JH/00/30/A

The Scottish Parliament

JUSTICE AND HOME AFFAIRS COMMITTEE

AGENDA

30th Meeting, 2000 (Session 1)

Wednesday 4 October 2000

The Committee will meet at 9.30 am, in Committee Room 3, Committee Chambers, George IV Bridge, Edinburgh.

1. **Convener:** The Committee will choose a new convener.

2. **Item in private:** The Committee will decide whether to consider a draft report on the Protection of Wild Mammals (Scotland) Bill in private at its next meeting.

3. **Budget Process 2001-02:** The Committee will take evidence on the Executive's spending plans for justice at Stage 2 of the Budget process 2001-02 from—

   Jim Wallace MSP, Minister for Justice.

4. **Leasehold Casualties (Scotland) Bill:** The Committee will take evidence on the general principles of the Bill at Stage 1 from—

   Alistair G Rennie, Deputy Keeper, and Mr Ian Davis, Head of Legal Services, Registers of Scotland;

   Dr Eric Clive and John Dods, Scottish Law Commission;

   Brian Hamilton;

   Micheline Brannan, Justice Department, Scottish Executive, and Stuart Foubister, Office of the Solicitor to the Scottish Executive.

5. **Forward Programme:** The Committee will consider its forward programme.

6. **Protection of Wild Mammals (Scotland) Bill (in private):** The Committee will consider its response to evidence taken on the Bill.

Andrew Mylne
Clerk to the Committee, Tel 85206

The following papers are attached for this meeting:

Agenda item 4	
Written evidence from the Royal Institution of Chartered Surveyors in Scotland	JH/00/30/1
Letter from Professor Robert Rennie	JH/00/30/6
Agenda item 5	
Note by the Senior Assistant Clerk on the forward programme	JH/00/30/2
Agenda item 6	
Note by the Assistant Clerk on issues arising from evidence on the Protection of Wild Mammals (Scotland) Bill (private paper)	JH/00/30/3
Opinion of Mike Jones for SCAHD	JH/00/30/4
Extract of David Pannick QC's opinion referred to by Mike Jones QC	JH/00/30/5

Papers not circulated:

Agenda item 3:
Members should refer to the statement on justice expenditure by the Minister for Justice and the subsequent debate in the *Official Report* of the Parliament for 27 September. Members are reminded to bring with them copies of the Justice and Home Affairs Budget report and Scottish Executive response to the report (JH/00/28/9). Members may also wish to bring with them a copy of *Making a difference for Scotland – Spending Plans for Scotland 2001-02 to 2003-04* (copies available from the Document Supply Centre or on the Executive website, http://www.scotland.gov.uk, under Publications.)

The Executive has pointed out that the figure for prisons resources for 2000-01 on page 28 of *Making a Difference for Scotland* should read £249 million rather than £294 million.

Agenda item 4
Members are reminded to bring with them copies of the Bill and Accompanying Documents. Members may also wish to bring along a copy of the *Official Report* of the Justice and Home Affairs Committee meeting on 11 September. Members should also bring with them copies of letters by Brian Hamilton circulated previously (JH/00/28/7). The Scottish Law Commission's Report 165 on Leasehold Casualties is available from Document Supply Centre.

Agenda item 6
Members may wish to bring with them copies of the Bill and Accompanying Documents, together with other papers relating to the Bill previously circulated (see JH/00/30/3).

JUSTICE AND HOME AFFAIRS COMMITTEE

Papers for information circulated for the 30th meeting, 2000

Note on clerks' availability during the recess (members only)

Recent Written Answers on Prisons

Minutes of the 29th Meeting, 2000 JH/00/29/M

Note: Members may wish to be aware that the following SSIs were made on 7 September and come into force on 2 October. These instruments have not been laid before the Parliament and are therefore not subject to any Parliamentary scrutiny. Copies are available on request from the Clerks.

- Act of Adjournal (Criminal Procedure Rules Amendment No. 2) (Human Rights Act 1998) 2000 (SSI 2000 no. 315)
- Act of Sederunt (Rules of the Court of Session Amendment No. 6) (Human Rights Act 1998) 2000 (SSI 2000 No. 316)
- Act of Sederunt (Rules of the Court of Session Amendment No. 5) (Public Interest Intervention in Judicial Review) 2000 (SSI 2000 No. 317)
- Act of Sederunt (Rules of the Court of Session Amendment No. 4) (Applications under s. 1 of the Administration of Justice (Scotland) Act 1972) 2000 (SSI 2000 no. 319)

JH/00/30/1

JUSTICE AND HOME AFFAIRS COMMITTEE

LEASEHOLD CASUALTIES (SCOTLAND) BILL

SUBMISSION FROM ROYAL INSTITUTION OF CHARTERED SURVEYORS IN SCOTLAND

Thank you for your [Alison Taylor's] letter of 22 August 2000, inviting the Royal Institution of Chartered Surveyors in Scotland (RICS) to submit written evidence to the Justice and Home Affairs Committee on the Leasehold Casualties (Scotland) Bill. The Institution very much welcomes the opportunity to contribute to this exercise, having contributed to the Scottish Law Commission's consultation exercise in 1997.

While the RICS in Scotland recognises the comparative rarity of leasehold casualties, the Institution wholeheartedly supports the principles of the proposed Bill. Casualties which remain are anomalous and can be problematic.

Attempting to satisfy both landlords and tenant in the resolution of such an anomalous system is no easy matter. However, the RICS in Scotland believes that the provisions have been well thought through. The Institution has the following brief comments to make.

Section 1

The RICS in Scotland agrees that all leasehold casualties should be abolished provided that compensation is available. We do wonder whether 300 years as a minimum length of lease is correct, or indeed consistent, with other legislative proposals. The Institution does note that research has shown that this length of lease is where casualties occur. We also agree that the matter of casualties should not interfere with modern commercial leases. However, we would argue that there will be few commercial leases which extend beyond 175 years. For the rare cases that do exist, there is provision in Section 3 to refer the matter, in extreme cases, to the Lands Tribunal for Scotland on the matter of compensation which is something which would be clearly understood by commercial landlords.

Section 3

The provisions for compensation seem to have been well considered. It would appear, however, that in some cases they favour the tenant more than the landlord. With regard to the provisions for compensation where casualties are based on rent or rental value, the Bill compensates the landlord for the casualty, but based on the value of the ground rent only, without taking into account the value of any buildings or improvements carried out by the tenant or his predecessors.

