment assesses the likelihood of a successful legal challenge to a ban. Firstly it analyses the challenges to the Hunting Act 2004 under human rights law and applies the case law by analogy to a ban on wild animals in circuses; secondly, it examines the case law on Article 49 of the EC Treaty (which prohibits restrictions on the free movement of services) as well as the wording incorporated into the new European Services Directive which builds on the Article 49 case law. It concludes that a ban in England will not be unlawful under human rights law or the law of the European Union.

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Could a ban in England on the use of wild animals in circuses be challenged in the courts? A response to the Government's position that a ban would be unlawful

On 22nd June 2011 a commons motion calling for a ban on the use of wild animals in circuses led to a heated debate in the House of Commons which culminated in the MPs unanimously agreeing to direct the Government to introduce a ban from July 2012. This followed the Government's announcement in the previous month that it would not be implementing a ban on the use of wild animals in circuses but would opt for stricter regulation by means of a new licensing system. The Government stated that the risk of a legal challenge, under the EC Treaty and the Human Rights Act 1998, made a ban unworkable. It is here submitted that a ban will not be in breach of human rights law or the EC Treaty and it is hoped that the Government will now review its position and accept the legality of a ban.

The limitations of the Circus Working Group

During the reading of the Animal Welfare Bill both Houses of Parliament sought to include a ban on the use of wild animals in circuses. However the Government advocated that the proposed amendments be withdrawn on the basis that the Animal Welfare Act 2006 (AWA 2006) would be an enabling act permitting secondary legislation to institute a ban once the act was in force. Subsequently, Defra established a Circus Working Group comprised of experts from opposing sides of the debate who collated evidence for review by an academic panel. The academic panel reported their findings to Mike Radford OBE, the chair of the working group. The panel concluded that there was little evidence that the welfare of animals in a travelling circus is any better or worse than other animals kept in captive environments. On the basis of this finding Radford published his report (Radford, 2007) concluding that to introduce a ban by secondary legislation under the AWA 2006 could be subject to a legal challenge in the courts as disproportionate under the Human Rights Act 1998. It is submitted here that due to significant constraints on the Circus Working Group and due to the availability of new scientific evidence it is now possible for the Government to take steps to implement a lawful ban.

The first major constraint on the working group was that its remit extended only to the housing and transportation of wild animals in circuses. Significantly, evidence in relation to

the training and performing of the wild animals was excluded. The intention at the time was that this aspect would be considered by a different group established by the Department for Culture, Media and Sport as it planned to introduce regulations governing all performing animals. Unfortunately nothing appears to have materialised in relation to this. Consequently welfare issues relating to the training and performing of wild animals in circuses was completely excluded from the review. Clearly this provides an incomplete picture and is a significant flaw in the findings of the working group since it is likely that it does compromise the welfare of the animals. A way forward would be for new research to be funded to specifically examine this issue.

The second constraint on the working group was that the Ministers had stated in Parliament that a ban would be on the basis of scientific evidence. Only evidence with a sound scientific base, preferably peer-reviewed published papers, was permissible. Photographic or video evidence was specifically excluded as it was deemed to be open to misinterpretation. This was a major limiting factor since there was little scientific evidence available for the academic panel to review which related specifically to wild animals in circuses. The academic panel were permitted to review scientific data in relation to other animals and apply this by analogy, for example research on the stress levels of livestock being transported to slaughter, but the panel understandably concluded that the experiences of farm animals were very different and therefore this evidence was found to be irrelevant. When the panel concluded that there was little evidence that the welfare of circus animals is any better or worse than other captive animals it meant that there were few relevant studies available for them to review.

New scientific evidence of poor welfare conditions

Significantly, a new piece of scientific evidence has been undertaken since the working group published its report. The first global study of animal welfare in circuses concludes that the welfare of the wild animals is adversely affected by the life they lead (Iossa, G, Soulsbury, C and Harris, S, 2009). The lead researcher, Professor Stephen Harris from Bristol University, observed that

> "It's no single factor ... whether it's lack of space and exercise, or lack of social contact, all factors combined show it's a poor quality of life compared with the wild".

