

## Sentencing for Wildlife Trade and Conservation Offences

### Introduction

In recent years, the public has become increasingly aware of the importance of preventing further loss of wildlife and preserving our remaining biodiversity. After habitat destruction, illegal trade and conservation offences are among the most significant dangers faced by endangered species. The impact of this illegal trade on the survival of the species underlines the need for strong penalties, which reflect the harm caused, to be imposed at all levels within the judicial system for wildlife trade or conservation offences.

While the UK has developed a generally supportive legislative framework for prosecuting incidents of wildlife trade crime, in practice the majority of cases result in sentences that do not provide an appropriate deterrent to offenders or take account of the full range of sentencing options available to the magistrate or judge. It is important that the utility of the laws that exist to promote a specific conservation agenda are used and offer effective condemnation or deterrence to the perpetrators.

This is no reflection of a lack of effort on the part of enforcing authorities, but there are substantial difficulties encountered by prosecutors and magistrates when dealing with these cases. The precedent of low fines following a successful prosecution for illegal wildlife trade can be traced in part to the following factors:

- The lack of internal barriers within the EU, the expertise required in identifying species, and increasingly recognised links between illegal traders and organised crime, all contribute to the difficulty in detecting/prosecuting wildlife crimes. Consequently, very few illegal wildlife trade cases will come before magistrates, making it less likely that information regarding the wider environmental, social, and economic impacts of this illegal trade will be taken into account at sentencing.
- The laws that exist for some offences are perceived by defendants, prosecutors and the majority of the judiciary as 'technical' or 'regulatory' offences. These have been described by Viscount Dilhorne in *Alphacell v Woodward*<sup>1</sup> as acts which are not criminal in the true sense but are acts which in the public interest are prohibited under statute. Such a view undoubtedly affects perceptions of moral culpability, in terms of 'real' crime.
- The environmental and cultural impacts of the harm to rare species are difficult to quantify. The nature of environmental damage makes it more difficult to accurately assess the seriousness of an offence, appropriateness of the fine, or indeed, whether magistrates' powers are adequate to hear the case. However, criteria such as the intrinsic value of species – not only its financial value but also its value as part of an ecosystem (ie that species are irreplaceable once extinct) as well as issues such as the species' potential value as a resource to medical science will help assess/establish the 'cost' of the damage. While slightly more esoteric, these concepts are not beyond the wit of the legal system.

High financial rewards and low risk of detection can create an incentive to commit these crimes, and so there arises an immediate need for all levels of the judiciary to use the full range of

<sup>1</sup> *Alphacell Ltd v Woodward* [1972] AC 824

appropriate penalties by way of counterbalance. Wildlife trade offenders have been shown to be involved in other types of crime and to be involved in organised networks as well as on an independent basis.

These concerns have been reflected in some recent cases, as well as in the recent strengthening of some wildlife legislation. That there is a growing recognition of the nature and impact of these offences within the higher judiciary as seen through the judgements made in two contemporary cases that reached the Court of Appeal and the High Court respectively.

- In *R v Sissen* (2000) All ER (D) 2193 (8 December 2000, Court of Appeal), a case involving the illegal import into the EC of one of the most endangered birds in the world, the Lear's macaw (only 150 birds remain in the wild), the defendant was imprisoned for 30 months. Of as much interest as the jail term is the comment of Mr Justice Ouseley who stated that:  
*"the law is clear as to where the interests of conservation lie. These are serious offences. An immediate custodial sentence is usually appropriate to mark their gravity and the need for deterrence"*
- In *R v Secretary of State for the Environment, Food & Rural Affairs exp. White* (unreported) see Environmental Law and Management 14 (2001) 1 p.14, a case involving incongruity between CITES export permits and a shipment of caviar, where there was no criminal prosecution, but a challenge to the impounding of the imported but non-permitted caviar. Caviar comes from sturgeon whose populations have declined sharply in recent years due to illegal fishing for caviar. In giving judgement against the claimant, Justice Forbes referred to a:  
*"fundamental public interest in the preservation of endangered species"*

### **Legislation covering wildlife trade and conservation offences**

The Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES), bans international trade in endangered species and regulates trade in species that could become endangered by trade and is implemented through European and domestic legislation.

European Council Regulation 338/97 (as amended) on the protection of species of wild fauna and flora incorporates all of the provisions of CITES as well as additional stricter measures concerning European species and stricter import, housing, and transport conditions for live specimens. The European Court of Justice in a recent case involving the interpretation of French law against the EC Treaty determined that the purpose of the Regulations was to "ensure the conservation of animal [and plant] species, and hence the protection of the life and health of those species".<sup>2</sup> The specific implementing offences for violations of the EU Regulations are contained in provisions in the Customs and Excise Management Act 1979 (CEMA) and in the Control of Trade in Endangered Species (Enforcement) Regulations 1997 (COTES). The general CEMA provisions are used to cover the illegal import and export of CITES species as the prohibition or restrictions of these species is an 'assigned matter' for Customs. COTES is the national legislation which covers trade offences once the species has entered the UK.