On the basis that the tenant was properly advised when he purchased the property, the presence of the casualty and other onerous clauses in the lease will have been taken into account in arriving at its value. The value is quite likely to have been depressed as

a result of the lease conditions and as a likely result of the property being less acceptable to mortgage lenders.

In terms of the Bill, the tenant will only have to pay one casualty, based on the value of the ground rent only, multiplied by a multiplier of 0.75, which, of course, further reduces the figure. The tenant will have been released from the obligation to pay any historic casualties that have not been claimed at the full rental value figures, and any future sale of the property will be totally free of casualty payments and onerous lease conditions, such as irritancy provisions. These measures will noticeably improve the appeal of these properties to the market place, which in turn will likely enhance their value. Accordingly, it could be argued in these cases that the tenant will gain substantially by acquiring a more valuable property, having paid a modest level of compensation to the landlord.

Sections 5 & 6

The RICS in Scotland supports the removal of the right of a landlord to irritate for non-payment and to collect casualties from new tenants who were not leaseholders at the time the casualty fell due to be paid.

Section 7

The Institution supports the inclusion of this section which will prevent a landlord from seeking to preserve their irritancy rights and rights to recover previous tenants' arrears from the current tenant by commencing actions, and seeking to bring them to a conclusion, before the Act comes into force.

Conclusion

Despite our minor concern regarding compensation in relation to casualties which are based on rent or rental value, the RICS in Scotland wholeheartedly supports the principles of this Bill. We would argue that this Bill has universal support and we look forward to seeing it progress through the legislative process to become an Act of the Scottish Parliament.

On behalf of the RICS in Scotland, I hope the above comments are of assistance. Should any clarification of the above points be required, please do not hesitate to contact me.

Lynne Raeside
Head of Policy Unit
28 September 2000

JH/00/30/6

[redacted]

Ballantyne & Copland
Solicitors and Notaries Public

[redacted]

INVESTOR IN PEOPLE

Our Ref: RR/ML

Please ask for: Professor R. Rennie

Your Ref:

Personal email:

Date: 3rd October 2000

Miss Fiona Groves,
Assistant Clerk,
Scottish Parliament,
Room 3.10,
Committee Chambers,
George 1V Bridge,
EDINBURGH EH99 1SP.

Dear Miss Groves,

Leasehold Casualties (Scotland) Bill.

Thank you for your letter of 25 th September. I think I probably have seen the two letters from Brian Hamilton before. The point which he makes is one which I think I covered in a general way when I gave evidence and that is that if a leasehold casualty was collected, then the tenant under the long lease would be able to make a claim on someone. Possibly this would be a Solicitor through the Solicitors' Insurance Indemnity or possibly Mr. Hamilton might have a claim against the Keeper if the Keeper had mistakenly omitted the casualty from the Title Sheet. It may well be that after a number of months, or possibly in some cases years, an Insurance Company or the Keeper pay indemnity. In my evidence to the Committee, however, I had to point out that the parties who would be sued for the casualty payment or indeed, any breach as a result of failure to pay previous casualties, would be the current tenant. Accordingly, the current tenant would be the person who would suffer the strain and anxiety initially.

The other point of the reform of course is to clear up what is an anachronism in our land tenure system. There is no doubt that the Scottish Law Commission viewed the existence of casualties as an anachronism given the fact that casualties in feudal titles were abolished in 1914. I do not think that Mr. Hamilton would necessarily dispute this. I suspect that Mr. Hamilton's main point will be that if the casualties are to be abolished, then the compensation suggested in the draft Bill is hopelessly inadequate.

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JH/00/30/2

JUSTICE AND HOME AFFAIRS COMMITTEE

Provisional Forward Programme Oct – Dec 2000

Note by the Clerk

Attached below is a list of items for consideration by the Committee after the autumn recess. The list incorporates legislative work, as well as items which the Committee has identified as priorities for future business. Items have only been allocated to particular dates where there are particular reasons identifiable at this stage for doing so; the intention is to assign other items from the list to particular dates in due course.

The purpose of circulating this note now is to keep the Committee informed of the likely programme of meetings after the recess. The allocation of business to particular agendas will be taken forward by the Convener and the clerks.

Bills

- The Committee is likely to be asked to take Stage 2 of the Leasehold Casualties (Scotland) Bill (assuming the Bill is agreed to at Stage 1).
- The Executive's ECHR Bill is (according to the legislative programme announcement) expected to be introduced "later in the autumn".

Committee business

- Proposed Protection from Abuse Bill: The clerks will aim to prepare a draft report for consideration by the Committee shortly after the October recess.
- Legal Aid Inquiry: The procurement office are in the process of arranging the appointment of an adviser. It is hoped that an adviser will be in a position to advise on a remit and potential witnesses shortly after the October recess
- Prisons Estate Review: The Committee has indicated that it wishes to take evidence from Tony Cameron, Chief Executive of the Scottish Prison Service on the outcomes of the review once it has been announced. No date is yet known for that announcement.
- Consideration of outstanding petitions (see Annex)

Consultations

Responses to the White Paper on Scottish family law *Parents and Children* are due by 8 December. The Committee may wish to appoint a reporter on this issue, or to take evidence as a Committee.

Dates of future meetings

All details are provisional at this stage, but are included to give an indication of the likely pattern of business. Members are advised to note dates and times in their diaries. Venues (within Edinburgh) are subject to change.

Monday 23 October, 2pm, **Stirling (note venue)**

Draft Stage 1 report on the Protection of Wild Mammals (Scotland) Bill

Tuesday 31 October, 9.30am, Chamber
Draft Stage 2 budget report
Draft Stage 1 report on Leasehold Casualties (Scotland) Bill

Monday 6 November
Some members to visit HMP Barlinnie

Wednesday 8 November, 9.30am, CR 3
Draft report on the Protection from Abuse Bill
Report back from visit to HMP Barlinnie

Tuesday 14 November, 9.30am, Chamber

Monday 20 November, 2.00pm, **Glasgow City Chambers (note venue)**

Tuesday 28 November, 9.30am, Chamber

Wednesday 6 December, 9.30am, CR 3

Tuesday 12 December, 9.30am, Chamber

Wednesday 20 December, 9.30am, Chamber

Winter recess (21 December – 7 January)

Annex: list of outstanding petitions

PE29 by Alex and Margaret Dekker
PE55 by Tricia Donegan
PE111 by Mr Harvey
Subject: road traffic deaths.
Status: Awaiting publication of research by the Department of Environment, Transport and the Regions.