Even compared to zoos, the travelling circuses fare poorly. The study found that on average the wild animals spend 91-99 per cent of their time confined to cages, wagons or enclosures which generally cover just a quarter of the area recommended for zoos. It found that elephants can be shackled by short chains for 12 to 23 hours a day in areas from just 7 to 12 square metres with consequent health problems, such as rheumatoid disorders developing due to long inactivity and confinement. The study analysed the itineraries of 153 European and North American circus trips and found that circuses "only stayed in one location for an average of a week before moving on, with an average of almost 300 kilometres between locations".

One can only speculate as to the effect this study could have had on the findings of the Circus Working Group. With such clear evidence of poor animal welfare and of a nature that was admissible to the panel, it is possible that the panel would have reached a different conclusion. In any event it is clear that the Government could rely on this scientific study to support a ban under the AWA 2006.

The Government's reasons for not introducing a ban

When the Government announced in May 2011 that there would be no ban on the use of wild animals in circuses two reasons were given for this decision: firstly, that a ban may be disproportionate action under the Human Rights Act 1998 and secondly, that a ban may be subject to challenge under the EC Treaty (and the European Services Directive) as an unlawful restriction on the free movement of services. In relation to a challenge under EU law the Government said that court proceedings had been initiated against the Austrian Government in relation to its 2005 ban. These two reasons will now be examined in turn with a view to demonstrating that a ban in England and Wales would be lawful.

A challenge under the Human Rights Act 1998

It is important to distinguish between implementing a ban by secondary legislation and introducing a ban by primary legislation. If the Government seek to use secondary legislation under the enabling provisions of the AWA 2006, then it is possible that a ban may be subject to a challenge in the courts as being disproportionate under the Human Rights Act (HRA 1998) unless new scientific evidence, unavailable to the Circus Working Group, can be relied upon. This is because the Minister can only introduce a ban if it can be shown that it is necessary to promote animal welfare. As already discussed, the new research published in 2009 by Bristol University is significant here. Alternatively the Government (or an animal organisation) may fund such research to be undertaken in the near future. Either way, if scientific evidence can be relied upon to establish that the welfare of wild animals is adversely affected by their use in circuses it will be possible to implement a ban using secondary legislation under the AWA 2006.

However, if the Government implement a ban by means of primary legislation there can be no challenge under the HRA 1998. The Government can take ethical issues into consideration as well as public opinion – both of which are inapplicable to implementation by secondary legislation. An application for judicial review, claiming that the Hunting Act 2004 contravenes the HRA 1998 was taken all the way to the House of Lords and the reasoning of the court in rejecting the appeal provides useful guidance here.

Human rights challenges to the Hunting Act 2004

The conjoined appeals of *R (on the application of Countryside Alliance and others) v Attorney General and another;* and *R (on the application of Countryside Alliance and others) v Attorney General and another,* [2007] UKHL 52; [2008] AC 719 included a challenge to the Hunting Act 2004 on the grounds that it breached Article 8 and Article 1, Protocol 1 of the European Convention of Human Rights and that the Act was inconsistent with article 49 of the EC Treaty. The House of Lords dismissed the appeals satisfied that there was no contravention of the Convention rights or inconsistency with the EC Treaty. It is suggested that the court's reasoning can usefully be applied by analogy to any similar challenge to a ban on the use of wild animals in circuses.

Article 8

Article 8 protects the right to respect for a private and family life and home. It encapsulates cultural lifestyle such as Lapp reindeer herders and gypsy travellers living in caravans (*G and E v Norway* (1983) 35 DR 30 and *Buckley v UK* (1996) 23 EHRR 101). According to Lord Bingham (at para.10) the purpose of Article 8

> is to protect the individual against intrusion by agents of the state, unless for good reason, into the private sphere within which individuals expect to be left alone to conduct their personal affairs and live their personal lives as they choose.

