PE1705/B
Petitioner submission of 22 February 2019

Introduction

Since I submitted my petition in March 2018 my knowledge of the subject has increased, and I have been made aware of many things related to my petition of which I was unaware in March. This has led me to suggest (below) additional changes in the law which I consider necessary and would help facilitate the protection of natural and cultural heritage including allowing more video evidence to be heard in court than is presently the case.

I refer the Petitions Committee to the speech of Lord Hope in the case of *Walton v Scottish Ministers* [2012] UKSC 44 at paragraph 152. Although this part of Lord Hope's speech is particularly focussed on legal standing, I would submit that it is especially relevant to this petition.

> "But some environmental issues that can properly be raised by an individual are not of that character. Take, for example, the risk that a route used by an osprey as it moves to and from a favourite fishing loch will be impeded by the proposed erection across it of a cluster of wind turbines. Does the fact that this proposal cannot reasonably be said to affect any individual's property rights or interests mean that it is not open to an individual to challenge the proposed development on this ground? That would seem to be contrary to **the purpose of environmental law, which proceeds on the basis that the quality of the natural environment is of legitimate concern to everyone**. The osprey has no means of taking that step on its own behalf, any more than any other wild creature. **If its interests are to be protected someone has to be allowed to speak up on its behalf**." [emphasis added].

Protecting wildlife is something that requires the involvement of the general public if it is to be effective. Indeed, protecting the natural environment is a legitimate concern to the public, and such protection should not be stifled by the limitations of the Land Reform (Scotland) Act 2003 where the wildlife in question is in a public place.

Land Reform (Scotland) Act 2003

The additional changes to legislation are three proposed amendments to the Land Reform (Scotland) Act 2003 ("LRA"):

1. By adding a new sub-section 1(3)(d):
   "for the purposes of protecting natural or cultural heritage";

2. By adding a new sub-section 1(5)(c):
   "gathering information or evidence for the purposes of protecting natural or cultural heritage"; and

3. By adding a new to sub-section (9)(h):

   "investigating and detecting crime except where a possible crime is detected while being on land which is a public place".

My explanation of these changes are set out in Appendix 1 below.

I do not see a need for the second part of my petition to need a similar change, but I examine further the sentencing issue in Appendix 2.

Other Appendices are:

Appendix 3: The latest actions I have taken in support of the petition.

Appendix 4: The role of the Inspectorate of Prosecution in Scotland (IPS).

Appendix 5: The case of the Tillypronie gamekeeper.

Appendix 1: A consideration of a change of wording in the petition.

The key sources of information informing this petition are the communication between the Crown Office Procurator Fiscal Service (COPFS) and the convener of the Land Reform and Climate Change committee (ECCLRC), the notes of a meeting of the ECCLRC on 16 January 2018, the applicable legislation, and reports in the media.

The letter from COPFS dated 30 May 2017 where quoted here is in italics.

"(i) The statutory access rights granted by section 1 of the Land Reform (Scotland) Act 2003 (LRA) *are granted for specific purposes. The purpose of investigating and detecting crime is not one of those purposes. It follows that someone who is on land for such a purpose is not there pursuant to the rights granted under the Act."*

I am only going to consider the case of the gamekeeper, who was charged with setting a baited 'pole trap'. It is an easier case for me to consider in order for me to justify my assertions in this submission. The persons who discovered the baited pole trap, and many persons passing the location, would have realised that it was illegal. It has been stated in the media[1] "On 9 July 2015, during routine fieldwork, RSPB Scotland Investigations staff discovered a pole trap on the Brewlands Estate in Glen Isla, Angus."

I will look first to see if the RSPB Scotland staff were acting in accordance with the LRA up to the point where they noticed a set pole trap. The LRA allows under sub-section 1(2) (b) "the right to cross land". Sub-section 1(4)(b) of the LRA states that: "[The reference] in subsection (2)(b) above to crossing land is a reference to going into it, passing over it and leaving it all for the purpose of getting from one place outside the land to another such place." Had the RSPB staff not been interrupted in crossing the land by the discovery of a set baited pole trap, they would have reached "another such place".