PE89 by Eileen McBride
Subject: non-conviction information on Enhanced Criminal Record Certificates.
Status: Awaiting a response from the Scottish Human Rights Centre.

PE102 by Mr Ward
Subject: sequestration procedure.
Status: Awaiting a response from the Executive.

PE116 by James Strang
Subject: compatibility of Scots law with article 6(1) of the European Convention.
Status: Awaiting a response from Scottish Human Rights Centre, following which petition to be referred to the Crown Office.

PE124 by Contact rights for Grandparents
Subject: rights of access for grandparents to grandchildren.

Status: Awaiting further consideration in context of Executive White Paper on family law.

PE176 by Mr J McMillan
Subject: case for independent body to investigate and prosecute complaints against the Police.
Status: to be considered in context of inquiry into self-regulation of police and legal profession.

PE200 by Mr Andrew Watt
Subject: working methods of the Legal Aid Board particularly in relation to compensation.
Status: Awaiting response from the Scottish Legal Aid Board; possibly to be considered in context of inquiry into legal aid and access to justice.

JH/00/30/4

JUSTICE AND HOME AFFAIRS COMMITTEE

The Protection of Wild Mammals (Scotland) Bill

OPINION OF SENIOR COUNSEL (MIKE JONES QC) FOR SCOTTISH CAMPAIGN AGAINST HUNTING WITH DOGS – 29 September 2000

1. The Protection of Wild Mammals (Scotland) Bill ("the Bill") was introduced in the Scottish Parliament on 1st March 2000.

Relevant Legislation

2. Section 29 of the Scotland Act 1998 provides, *inter alia,* as follows—
"(1) An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament.
(2) A provision is outside that competence so far as any of the following paragraphs apply—
…(d) it is incompatible with any of the Convention rights or with Community law, . ."

3. "The Convention rights" are those set out in
Articles 2 to 12 and 14 of the European Convention on Human Rights ("the Convention")
Articles 1 to 3 of the First Protocol, and
Articles 1 and 2 of the Sixth Protocol,
as read with Articles 16 to 18 of the Convention.[1]

4. Section 101 of the Scotland Act, provides, *inter alia,* as follows—
"(1) This section applies to-
any provision of an Act of the Scottish Parliament, or of a Bill for such an Act,
. . . .
which could be read in such a way as to be outside competence.
(2) Such a provision is to be read as narrowly as is required for it to be within competence, if such a reading is possible, and is to have effect accordingly."

5. Finally, section 2 of the Human Rights Act 1998 provides as follows—
"(1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any-
(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,
(b) opinion of the Commission given in a report adopted under Article 31 of the Convention,
(c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or
(d) decision of the Committee of Ministers taken under Article 46 of the Convention,

[1] Scotland Act 1998, section 126(1); Human Rights Act 1998, section 1(1).

whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that questions has arisen.

Scope of this Opinion

6. I am asked to express my opinion on the compatibility of the Bill with the Convention rights. I have considered, in particular, the rights and freedoms protected by Article 5, 6, 8, 11 and Article 1 of the First Protocol, and I have taken into account the terms of the "response to Protection of Wild Mammals (Scotland) Bill" by the Scottish Countryside Alliance ("the SCA"). I have been provided with a copy of an Opinion by David Pannick QC and others on the compatibility with the Convention of the Wild Mammals (Hunting With Dogs) Bill (" the English Bill").

Article 8

7. In Part 6 of their response, the SCA make the following assertions—
"6.1 The banning of hunting in Scotland would unnecessarily restrict the personal freedoms and rights of minority interests who wish to pursue this activity. The SCA has sought expert legal advice which has shown that a ban on hunting with dogs would, if enacted, be incompatible with the ECHR.

"6.5 The effect of enacting the proposed ban will be to prevent individuals and local communities from participating in a social and recreational activity. It will also prevent landowners on whose property hunting presently takes place from using their home and private land as they wish. In rural Scotland hunting is strongly identified with the ethos of local communities. To ban individuals from hunting on private land infringes their right to respect for the privacy of their own homes and lands. It infringes their right to respect for their private lives, in particular their freedom to choose and engage in recreational activity."

8. Article 8 of the Convention is in these terms—
"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

9. Applying the terms of Section 101 of the Scotland Act, it is necessary, first, to identify the provisions that are said to be outside competence. Clause 1 of the Bill reads as follows:-

"(1) A person must not hunt a wild mammal with a dog.
(2) A person who deliberately contravenes subsection (1) commits an offence.

(3) An owner or occupier of land who permits another person to enter or use it to hunt in contravention of subsection (1) commits an offence.
(4) An owner or keeper of a dog who permits another person to use it to hunt in contravention of subsection (1) commits an offence.
(5) A person who owns or keeps one or more dogs intending any of them to be used to hunt in contravention of subsection (1) commits an offence."

Respect for the home

10. The SCA contend that a prohibition on hunting a wild mammal with a dog, or on permitting another person to enter or use land to hunt, is a violation of the right to respect for a person's home. In my opinion, that proposition is unsound. Reading the word "home" in its context, "respect for . . . private and family life" and "correspondence" it would be surprising if it were intended to encompass the open spaces on which hunting with dogs takes place. I have found no material falling within the sources specified in section 2 of the Human Rights Act 1998 to suggest that the word "home" should be given the meaning contended for by the SCA. On the contrary, in *Pentidis v. Greece*[2] the Commission considered that the concept of "home" was "inapplicable to places which are freely accessible to the public and which are used as premises for activities which do not involve matters relating to the private sphere of the participants." In my opinion, Clause 1 of the Bill is not incompatible with the right to respect for a person's home.

Private life

11. The SCA go on to make this assertion – "To ban individuals from hunting on private land . . . infringes their right to respect for their private lives, in particular their freedom to choose and engage in recreational activity."