Their Lordships were confident that the ban on hunting with dogs did not come within the scope of Article 8. Lord Bingham observed (at para.15)

> Fox-hunting is a very public activity, carried out in daylight with considerable colour and noise, often attracting the attention of on-lookers attracted by the spectacle.

This he said is clearly far removed from the private sphere that Article 8 seeks to protect. Similarly, wild animals performing in a circus ring is a very public activity and does not come within notions of private life. It also seems unlikely that any claim to protecting a cultural lifestyle would succeed since a ban on the use of wild animals in circuses only affects a small part of a circus' show and does not prevent any circus from continuing to operate using other types of acts – human acts and those involving domesticated animals such as dogs and horses. In fact the majority of circuses in the UK do not use wild animals. Therefore the ban is not an attack on the cultural lifestyle of those who live and work in circuses.

Article 1, Protocol 1

Article 1, Protocol 1 relates to the protection of property providing that "Every natural or legal person is entitled to the peaceful enjoyment of his possessions". Under common law captive wild animals are property. Therefore could a ban on the use of wild animals in circuses be challenged by the owners of the animals as an interference with their property?

A ban would not be a confiscatory measure and so would not constitute a deprivation of possessions. It is probable that any ban would result in those wild animals currently being used in UK circuses being sold to overseas circuses. Consequently deprivation is not at issue here. Instead the circus owners would suffer a loss of control over their property in accordance with Article 1, Protocol 1 which permits a State "to enforce such laws as it deems necessary to control the use of property in accordance with the general interest". What is understood by the phrase 'general interest' is not explicated in Article 1, Protocol 1. It is clear that this general interest requirement relates to the state's justifications and reasons for controlling the use of property. Thus there must be a legitimate aim that justifies the interference. The protection of morals has been found to fall within the concept of 'general interest' and the European Court has left the question of what constitutes a moral to the state's margin of appreciation observing (in *Handyside v UK* (1976) 1 EHRR 737at para.48) that "it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals".

Compromising the welfare of wild animals for the sole purpose of human entertainment is a moral issue. In any event promoting animal welfare can be seen as a legitimate aim in its own right. A combination of the two was accepted by the House of Lords in relation to the Hunting Act. Concurring with the findings of the lower courts, Lord Bingham accepted (at para.40)

> the legislative aim of the Hunting Act is a composite one of preventing or reducing unnecessary suffering to wild mammals, overlaid by a moral viewpoint that causing suffering to animals for sport is unethical and should, so far as is practical and proportionate, be stopped.

This clearly applies to a ban on the use of wild animals in circuses and it is unlikely that the Strasbourg institutions will dispute this legitimate aim. In addition to a legitimate aim there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised and this has been expressed as a 'fair balance' test. Recognising the State's wide margin of appreciation here, Baroness Hale concluded (at para.129)

> protecting wild animals from avoidable compromise to their welfare seems to me to fall well within the general interest and the means chosen to strike a fair balance.

In 2009 an appeal to the European Court of Human Rights was ruled inadmissible (*Friend v UK* application no. 16072/06 and *Countryside Alliance and others v UK* no.27809/08).

A challenge under the EC Treaty

Article 49 of the EC Treaty prohibits restrictions on freedom to provide services within the Community. There are exceptions in Article 46 one of which permits restrictions on the grounds of public policy. However, any rules that hinder the exercise of a fundamental freedom – in this case the free movement of services – must also satisfy the *Gebhard* test (*Case C-55/94 Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-04165 at para.37) and must

i. be applied in a non-discriminatory fashion;
ii. be justified by imperative requirements in the general interest;
iii. be suitable for securing the attainment of the objective which they pursue; and
iv. not go beyond what is necessary in order to attain that objective.