They were not necessarily exercising rights under sub-section 1(2)(a) of the LRA being "the right to be, for any of the purposes set out in subsection (3) below, on land;" and in terms of sub-section 1(3): "The right set out in subsection (2)(a) above may be exercised only—

(a)for recreational purposes;

(b)for the purposes of carrying on a relevant educational activity; or

(c)for the purposes of carrying on, commercially or for profit, an activity which the person exercising the right could carry on otherwise than commercially or for profit."

It should be noted that these are additional rights to those under sub-section 1(2)(b) which are independent of those described by the letter as '*investigating and detecting crime'* as these would likely be rights under sub-section 1(2)(a). It may well be possible for me to suggest that the RSPB staff were not '*investigating and detecting crime'* whilst crossing the land, perhaps as it may be assumed that the discovery of a crime could not be predicted in advance but I do not need to show that as the rights under sub-section 1(2)(b) are not dependent on any conclusion as to purpose other than crossing land, and which they were doing until the discovery of an illegal trap.

[1] https://ww2.rspb.org.uk/Images/legal-eagle-82_tcm9-446133.pdf

I will now examine the next actions of the RSPB personnel, after discovering an illegal set baited pole trap and placing a concealed camera. That activity can now be described as undertaking covert surveillance and has changed from having the “the right to cross land”. However sub-section 1(2)(c) of Regulation of Investigatory Powers (Scotland) Act 2000 (RIP(S)A) states: “otherwise than by way of an immediate response to events or circumstances the nature of which is such that it would not be reasonably practicable for an authorisation under this Act to be sought for the carrying out of the surveillance.”

It is appropriate here, although not enacted legislation, to quote the Covert Surveillance and Property Interference Code of Practice for a fuller understanding: “3.30. Covert surveillance that is likely to reveal private information about a person but is carried out by way of an immediate response to events would not require a directed surveillance authorisation. RIP(S)A is not intended to prevent public authorities from fulfilling their legislative functions. To this end section 1(2)(c) of RIP(S)A provides that surveillance is not directed surveillance when it is carried out by way of an immediate response to events or circumstances the nature of which is such that it is not reasonably practicable for an authorisation to be sought for the carrying out of the surveillance.”

The covert surveillance, whilst not, and not needing to be, authorised, was the correct immediate response to events permitted under RIP(S)A.

Additionally, it is noted that OSC’s 2016 Procedures & Guidance document Section 279 states: “Surveillance of persons while they are actually engaged in crime in a public place is not obtaining information about them which is properly to be regarded as “private”. But surveillance of persons who are not, or who turn out not to be, engaged in crime is much more likely to result in the obtaining of private information about them.”

The RSPB personnel reported their actions to the police as soon as practicable and returned with the police in cooperation who investigated the crime and recover the data from the concealed camera. The police, after taking the lead in the investigation, were presumably able to identify one of the individuals and the gamekeeper was charged probably under the Wildlife and Countryside Act 1981 (WCA). I intentionally do not consider why the head of the Wildlife and Environmental Crime Unit in COPFS did not consider this in the letter she was asked to write in reply.

“Crown Counsel concluded that the placing of covert cameras was, in those cases, for the purpose of detecting crime and, as that activity was not authorised, the subsequent video evidence was obtained irregularly. The irregularity was not capable of being excused, for the purposes of the common law of admissibility, and it followed, on the application of the common law principles to which I have referred, that the evidence was inadmissible. In light of that conclusion it was appropriate that the proceedings were brought to an end.”

I have already shown that authorisation was not necessary in the case I am examining in detail. The admission of video evidence in a public place, and this is a public place, such as from CCTV, police video cameras, and dash cams is well established, and the procedure for authorisation, which needs to be sought in advance of any setting of a camera, is well known to Crown Counsel. The paragraph does not state that it does not apply in the case of the gamekeeper. In my opinion, it is in error in the case of the gamekeeper.