12. In my view, to determine the validity of that proposition, it is necessary first to ask whether or not the right asserted by the SCA – to hunt a wild mammal with a dog - "falls within the scope of the concept of "respect" for "private life" set forth in Article 8 of the Convention".[3]

13. Of the phrase "private life", the European Commission of Human Rights ("the Commission") has said this—
"The right to respect for "private life" is the right to privacy, the right to live as far as one wishes, protected from publicity . . . however the right to respect for private life does not end there. It comprises also, to a certain degree, the right to establish and develop relationships with other human beings especially in the emotional field, for the development and fulfilment of one's own personality."[4]

[2] 24 EHRR CD 1, para. 68.
[3] *Botta v. Italy* (1998) 26 EHRR 241 at para. 31.
[4] *X. v. Iceland* DR 5, pp. 86-87.

14. More recently, in *Botta v Italy*[5], the European Court of Human Rights ("the Court") expressed this view – "the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings".

15. In my opinion, it is clear that prohibiting an individual from hunting a wild mammal with a dog does not interfere with that person's right to privacy, in the narrow sense. Nor, in my opinion, does such a prohibition have "for object or effect the prevention of [a person's] establishing with other persons the "relationships of various kinds, including sexual", necessary "for the development and fulfilment of his own personality".[6] When one has regard to the activity that Clause 1(1) of the Bill seeks to proscribe, it is of a type indistinguishable, in my view, from the freedom to keep a dog, a right which is not secured by Article 8.[7] In the words of the Commission—

"The Commission cannot, however, accept that the protection afforded by Article 8 of the Convention extends to relationships of the individual with his entire immediate surroundings, in so far as they do not involve human relationships and notwithstanding the desire of the individual to keep such relationship within the private sphere.

No doubt the dog has had close ties with man since time immemorial. However, given the above consideration, this element alone is not sufficient to bring the keeping of a dog into the sphere of private life of the owner. It can be further mentioned that the keeping of dogs is by the very nature of that animal necessarily associated with certain interferences with the life of others and even with the public life."[8]

16. It may be argued that, where an individual gathers together with one or more others to hunt a wild mammal with a dog, he is thereby exercising the right to develop his personality in his relations with other human beings.

17. In my opinion, in such circumstances, the activity ceases to be confined to the individual's private life, and loses the protection of Article 8 for that reason. "[T]here are limits to the private sphere. While a large proportion of the law existing in a given State has some immediate or remote effect on the individual's possibility of developing his personality by doing what he wants to do, not all of these can be considered to constitute an interference with private life in the sense of Article 8 ... the claim to respect for private life is automatically reduced to the extent that the individual himself brings his private life into contact with public life or into close connection with other protected interests."[9] "Whether . . . an activity falls within the

[5] *supra*; at para. 32.
[6] Op. Com. 1 March 1979, *Van Oosterwijck* Case, paras. 51-52. Publ. Court B., Vol 36 pp 25-26.
[7] *X. v. Iceland*; *supra*.
[8] Dec. Admin. Com. Ap. 6825/74; D&R 5 p. 86 (87).
[9] *Brüggemann and Scheuten v. Germany* (1981) 3 EHRR 244, at para. 56.

concept of private life or not must be judged on the basis of the nature of the activity itself."[10]

18. In my view, two or more persons hunting a wild mammal with a dog is a public rather than a private activity. As the SCA themselves say, hunting involves the participation of "individuals and communities" in a "social and recreational activity".[11]

19. Further, in my opinion, an individual who hunts a wild mammal with a dog, whether alone or with others, brings himself "into close connection with other protected interests". It is clear that the concept of "other protected interests" is broader than the rights and freedoms protected by the Convention. In *Brüggemann,* the Commission regarded the unborn child as having interests that were protected by provisions other than the Convention rights. It held that the existence of these interests meant that "Article 8(1) [could not] be interpreted as meaning that pregnancy and its termination are, as a principle solely a matter of the private life of the mother." In this country, there is a long tradition of the State's having an interest in the conservation of wildlife, and the prevention of cruelty to animals. An underlying premise of the Bill is that hunting with dogs causes unnecessary suffering to mammals. In these circumstances, therefore, it cannot be said that hunting wild mammals with dogs is "solely a matter of the private life" of the hunter.

Article 8(2)

20. If I am wrong so far, and if Clause 1(1) will interfere with a right protected by Article 8(1), it is necessary to consider whether not such interference is justified by reference to Article 8(2).

21. State interference in the exercise of these rights is permissible where interference (i) is in accordance with the law; and (ii) is necessary in a democratic society in the interests of, *inter alia,* the protection of morals. To satisfy the first of these requirements "the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case." Further, the law must be "formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."[12] In my view, Clause 1 of the Bill gives an adequate indication of the applicable legal rules, and it meets the test of sufficient precision.

22. Interference will be held to be necessary in a democratic society in the interests of the protection of morals if it corresponds to a pressing social need and is

[10] *Tsavachidis v. Greece* Application No. 28802/95, the Commission's Report, para. 47, 28th October 1997, unreported.
[11] Response to the Bill, paragraph 6.5.
[12] *Malone v. UK* (1984) 7 EHRR 14 at para. 70; *Sunday Times v.UK* (1979-80) 2 EHRR 245 at para. 49.

proportionate to the legitimate aim (here, the protection of morals) pursued.[13] The reasons given to justify the interference must be relevant and sufficient.[14]

23. When exercising its supervisory jurisdiction in this field, the Court gives the domestic legislator a margin of appreciation. Lord Hope of Craighead has explained the doctrine of the "margin of appreciation" in this way—

"[It] is a familiar part of the jurisprudence of the European Court of Human Rights. The European Court has acknowledged that, by reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed to evaluate local needs and conditions than an international court. . . . Although this means that, as the European Court explained in *Handyside v. United Kingdom* (1976) 1 E.H.R.R. 737, 753, para. 48, "the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights," it goes hand in hand with a European supervision. The extent of this supervision will vary according to such factors as the nature of the Convention right in issue, the importance of that right for the individual and the nature of the activities involved in the case.