Species native to the UK are protected under the Wildlife and Countryside Act 1981 (WCA). This was amended under the Countryside and Rights of Way Act 2000 (CRoW) specifically making some offences under the WCA arrestable. In doing so, CRoW has improved protection to native species that has not been given to non-native species that are equally or more endangered. While this

---

<sup>2</sup> Criminal Proceedings against Tridon (Federation Departementale des chasseurs de l'Isere & another) Case C-510/99, ECJ, 23 October 2001, not yet reported.

distinction is difficult to justify, especially given the EC 'equality principle', the meaningful increase in monetary and custodial sentences that have resulted from the amendments to CRoW offer some guidance in ascertaining the 'seriousness' of cases brought in trade in non-native endangered species.<sup>3</sup>

### **Key provisions for enforcing wildlife trade and conservation offences**

- Relevant CEMA sections: s170(1), s170(2), s68
- COTES
- Relevant sections of WCA: s1(1), s1(2), s1(5), s6, s9, s13(1)(a) or (2), and s14
- CRoW amendments to WCA

As many of the offences above are classified as either way offences (other than offences under the WCA 1981, excluding s14) it is important for magistrates to consider whether the seriousness of the crime is such that the case is more appropriately tried/sentenced in Crown Courts.<sup>4</sup>

### **New guidance**

In considering wildlife trade and conservation offences, magistrates should also have regard to general guidance on environmental offences due to similarities in quantifying the seriousness of the offence and evaluating the financial cost/value of the damage. The Sentencing Advisory Panel addressed many of these issues in their recommendations to the Court of Appeal on environmental offences. Additionally, the Magistrates' Association guidelines on *Fining of Companies for Environmental and Health and Safety Offences* covers similar concepts.

Some important new guidance regarding sentencing of companies for environmental offences has been given in *R v Friskies Petcare UK Ltd*, *R v Humphrey*, and *R v Sissen*.

- *R v Friskies Petcare UK Ltd* (2000) Cr. App. R (s) 410 sets out important guidelines for the sentencing court in the event of a plea of guilty. As guilty pleas seem to be common in wildlife trade cases, on the basis of the 'regulatory offence' position, the procedure set out in this case for aiding magistrates' courts in deciding when to commit a case for sentencing could be useful.<sup>5</sup>
- In *R v Humphrey T 2001/0105* Isleworth Crown Court, a case prosecuted under CEMA in January 2002, the court recognised the serious nature of damage in an illegal wildlife trade case. The offender was charged with trafficking in endangered birds of prey from Thailand – birds were packed in plastic tubes and many did not survive their journey. In addition, the defendant had also smuggled into the UK a golden-cheeked gibbon, which is endangered in the wild with fewer than 1000 individuals remaining. The trial resulted in a custodial sentence of 6½ years.
- In the *R v Sissen* (2000) All ER (D) 2193 (8 December 2000, Court of Appeal) case, Customs officials seized three Lear's macaws (a CITES Appendix I /EU Annex A listed species) that had been smuggled into the UK. In April 2000, the Newcastle Crown Court sentenced the offender to a custodial sentence of 2½ years. In this case the judge looked beyond the price tag of the

3 See *R v D'cruze*, a case prosecuted under the WCA after the CRoW amendments, in which the defendant was sentenced to six months in prison for the taking and possession of rare bird eggs.

4 Not all wildlife conservation offences involve species that are rare. Some offences are more serious than others and must be assessed on a case by case basis. However, as illustrated by CRoW even when a species isn't of the highest conservation concern, it may still require heightened native legal protection.

5 *R v Friskies Petcare UK Ltd* was previously referenced in the *Fining of Companies for Environmental and Health and Safety Offences*, issued by the Magistrates' Association as supplemental sentencing guidelines in May 2001.

animals (a breeding pair was worth over £50,000 on the black market) and considered the ecological value of the birds and the impact on the species. The trial judge's approach was endorsed in the Court of Appeal where Mr Justice Ouseley stated that:

*"There is nothing wrong in principle with a sentence of 30 months for an offence such as this. This was, as the sentencing judge put it, a devious and elaborate scheme to smuggle birds into the country, including critically endangered species."*

While magistrates must evaluate offences on a case-by-case basis, there is little doubt that a better understanding of the true environmental costs of these crimes should result in more cases reaching the Crown Courts. It was particularly notable in the *R v Sissen* case that the defendant's excuse that he had merely erred in relation to the paperwork was rejected. The defendant was, after all an expert in his field and was well aware of the applicable law and perhaps more importantly, its rationale. In addition, he had concealed the birds during transit to avoid detection.

### **Procedures**

When considering wildlife trade and conservation cases, one of the first questions to be asked when dealing with an either way offence, is whether the seriousness of the offence is such that the sentencing powers of the magistrates are inadequate. If so, then the court should not deal with the case and commit it to the Crown Court.

If the court is prepared to hear the case then the general procedure adopted in the *Magistrates' Court Sentencing Guidelines* should be followed. After an initial consideration of the seriousness of the offence, an appropriate type of penalty should be considered. This could be a fine, a community sentence or custody. In coming to a provisional conclusion on this issue, courts should always consider the specific factors present in the case in question, including the true value of the species in question.