My view is that the case referred to by Crown Counsel of *Lawrie v Muir* 1950 JC 19 confers discretion on what is and is not an irregularity. I find it regrettable, to say the least, that Crown Counsel formed the view that the video evidence was inadmissible.

"(*ii) In any event, the Scottish Outdoor Access Code states that where people exercising access rights wish to undertake surveys of natural or cultural heritage which require the installation of any equipment or instruments they should "seek the permission of the relevant land managers": para. 3.64."*

That is true, in that it does say that. It is a Code, nevertheless. However, the implication here is that the land manager (who may face prosecution under vicarious liability legislation) and in this case his employee are protected from the actions of persons who have already discovered a crime. Does this require to be excused? There is no suggestion that the persons were undertaking surveys of natural or cultural heritage, they were not. They were seeking to assist the police whom they subsequently advised of the offence and the actions which they took. They needed no authorisation as a crime had been committed and the correct immediate response was taken exactly in accordance with RIP(S)A. I do not see how any reasonable person could require that such action even needed to be excused.

"*(iii) The police have specific powers which they may utilise in appropriate cases in the investigation of wildlife crime. In particular, section 19(2) of the Wildlife and Countryside Act 1981 gives a specific power to constables to enter premises other than a dwelling if the constable suspects with reasonable cause that any person is committing or has committed an offence under Part I of the 1982 Act. Further, as you will appreciate, the police have statutory powers (under the Regulation of Investigatory Powers (Scotland) Act 2000 and the Police Act 1997) under which they may, when that is permitted under the statutory regime, be authorised to undertake covert surveillance."*

The first section is correct and the police even may have used this power after they were informed by those discovering the crime. The second sentence is true but I can only classify this as a 'red herring' as it has no validity in either of the cases which were reviewed. Neither case would be considered 'serious', carrying a maximum sentence of 3 years or more and authorisation, of necessity, in advance could never be granted; indeed my petition seeks to remedy this. I can see no relevance for this paragraph at all, but it is likely to have confused others.

Having discounted each of the 3 listed context items in the one case I am reviewing, the only item which may have some validity is that these persons were not allowed to be on the land for the first reason considered: "*The purpose of investigating and detecting crime is not one of those purposes. It follows that someone who is on land for such a purpose is not there pursuant to the rights granted under the Act."*

Crown Counsel may well have decided that RSPB personnel, if they have not been invited on the land either by the police or the owner, are not permitted to be on any land in Scotland where access is granted under the LRA to individuals, despite or because of their necessity to cross land as part of their fieldwork. It may also apply to myself or other members of the public, when they cross land equipped with suitable cameras to remotely monitor and/or covert cameras to use if they were ever to detect illegal activity. It may be that they believe that the separate right to cross land is overruled by this decision. Whilst I do not agree with this conclusion, I have decided that my attempt to allow more video evidence to reach court should be by means of changes to the LRA in addition to my suggested amendments to the WCA. It may allow some cases to go to court which otherwise might not do so, and that is

the aim of my petition.

It should be noted that I believe, and may well have demonstrated, that no change in the law is required at all in this case, but given the approach taken by Crown Counsel it would clarify the position for the use of such material in other cases and put the question beyond doubt of whether or not evidence gathered by the public can be led, so I suggest the wording of the proposed changes in the LRA may be appropriate for consideration.

Again, to repeat the words of Lord Hope, “the natural environment is of legitimate concern to everyone”. Our justice system must be able to rely on evidence provided by the public if wildlife crime is to be tackled more robustly.

Appendix 2: Wildlife crime sentencing considerations.

The petition was clear in its reasoning, and I see no need to change it. However, I would suggest that in order to ensure that the police have all the necessary powers at their disposal to ensure that those who are suspected of a wildlife crime (including land owners and managers for vicarious liability) that the proposals are implemented to enable cases against those committing wildlife crime to be investigated thoroughly. The law presently allows those in charge of large landholdings to conceal the true identity of individuals who might be suspected, and an entity which makes claims for government farm subsidy payments is not required to be registered in such a way as to be identified at individual level. The Poustie report may or may not have included this in its brief, but perhaps the government or MSPs in their consideration of its implementation may wish to bear this in mind. This is not part of my petition, but MSPs may wish to be aware of this.