This doctrine is an integral part of the supervisory jurisdiction which is exercised over state conduct by the international court. By conceding a margin of appreciation to each national system, the court has recognised that the Convention, as a living system, does not need to be applied uniformly by all states but may vary in its application according to local needs and conditions. This technique is not available to the national courts when they are considering Convention issues arising within their own countries. But in the hands of the national courts also the Convention should be seen as an expression of fundamental principles rather than as a set of mere rules. The questions which the courts will have to decide in the application of these principles will involve questions of balance between competing interests and issues of proportionality. In this area difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention. This point is well made at p. 74, para. 3.21 of *Human Rights Law and Practice* (1999), of which Lord Lester of Herne Hill and Mr. Pannick are the general editors, where the area in which these choices may arise is conveniently and appropriately described as the "discretionary area of judgment." It will be easier for such an area of judgment to be recognised where the Convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified. It will be easier for it to be recognised where the issues involve questions of social or economic policy, much less so where

[13] *Handyside v. UK* (1979-80) 1 EHRR 737 at para. 49.
[14] *Sunday Times v. UK; supra* at para. 62.

the rights are of high constitutional importance or are of a kind where the courts are especially well placed to assess the need for protection."[15]

24. Amongst the "needs and conditions" referred to by Lord Hope are "the requirements of morals". Not only does the Court regard state authorities as being in a better position than the international judge to evaluate the exact content of these requirements, it sees the state as better able to determine "the "necessity" of a "restriction" or "penalty" intended to meet them. . . . [I]t is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of "necessity" in this context."[16] Applying that approach to the domestic domain, it is for Parliament in its discretionary area of judgement, rather than the courts, to decide the requirements of morals and the necessity of restrictions or penalties to meet them.

25. In my view, if Clause 1 can properly be regarded as interfering with an Article 8(1) right, it is within Parliament's discretion to decide, on the evidence before it and informed by public debate, whether or not such interference is necessary in the interests of the protection of morals.

26. Further, in my opinion, if Parliament decides that hunting wild mammals with a dog should be banned on moral grounds, the Bill meets the test of proportionality. The prohibitions and penalties are in line with similar, current legislation and are, in my view appropriate.[17]

27. In summary, I am of opinion that—
the Bill does not interfere with any right guaranteed by Article 8(1), but if it does, it is within Parliament's discretionary area of judgment to interfere.

The First Protocol, Article 1

28. In paragraphs 6.8 and 6.9 of their response, the SCA say this—
"6.8 The Bill would also have implications for the property rights of individuals. . . . [A] ban will render dogs kept for hunting valueless . . . In addition it would have a negative impact on the rural economy and lead to loss of jobs without creating any alternative employment.

The Bill contains no provision for compensation to be paid for the restriction on landowners' use of their land or to dog owners for the reduction in the value and utility of their dogs. Under the European Convention great weight is placed on the importance of compensation as a means of balancing deprivation or restriction of property rights. The lack of provision for compensation, when the Bill will impose a particular burden on certain individuals, indicates that the legislation does not strike a proper balance."

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[15] *R v DPP, ex parte Kebilene* [1999] 3 WLR 972, at pp. 993-994.
[16] *Handyside v. UK* (1979-80) 1 EHRR 737 at para. 48.
[17] See e.g. the Deer (Scotland) Act 1959.

29. Article 1 of the First Protocol provides as follows—
"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

30. The Court has analysed Article 1 of First Protocol in this way—
"Article 1 (P1-1) in substance guarantees the right of property . . . In its judgment of 23 September 1982 in the case of Sporrong and Lönnroth, the Court analysed Article 1 (P1-1) as comprising "three distinct rules": the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest . . . The Court further observed that, before inquiring whether the first general rule has been complied with, it must determine whether the last two are applicable . . . The three rules are not, however, "distinct" in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule."[18]

Control of the use of property

31. The SCA's complaint that the effect of the Bill will be to restrict landowners' use of their land and the utility to owners of their dogs gives rise to considerations that fall under the third rule. The particular question to be addressed is whether or not such control over the use of property is in accordance with the general interest. In the different but related context of deprivation of property, the Court has said:-

"Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is "in the public interest". Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment both of the existence of a problem of public concern warranting measures of deprivation of property and of the remedial action to be taken . . . Here, as in other fields to which the safeguards of the Convention extend, the national authorities accordingly enjoy a certain margin of appreciation.

[18] *James v. UK* (1986) 8 EHRR 123 at para. 37.

Furthermore, the notion of "public interest" is necessarily extensive. In particular, as the Commission noted, the decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ widely. The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is "in the public interest" unless that judgment be manifestly without reasonable foundation."[19]

32. Applying these words to the domestic context, Parliament has a wide discretion to determine whether or not any control of the use of property that the Bill will entail is "in the general interest" within the meaning of Article 1 of the First Protocol. It could only be said to have to acted outside its legislative competence, in my view, if its determination of that issue in favour of control were "manifestly without foundation".

Compensation – Control of Use

33. In paragraphs 6.8 and 6.9 of their response, the SCA argue that the absence of compensation provisions in the Bill "indicates that the legislation does not strike a proper balance".

34. Assistance on this issue can be gained from the case of *Baner v. Sweden*[20] The applicant complained that, as a result of the legislation concerning the right of the public to fish with hand-held tackle in his waters without the payment of compensation, there was a breach of Article 1 of Protocol No. 1 to the Convention. The applicant submitted that the interference with his right of property must be characterised as a "deprivation of possessions" and not as "control of use" of his property, and that, as he received no compensation for this deprivation of possessions, there was no reasonable proportion between the public interest pursued and the protection of his fundamental rights.

35. The Commission held, *inter alia,* as follows—
"Legislation of a general character affecting and redefining the rights of property owners cannot normally be assimilated to expropriation even if some aspect of the property right is thereby interfered with or even taken away. There are many examples in the Contracting States that the right to property is redefined as a result of legislative acts. Indeed, the wording of Article 1 para. 2 (Art. 1-2) shows that general rules regulating the use of property are not to be considered as expropriation. The Commission finds support for this view in the national laws of many countries which make a clear distinction between, on the one hand, general

[19] *James; supra*, para. 46.
[20] (1989) 60 DR 128.

legislation redefining the content of the property right and expropriation, on the other."[21]
….It follows from the case-law of the Convention organs that as regards deprivation of possessions there is normally an inherent right to compensation. . . . However, in the Commission's view such a right to compensation is not inherent in the second paragraph. The legislation regulating the use of property sets the framework in which the property may be used and does not, as a rule, contain any right to compensation. This general distinction between expropriation and regulation of use is known in many, if not all, Convention countries.