The Austrian ban

In 2005 Austria banned the use of wild animals in circuses. The European Circus Association (ECA) submitted a complaint to the EU Commission that the ban was contrary to the freedom of services within the EU and was therefore in breach of Article 49 of the Treaty. The Commission sent a letter of formal notice to the Austrian authorities that a ban was disproportionate as the public interest of animal welfare could be achieved by less restrictive measures. Subsequently the Commission stated that it did not intend to pursue the inquiry further and the infringement proceedings would be closed. The ECA lodged a complaint to the European Ombudsman that insufficient reasons were given as to why the restriction on the free movement of services was now justified. The Ombudsman found maladministration on the part of the Commission but this was disputed by the Commission.

It is interesting to examine the Ombudsman's findings and the Commission's response as it provides an excellent appreciation of whether a ban in England and Wales would be in contravention of EU law on the free movement of services.

Applying the *Gebhard* test , the ECA argued that the ban was discriminatory since the use of wild animals had been banned in circuses but was still permissible in other settings, for example, on a film set. The Commission stated that the ban applied equally to all circuses – those in Austria as well as those based in other Member States wishing to travel and perform in Austria and consequently the measure was non-discriminatory within the context of Article 49. As regards the second requirement from the *Gebhard* test – that the ban is justified as being in the general interest – the Commission stated that animal welfare is a generally accepted public interest.

Whether the ban was suitable to achieve the aim of protecting the welfare of wild animals in circuses and whether the ban did not go beyond what was necessary to attain that objective (conditions iii and iv in the *Gebhard* test) were identified by the Ombudsman as being inadequately addressed by the Commission. The ECA submitted that there were other less restrictive means available to protect the welfare of wild animals in circuses and therefore the ban was disproportionate. The Commission responded

> "with regard to animal protection, Member States are best placed, given the sensitivity of that subject matter within their respective populations and the fact that this may vary from one Member State to another, to decide on the appropriate measures to apply".

The Ombudsman took the view that the Commission had abdicated its role as 'guardian of the Treaty' in this area because it had failed to express any viewpoint on the issue of proportionality and merely left it to the Member State. It therefore recommended that the Commission evaluate the proportionality of the ban. It is important to appreciate that the Ombudsman was not saying that the ban was disproportionate but merely that the Commission had failed to address this issue and therefore needed to rectify this. The Ombudsman accepted (at para.45)

> it is certainly the case that a particular Member State, enjoying a broad margin of appreciation, can invoke its particular national sensitivities as regards animal welfare to justify to the Commission a particularly high level of protection for animals in circus.

The Commission did not share the view of the Ombudsman on the question of proportionality and whether it should have examined whether less restrictive means of achieving the aim were available to Austria. It reiterated its view that in exercising its discretionary power under Article 226 of the EC Treaty to decide whether or not to pursue a case, Member States are better placed to address the protection of wild animals in circuses.

The European Services Directive

In its reasoning for not introducing a ban, our Government specifically mentioned the new European Services Directive. The Directive was adopted by the European Parliament in 2006 and implemented in the Member States by 2009. It seeks to facilitate the cross-border provision of services by removing legal and administrative barriers. Significantly, in line with Article 49, it permits restrictions on grounds of 'public policy' which is defined in the Directive (at para.41):

> The concept of 'public policy', as interpreted by the Court of Justice, covers the protection against a genuine and sufficiently serious threat affecting one of the fundamental interests of society and may include, in particular, issues relating to human dignity, the protection of minors and vulnerable adults and animal welfare.

That animal welfare is specifically included as a ground of public policy is significant. In addition, the Directive incorporates the Gebhard test stating, at Article 16, that any restrictions on service activity imposed by a Member state must be non-discriminatory; necessary (meaning justified for a legitimate purpose e.g. animal welfare) and proportionate (meaning that it must be suitable for attaining the objective pursued and must not go beyond what is necessary to attain that objective).