Appendix 3: The latest actions I have taken in support of the petition.

Although the Cabinet Secretary for the Environment, Land Reform and Climate Change committee (ECCLRC) suggested in a letter to my MSP, Ms Maureen Watt, that I should write to the COPFS to see if it was possible to obtain further information on the decisions taken in relation to the cases, despite several attempts to arrange some communication or to ask questions, I was unable to have any substantive communication with COPFS.

The COPFS letters I received had two common themes: There was no possibility of any form of communication between us, and the suggestion that “you may wish to seek independent legal advice.”

As a result, I have indeed sought independent legal advice, and this submission is made with the benefit of that advice.

Appendix 4: The role of the Inspectorate of Prosecution in Scotland (IPS)

The Criminal Proceedings etc. (Reform) (Scotland) Act 2007, Part 5 states: "The Inspector is to submit to the Lord Advocate a report on any particular matter connected with the operation of the Service which the Lord Advocate refers to the Inspector."

The inspector is thus limited by statute in which matters to investigate and report upon, and hence limiting independence. This was made clear in submissions during the preparation of the Inquiry into the role and purpose of the Crown Office and Procurator Fiscal Service conducted in 2016/2017.

I felt that the IPS could usefully have a role in 'conflict resolution' which might both assist where there were conflicting views and help morale. The correspondence may be found here.

The Chief Inspector did write to me, although I was already aware, explaining that: "For clarification, please note that the Inspectorate of Prosecution has no authority or remit to review decisions taken by the police or the prosecution service relating to individual cases or for any legislative changes."

The only person able to request such a report from the Chief Inspector is the Lord Advocate.

Of course, it may be assumed that I would desire that the Lord Advocate confirm that the Scottish justice system is fit for purpose by requesting that the Chief Inspector issue an independent report (with a copy to Cabinet Secretary for Justice for information) within 28 days into the decision by Crown Counsel in relation to the case against the gamekeeper and any case which was made or could have been made by COPFS in the matters involved in the SNH restriction 02/2017. The report need only list the areas of law covered, and in the areas where a court would be bound to find that evidence was inadmissible, give a short reasoning.

That is, however, not likely to be a possible result from my petition submission.

Appendix 5: The case of the Tillypronie gamekeeper.

After I submitted my petition originally in March 2018, the Guardian newspaper printed an article about another case which had no official public exposure. I am going to assume that it is true. Further, I am going to assume that the unknown person referred to in the article who set a pole trap in March 2014, apparently in very similar circumstances to the gamekeeper case, was the only person to have been issued a personal restriction in Scotland by SNH, in September 2017, General Licence restriction 02/2017. The restriction gives next to no information. There are two conclusions I make from this.

Firstly, that the case was ongoing in some way from March 2014 until September 2017. The protocol SNH has in place for restrictions in licences requires the police to report cases where there is insufficient evidence for a prosecution but enough for a restriction to be applied. This suggests that the police made the decision, or perhaps were told of a decision, only after more than three years had elapsed.

The second conclusion is that the case was likely under consideration, possibly by COPFS, and may even have been a factor in, or subject to, the same considerations as the decision to bring the known proceedings to an end by Crown Counsel. I do not know how this delay came about and my conclusions could possibly be explained by any other means of which I am not aware, but I do not consider that it is likely. Truthfully, I was very concerned when I learned of the article's contents, and believe it to be relevant to my petition. Had I been aware of the matter at the time of my petition or the actions I took prior to that time, I might well have been able to cover the case. As it is, I can only hint at its relevance, and wonder why was I not aware in a country where I thought cases were able to be known, even in a very restricted way in some cases, to the public during a period of more than three years?