This does not exclude that the law may provide for compensation in cases where a regulation of use may have severe economic consequences to the detriment of the property owner. The Commission is not required to establish in the abstract under which circumstances Article 1 (Art. 1) may require that compensation be paid in such cases. When assessing the proportionality of the regulation in question it will be of relevance whether compensation is available and to what extent a concrete economic loss was caused by the legislation."[22]

36. Whether or not compensation should be paid in control of use cases, therefore, is to be determined by the legislator, on the relevant evidence. The Commission has indicated that matters properly to be taken into account include the following—

The degree of interference created by the provision;
The importance of the "general interest" that is being protected by the interference;
Whether any direct loss of income will result from the reform;
Whether a specific and concrete reduction in the value of property could result from the legislation.

37. Even assuming that some theoretical loss in value of property could be established, the Commission expressed themselves unable to find that such a loss caused by general legislation must necessarily be compensated on the basis of Article 1 of Protocol No. 1.

38. In this field too, there is a wide margin of appreciation.[23] Consequently, in my opinion, whether or not the legislation strikes "a proper balance" is a matter to be determined by Parliament, within its wide discretion, on the whole evidence before it.

Compensation – Loss of Jobs

39. Article 1 of the First Protocol guarantees the right to peaceful enjoyment of a person's possessions. I know of no instance in which it has been held that a job is a

[21] *Baner; supra*, para. 5; see also *Pinnacle Meat Processors Company & others v. UK* App. No. 33298/96, 27 EHRR CD 217.
[22] *Baner; supra* para. 6.
[23] *Baner; supra* para. 6.

possession within the meaning of Article 1, and I agree with and adopt the reasons advanced by Mr Pannick and his colleagues in support of the view that Article 1 of the First Protocol does not require compensation for the loss of any job that may arise as a result of this proposed legislation.

The Opinion of David Pannick QC and Others

40. So far in this Opinion, I have addressed only the Convention rights issues specifically raised by the SCA. In their Opinion, Mr Pannick and others consider the compatibility of certain provisions of the English Bill with the Convention rights. I have considered their views on Articles 5, 6, 8 and 11, and on the issue of "deprivation of property" under Article 1 of the First Protocol.

41. I agree with the views expressed in paragraphs 22 to 27, inclusive, on the considerations relevant to "deprivation of property". In my opinion, the disqualification provisions of the Bill are compatible with Article 1 of the First Protocol.

42. In my view, Clause 5(6) of the Bill in compatible with Article 6(2) of the Convention. I agree with and adopt the reasoning of Mr Pannick and others on this issue at paragraphs 36 to 41, inclusive.

43. For the reasons given at paragraphs 43 and 44 of that Opinion, I agree that the right to freedom of association is irrelevant in the context of the Bill.

Conclusion

44. In my opinion, two different questions arise in this case, in determining whether or not a provision of the Bill is within the legislative competence of Parliament. The first question is whether or not a particular provision will interfere with a Convention right. That is a question of law, to be determined in the context of certain relevant facts that are capable of being relatively easily ascertained. The second question only arises where such interference will occur; it is whether or not a decision by Parliament to enact the provision falls within its discretionary area of judgment. In my view, that question is, in the first instance, one for Parliament itself, and can only be answered on a consideration of the whole evidence before it. The courts will interfere only if they are persuaded that Parliament has strayed outside the boundaries of its discretion.

45. For the reasons given, I am of opinion that the provisions of the Bill interfere with the rights guaranteed by Article 1 of the First Protocol, but no others. In my view, it falls to Parliament to consider the whole evidence and decide on whether or not such interference can be justified and, if so, whether the relevant provisions of the Bill meet the proportionality test. At this stage, all that the lawyers can properly and usefully do is advise on the factors that should be taken into account by Parliament in reaching its decision.

JH/00/29/M

The Scottish Parliament

JUSTICE AND HOME AFFAIRS COMMITTEE

MINUTES

29th Meeting, 2000 (Session 1)

Wednesday 27 September 2000

Present:

Scott Barrie
Phil Gallie
Gordon Jackson (Deputy Convener)
Maureen Macmillan
Mrs Lyndsay McIntosh
Euan Robson
Roseanna Cunningham (Convener)
Christine Grahame
Kate MacLean
Michael Matheson
Pauline McNeill

Also present: Fergus Ewing, Alex Fergusson, Mike Rumbles.

The meeting opened at 9.34 am.

1. **Items in private:** The Committee agreed to take item 7 in private and to consider, in private at its next meeting, how to report to the Rural Affairs Committee on the Protection of Wild Mammals (Scotland) Bill.

2. **Lord Advocate and Solicitor General:** The Committee took evidence on the Crown Office's recent performance and future plans, and on Stage 2 of the budget process 2001-02, from—

   Colin Boyd QC, the Lord Advocate, and Neil Davidson QC, Solicitor General for Scotland.

3. **Protection of Wild Mammals (Scotland) Bill:** The Committee took evidence on enforcement aspects of the Bill at Stage 1 from—

   Allan Murray, Director, Simon Hart, Campaigns Director, Peter Watson, Solicitor, and Paul Cullen QC, Scottish Countryside Alliance.

4. **Subordinate Legislation:** The Committee took note of the Human Rights Act 1998 (Jurisdiction) (Scotland) Rules 2000 (SSI 2000/301).

5. **Domestic Violence:** Maureen Macmillan reported on her recent meetings with the Minister for Justice and Deputy Minister for Communities and with Executive officials. The Committee agreed to proceed with the preparation of a report outlining its proposal for a Committee Bill.

6. **Petition:** The Committee considered written evidence on petition PE102 by James Ward from the Law Society of Scotland, the Accountant in Bankruptcy and Money Advice Scotland. The Committee agreed to refer the petition to the Executive asking whether it would consider improving the information available to individuals facing sequestration and whether it is satisfied that the current law is compatible with the European Convention on Human Rights.

7. **Protection of Wild Mammals (Scotland) Bill (in private):** The Committee considered the evidence taken and agreed to consider at its next meeting its conclusions on the enforcement aspects of the Bill.

The meeting closed at 12.02 pm.

Andrew Mylne, Clerk to the Committee

Extract of David Pannick QC's opinion referred to by Mike Jones QC (JH/00/30/4)

9 EHRR 1 at para. 51, where the ECtHR considered the forfeiture of gold coins illegally imported into the UK under the third rule in Article 1. The issues for the court to determine will be whether the forfeiture was lawful,
whether it was in the public interest, whether a reasonable or fair balance was struck between the public interest and individual rights and whether the
general principles of international law were respected.