Therefore if the Government fears that a ban on the use of wild animals in circuses is disproportionate under the European Services Directive, it is essentially the case law relating to Article 49 that will apply here and as we have seen already the Commission is confident that the ban in Austria is not in contravention of EU law.

On 15 June 2011 the ECA announced that a legal action had been filed against Austria to challenge its ban on the use of wild animals in circuses. It will be interesting to see how the court tackles the question of proportionality under Article 49. The ban may be deemed legal and within Austria's margin of appreciation in line with the view of the Commission; But even if the Ombudsman's approach is followed all Austria needs to do is explain how the use of wild animals in circuses is different, in the context of animal welfare, from the use of wild animals in other settings e.g. on films sets and television. In relation to a ban in England it would be relatively easy for the Government to demonstrate how the use of wild animals in circuses compromises the animals' welfare in ways that are not applicable in other settings. For example, the recent study by Bristol University provides evidence of the adverse effects of constant travel and small enclosures which are less applicable to other captive wild animals.

|Article 49 and the Hunting Act 2004

In the recent challenges to the Hunting Act 2004 (*R (on the application of Countryside Alliance and others) v Attorney General and another;* and *R (on the application of Countryside Alliance and others) v Attorney General and another*, [2007] UKHL 52; [2008] AC 719), the House of Lords took a different approach to tackling restrictions on the free movement of services protected under Article 49. There was some uncertainty in the House of Lords as to whether or not the hunting ban did engage Article 49, but in any event the court decided that the ban was justified. Lord Bingham observed (at para.50) that the hunting ban

> is a measure of social reform, not directed to the regulation of commercial activity, of which any impediment to the intra-Community provision of goods or services is a minor and unintended consequence and which bears more hardly on those within this country than outside it.

Lord Bingham's observations apply equally to any ban on the use of wild animals in circuses which is also a measure of social reform aimed at animal welfare and not the regulation of commercial services.

Where does the Government go from here?

Secondary legislation

If the Government introduces a ban using secondary legislation under the AWA 2006 then evidence is needed to show that the welfare of wild animals is adversely affected by their use in circuses. Animal welfare scientists are vital players here. There is the new research published in 2009 by Bristol University but further research may be useful especially in relation to the effects of training and performing. In addition the Government could agree to broaden the scope of the evidence to be considered, for example, to include expert opinion and not just scientific data. This is particularly pertinent given the nature of scientific empirical evidence since it is very difficult to collect reliable data for such a small number of animals. It would be sensible to allow expert opinion in these circumstances. For example, a former expert adviser to Defra, Raymond Ings, who is a specialist in elephant welfare said

that circuses were “fundamentally unsuited” to keeping elephants, big cats and other wild animals (The Independent, 16 May 2011). The advice of such experts could be especially valuable in providing the evidence needed to permit a ban using the AWA 2006.

Primary legislation

If the Government implements a ban using primary legislation it is submitted here that the ban will not be in contravention of the Human Rights Act 1998 or the European Services Directive. The difficulty is whether the Government will be prepared to use Parliamentary time to pass primary legislation, especially bearing in mind the small number of animals that will be affected by any ban (currently less than 50 animals). It is also probable that these particular animals will not benefit from the ban in any event since they may be sold to overseas circuses. However this is not inevitable. In April 2011 Longleat Safari Park re-homed Anne, a 57-year old arthritic elephant from the Bobby Roberts Super Circus after footage was released of Anne being beaten by circus workers. In any event, it is arguable that there is a wider issue at stake than the welfare of those wild animals currently touring with three circuses in the UK. It is unethical to compromise the welfare of wild animals solely for human entertainment and there is certainly widespread public support for a ban. Of the 13,000 responses to the government consultation published in March 2010 94.5 per cent of the respondents supported a ban and, of course, the fact that MPs unanimously directed the Government to introduce a ban suggests that it is a cause worthy of Parliamentary time.

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