### **Evaluating 'seriousness' – aggravating and mitigating factors**

When considering the seriousness of the offence magistrates should first take into account the ecological impact of the offence and the impact on the sustainability of the species. When endangered species are involved it will often be that the case is more appropriately tried/sentenced in the Crown Court – these species are referenced in the CITES Appendices and the EU Regulation Annexes.

As stated in the sentencing guidelines, having properly heard the evidence and considered the seriousness of the offence and an appropriate form of penalty, the court considers factors which could aggravate or mitigate the offence.

The Sentencing Advisory Panel's advice on environmental offences – together with recent cases – suggest what some of those factors could be.

Those factors that have a bearing on wildlife trade and conservation offences and that can be considered to aggravate the seriousness of the offence are:

- the offence is shown to have been a deliberate or reckless breach of the law rather than the result of carelessness;

- the species concerned is listed as an endangered/protected species on the CITES Appendices, the EU Regulation Annexes or the Schedules to the WCA;
- the conservation implications of the case in terms of the effect on the global or local population of that species;
- a high financial value of the specimens where it is known;
- the number of specimens/items involved;
- the defendant has acted from a financial motive or is a serious/persistent offender (eg has damaged a bat roost or a newt habitat in order to proceed with a building development);<sup>6</sup>
- the defendant is shown to have knowledge of the specific risks involved (individual is aware that they are trafficking in an endangered/threatened species);
- the defendant's attitude towards the environmental authorities was dismissive or obstructive (for example, defendant attempted to deceive Customs officials by smuggling species in specially manufactured concealments);
- human health, animal health, or flora were adversely affected, especially where a protected species was affected (animals were killed/injured during transit, cruelty was employed in treatment of animals, eg tail feathers pulled out of parrots or drugs administered);
- the defendant has evaded taxes and duties;
- the level of revenue from the illegal transactions carried out;
- the defendant has conspired to defraud buyers by selling them illegal goods;
- it is an organised activity;
- the defendant has previous convictions for like offences;
- there is evidence of prolonged activity;
- the defendant is a professional dealer;
- the conduct of the defendant after detection has led to the concealment of specimens or an increase in the harm caused to the species or population.

As explained in the *Humphrey* case, the value of the species and condition in which they were transported should also be a factor.

In evaluating the status of the species it may be helpful to refer to CITES Appendix listings and EU Regulation Annexes ([www.unep-wcmc.org](http://www.unep-wcmc.org)). If the species is listed on CITES or contained in the EU Annexes, depending on the other facts of the case (such as the crime being of an organised nature, involving high value specimens and perpetrated by a repeat/serious offender), the magistrates could consider committing the case to the Crown Courts for trial/sentencing.

Some mitigating factors may be:

- genuine lack of awareness that the animal was a threatened species;
- offender had minor role with little personal responsibility;
- co-operation with investigating authority;
- little financial gain;
- minimal conservation impact;
- timely plea of guilt.

---

<sup>6</sup> See *R v Day* a case in which the Melton and Belvoir magistrates' court found a defendant guilty of intentional and reckless damage of a bat roost.

### **The level of fines – general approach**

The normal principles of the Criminal Justice Act 1991 should apply and the seriousness of the offence and the financial circumstances of the defendant should be taken into account. The level of fine should reflect the extent to which the defendant's behaviour has fallen below the required standard. High culpability should be matched by a high fine.

In line with *R v Howe*, the level of the fine should reflect any economic gain from the offence.<sup>7</sup>

In considering their approach to environmental offences, the Sentencing Advisory Panel considered financial penalties, which included an evaluation of the issues of costs and compensation. As to costs, it was reiterated that the prosecution authority should be awarded costs, for example reflecting the costs of the investigation, file preparation and presentation, subject to the caveat that they should remain within reasonable boundaries that have actually been incurred. The Court of Appeal set out principles in *R v Associated Octel Ltd* (1997) 1 Cr App R (S) 435, which have been approved and reviewed in *R v Northallerton Magistrates' Court, Exp. Dove* (2000) 1 Cr App R (S) 136, which determines that costs should not be seen as disproportionate to the fine.

It is difficult to envisage a role for compensation in the majority of cases, other than where a proprietary interest could be proven in relation to a particular specimen that might have been illegally traded. The majority of illegally traded wildlife is 'wild-caught' and thus there is nobody to be compensated. That said, the lack of compensation as a tool of the sentencer's armoury, albeit at a low level in the magistrates' court, can be offset by greater use of the available fines and custodial/community sentences, as examined below.

### **Other sentencing options**

As always, magistrates should seek the advice of the legal adviser on sentencing options and guidelines in all cases.

In regard to wildlife trade and conservation offences, where a fine alone would be inadequate, custodial sentences and community service should be given serious consideration where allowed by statute.

---

<sup>7</sup> *R v Howe* was previously referenced in the *Fining of Companies for Environmental and Health and Safety Offences*, issued by the Magistrates' Association as supplemental sentencing guidelines in May 2001.