23. With regard to the requirement of lawfulness, this has been interpreted in a similar way to the requirement of "in accordance with the law" as discussed in paragraph 14 above in the context of Article 8. For the reasons
given there, the court should be satisfied with the "lawful" quality of the Bill. In some circumstances, the ECtHR has also required the deprivation of property to be accompanied by procedural guarantees: Hentrich v France (1994) 18 EHRR 440. Clause 4 of Bill establishes that the offences are triable summarily. Therefore, the full range of safeguards available in the magistrates' courts will be in place. Thus any such requirement should be satisfied.

24. The ECtHR has stated that: "Under the system of protection established by the Convention, it is ... for national authorities to make the initial assessment both of the existence of a problem of public concern warranting measures of deprivation of property and of the remedial action to be taken. Here ... the national authorities enjoy a certain margin of appreciation. Furthermore, the notion of 'public interest' is necessarily extensive. In particular ... the decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ. The Court,
finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is in the 'public interest' unless that judgment is manifestly without reasonable foundation":
James v UK at para. 46.

25. As we have said in paragraph 11 above, although the doctrine of the margin of appreciation will be inapplicable under the HRA, the domestic courts will afford Parliament a discretionary area of judgment in assessing questions of the public interest. In our view, a court should consider the Bill to be in the public interest, as assessed by Parliament following extensive public and political debate. It should be stressed in this context
that a forfeiture order under clause 4 will be made only where a person has by definition committed an offence, i.e. has chosen to flout the law enacted
by Parliament. It is a common feature of legislation which creates a criminal offence also to provide for forfeiture of property which is to be used in connection with, or has been obtained as a result of, that offence: this clearly promotes the public interest that criminal laws should be obeyed.

26. A court should also be satisfied that the Bill achieves a "fair balance"
between the general interest of the community and the requirements of the protection of the dog owner's right not to be deprived of their property. The Bill is a reasonable and well-balanced measure which secures its intended aim. A significant consideration is that there are no alternative measures which would effectively bring hunting wild mammals with dogs to an end. The ECtHR would also take into account the availability of compensation: "[t]he taking of property without payment of an amount

reasonably related to its value would normally constitute a disproportionate
interference which could not be considered justifiable under Article 1. Article 1 does not, however, guarantee a full right to compensation in all circumstances": James v UK at para. 54. A total lack of compensation will only be considered justifiable in exceptional circumstances: Holy Monasteries v Greece (1995) 20 EHRR 1 at para. 70. Given that the intention of the forfeiture provisions is to punish the offender, in our view this will amount to an exceptional circumstance capable of justifying the State's
refusal to pay any compensation. Indeed, it could be regarded as falling with the final limb of Article 1 of Protocol No.1, which permits States to secure the payment of penalties. As we have noted in paragraph 25 above, it is a common feature of criminal legislation to include provisions for forfeiture after a conviction. They can be regarded as elements of the punishment for the offence committed. Finally in this context, we repeat that the forfeiture provisions should be considered under the third (not the
second) rule in Article 1: As we mention in paragraph 32 below, the Strasbourg case law establishes that there is no general right to compensation under the third rule (control of the use of property).

27. The requirement of respect for the principles of international law is only applicable to deprivations affecting the property of non-nationals (James) and is therefore likely to be irrelevant in the present context.

28. Accordingly, in our view, the forfeiture provisions in clause 4 of the Bill should be considered to be compatible with Article 1 of Protocol 1.

Control of use property

29. First, we will consider the control of the use of land, horses and dogs.

The Bill clearly seeks to limit the manner in which land, horses and dogs may be lawfully used. Accordingly, the third rule is applicable and the Bill
must satisfy the conditions set out above and discussed in relation to clause 4 of the Bill.

30. In our view, for the reasons given above, the measures should be considered to be lawful, to pursue legitimate aims, the protection of morals
and the prevention of cruelty, and to be proportionate to achieve those aims.

31. The loss of a sporting right was classified as a control of use, rather than a deprivation, in Baner v Sweden (1989) 60 DR 128, where the applicant complained that he had lost a potential opportunity to make profitable use of his former exclusive right to fish through legislation which permitted the public to fish with hand-held tackle in waters such as those belonging to him. (The compulsory transfer of hunting rights over land was held to constitute an interference with the enjoyment of rights of ownership over property, in the rather unusual circumstances of Chassagnou v France 29th April 1999 at para. 74, where although the applicants were opposed to hunting on ethical grounds they were obliged to tolerate the presence of armed men and gun dogs on their land every year.) In the circumstances of the present case, the Bill should be classified as a control of sporting rights. Thus the requirements of "lawfulness" and "the general interest" (a less stringent test than necessity in Article 8(2)) are applicable.

32. As stated in paragraph 14 above in the context of Article 8(2), the Bill
should be considered to be "in accordance with the law". A court should also
be satisfied that it is in the general interest and proportionate. It is argued by some that the prohibition on hunting certain species of wildlife

be expressed by landowners and farmers: for example, clause 1(2) provides that it is only the owner or occupier of land who knowingly permits another person to enter or use it to hunt a wild mammal with a dog who commits an offence. Only hunting by the use of dogs will be banned; other forms of hunting, such as shooting or humane trapping, will be unaffected. Only the hunting of wild mammals with dogs will be prohibited; the use of dogs for other activities, such as draghunting, will be unaffected.

18. In our view, even if Article 8(1) is engaged, any interference with the right to respect for private life is justified pursuant to Article 8(2).

Article 1 of Protocol No.1

19. Article 1 of Protocol No.1 provides:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

20. The ECtHR has stated that Article 1 contains three rules:

The first rule, which is of a general nature, announces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph.

The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph.

The third rule recognises that States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph: Sporrong v Sweden (1983) 5 EHRR 35 at para. 61.

The three rules are not, however, 'distinct' in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule: James v UK (1986) 8 EHRR 123 at para. 37.

21. When a bill to ban hunting with dogs introduced by Michael Foster MP in 1997 ('the Foster Bill') was considered in Committee in the House of Commons, it was argued that a prohibition of hunting on private estates amounted to an uncompensated expropriation of (or at least an excessive interference with) the valuable right to use one's property as one wishes. It may also be suggested that the State is interfering with three other categories of alleged "possessions": (a) sporting rights; (b) horses, dogs and inanimate objects used in hunting; and (c) jobs. These "possessions" will be considered under the following headings: (i) deprivation of property and (ii) control of use of property.

Deprivation of property

22. The forfeiture and disqualification provisions contained in clause 4 of the Bill (which applies to dogs and any objects designed to be used for the purpose of hunting) arguably amount to the deprivation of property. However, where the deprivation of property forms a constituent element of a procedure for the control of the use of the property in question, it will be examined under the third rule in Article 1 and not the second rule (i.e. as control of use cases rather than deprivation cases): for example, AGOSI v UK (1987)

in such situations. Thirdly, the modern practice, certainly in Western European states, is to provide for job losses through social security and redundancy payment schemes. Finally, we do not consider that there is a right to a job as a "possession" within the meaning of Article 1 of Protocol
No.1: there is nothing in the case law to suggest that it is. The present context can be distinguished from cases where it has been held that a licence to carry on an economic activity constitutes a "possession".
Article 6
36. Article 6(2) provides:
"Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."
37. Clause 2(2) of the Bill, by way of example, puts the burden on the person charged under clause 1(2), (3), (4) or (5) of establishing the defence, that at the time of the alleged offence he reasonably believed an exception in clause 2(3), (4) or (5) would apply. The relevant clauses are set out in full in the annex. The following analysis applies equally to other exceptions in the Bill as it does to clause 2(2).
38. Lord Hope analysed 'reverse-onus' clauses in Kebilene at pp.991-992. The
first step is to determine which of the legislative techniques to which Lord
Hope referred has been used. In our view, clause 2(2) falls within the third
category of statutory presumptions which transfer the "persuasive" burden:
"The third category of provisions which fall within the general description of reverse onus clauses consists of provisions which relate to an exemption or proviso which the accused must establish if he wishes to avoid conviction
but is not an essential element of the offence. In Reg v Edwards [1975] QB 27 a provision of this kind was held to impose a burden of proof on the applicant to establish on the balance of probabilities that he had a licence
for the sale of intoxicating liquor. Lawton LJ said, at pp. 39-40, when giving the judgment of the court that this exception to the fundamental rule
that the prosecution must prove every element of the offence charged was limited to offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with special qualifications or with the licence or permission of specified authorities. In Reg v Hunt (Richard) [1987] AC 352, 375 Lord Griffiths emphasised the special nature of these provisions when he said that he had little doubt that the occasions upon which a statute will be construed as imposing a burden of proof upon a defendant which did not fall within this formulation are likely to be exceedingly rare.
These provisions may or may not violate the presumption of innocence, depending on the circumstances" [992G-993B].
39. Lord Hope then referred to the decision of the ECtHR in Salabiaku v France (1988) 13 EHRR 379 for guidance:
"Presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the contracting states to remain within certain limits in this respect as regards criminal law...Article 6(2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires states to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence" [para. 28].
40. Lord Hope then proceeded to consider whether such limits were exceeded to the detriment of the applicants adopting a three stage test:

(1) what does the prosecution have to prove in order to transfer the onus to the defence?
(2) what is the burden on the accused - does it relate to something which is likely to be difficult for him to prove, or does it relate to something which is likely to be within his knowledge or to which he readily has access?
(3) what is the nature of the threat faced by society which the provision is designed to combat?

41. In our view, for the following reasons, clause 2(2) is confined within reasonable limits and thus should be considered to be compatible with Article 6(2). First, the prosecution must prove, beyond a reasonable doubt, for example, that the person charged knowingly permitted another person to enter or use his land to hunt a wild mammal with a dog (clause 1(2)). There is no presumption in favour of the prosecution in relation to the constituent elements of the offence, including the mental element ('mens rea'). This will be a difficult standard to meet. Knowledge is clearly a higher standard, requiring more cogent evidence, than reasonable suspicion, for example, a standard which may itself be sufficient in certain circumstances (see Lord Hope at 999B-G). Secondly, it is a defence for the person charged to demonstrate that he reasonably believed such a person intended, for example, to use a single dog to retrieve a rabbit or hare that has been shot (clause 2(5)). As with many such clauses, it is reasonable, if a person wishes to bring himself within a statutory exception to what would otherwise be an offence, to require that person to prove that the facts fall within the exception. It is difficult to form a view in the abstract as to the reasonableness of the burden which has been placed on the accused, since this is obviously dependent on the circumstances of the individual case. However, we consider that the accused will be in the best position to prove facts which will be in his own knowledge. Thirdly, as has been discussed in paragraphs 15 and 16 above, the threat in this case is the harm to public morals and cruelty to animals. In the circumstances, we are of the view that clause 2(2) in particular strikes the right balance between the needs of society and the presumption of innocence.

Article 11

42. Article 11(1) provides:

"Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests."

43. In our view, the right to freedom of association in Article 11 is irrelevant in the present context. Article 11 governs the right to associate for the purposes of expressing one's views rather than (for example) for social purposes: Anderson v UK (1998) 25 EHRR CD 172. It has been held to apply to such bodies as political parties, religious organisations and professional organisations. Clearly, at the heart of the present issue is the asserted right to use dogs to hunt wild mammals and not to associate to discuss the merits of such action.

44. Nor would there be any interference under the Bill with freedom of assembly or association. What would be banned is what the assembly could then do. But the criminal law already prohibits groups of people from doing certain things. That is not an interference with freedom of assembly or

association. In any event, any interference with such a right would be justified pursuant to Article 11(2) as being necessary in a democratic society for the protection of morals as discussed with regard to Article 8(2) above.

Article 5

45. Article 5, so far as material, provides:

"1. Everyone has the right to liberty and security of the person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

a. the lawful detention of a person after conviction by a competent court..."

46. Clause 4 of the Bill provides for summary conviction of an offender for up to 6 months. There is no right to elect trial by jury. The Countryside Alliance argue that, pursuant to Article 5, hunters should have such a right.

47. A "competent court" has been defined as a competent judicial body that offers adequate procedural guarantees and operates independently of the executive and the parties to a given case: Engel v Netherlands (1976) 1 EHRR

647 at para. 68. It is inconceivable that a magistrates' court would be considered to fail to meet that test. Thus the Bill should not violate Article 5. There is no right to trial by jury as such in the Convention, whether in the fairness guarantees of Article 6 or elsewhere.

Conclusion

49. For the above reasons, we conclude that a ban on hunting wild mammals with dogs would be compatible with the Convention.

11 May 2000

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