

SHORT COMMUNICATION

ANIMAL WELFARE *vs* FREE TRADE – FREE TRADE WINS: AN EXAMINATION OF THE ANIMAL WELFARE IMPLICATIONS OF R *v* MINISTRY OF AGRICULTURE, FISHERIES AND FOOD *ex p* COMPASSION IN WORLD FARMING (1998)

S Brooman[†] and D Legge

Liverpool John Moores University, School of Law and Applied Social Studies,
1 Myrtle Street, Liverpool L7 4DN, UK

[†] Contact for correspondence and requests for reprints

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Abstract

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The European Union (EU) has often been regarded as a prime mover in the cause of improved animal welfare. There is a great deal of European legislation to support this contention. This article discusses a recent case brought by the UK Government under Article 177 of the Treaty of Rome 1957 which challenges the assumption that EU law always favours animal welfare. We suggest that free trade is the driving force behind EU legislation and that where this conflicts with animal welfare, free trade is usually preferred.

Keywords: *animal welfare, European Union, free trade, veal crates*

Introduction

In 1989 Richard Ryder, a well-known protagonist in the animal welfare debate, contrasted the momentum given to the improvement of farm animal welfare by the European Union with the 'resigned air of impotence too often encountered in Westminster' (Ryder 1989). The case of R *v* Ministry of Agriculture, Fisheries and Food *ex parte* Compassion in World Farming [1998] All England Law Reports European Cases 302 (R *v* MAFF *ex p* CIWF) suggests that it is now time to re-evaluate how effective the EU will be in the future in relation to animal welfare reform.

The reason for this re-evaluation is that there is a conflict between the underlying EU principles of free trade and continued concern for the welfare of animals as seen in the recent case of R *v* MAFF *ex p* CIWF. In 1995 Compassion in World Farming (CIWF) brought an action in the UK High Court for judicial review of the decision of the then Minister of Agriculture, Douglas Hogg MP, in refusing to ban the export of calves for use in veal crates in other EU Member States. The case was referred to the European Court of Justice (ECJ) for clarification of certain issues.

Discussion

In the UK, groups such as the RSPCA and CIWF have reflected and voiced public concern about the use of veal crates to rear calves. Usually, veal crates are narrow, wooden box-like

structures, where a calf is kept in semi-darkness with no straw and which do not allow a calf to turn round. The veal crate system has been prohibited in the UK since January 1990 (GB Parliament 1990). Despite this ban, the ECJ stated that in the years up to 1996 between 500 000 and 600 000 veal calves were exported to other EU Member States each year with a substantial proportion being destined for veal crates.

The core of the CIWF case centred on a Directive issued by the EU Council in 1991 which lays down standards for the protection of calves confined for rearing and fattening in holdings of more than five animals (European Council 1991). The Directive lays down minimum welfare standards for requirements such as ventilation and space provided for those calves. The original final dates for compliance were amended by another EU Council Directive in 1997 (European Council 1997). By virtue of the Directive, new installations have been required to comply with its provisions since 01 January 1998 and old installations must comply by 01 January 2007.

CIWF argued against the validity of the Directive which allows the continuance of the use of veal crates in some EU countries in certain circumstances up to 01 January 2007. The Directive, CIWF argued, fails to comply with the EU's other international law obligations. The first is the *European Council's European Convention on the protection of animals kept for farming purposes* (European Council 1978a) that was adopted by the EU in the same year (European Council 1978b). The second is the *Council of Europe Recommendation concerning Cattle* (Council of Europe 1988).

Article 3 of the Convention provides that farm animals should be housed and cared for in a manner which takes due account of the requirements of that species. *Article 4* provides that there should be freedom of movement accorded to the animal in accordance with the development of scientific knowledge of that species' requirements, so as to avoid unnecessary suffering or injury. CIWF argued that, by allowing the practice of using veal crates to continue, the EU was in breach of these Articles of the Convention.

The Recommendation concerning Cattle requires that the construction of accommodation for tethered cattle should allow them sufficient freedom of movement and that they should be able to exercise their behavioural and psychological needs. CIWF argued that the Directive, which allows derogations for the use of veal crates until 2007, is inconsistent with this other piece of EC legislation which effectively prohibits the use of narrow veal crates.

When the case came before the UK High Court it was held that the narrow veal crate system does not provide for the same welfare standards as contained in the Convention or the Recommendation, and this was not disputed in the ECJ. So why did the CIWF lose its case?

The answer is to be found in the legal status accorded to a Directive under European law and the comparatively weak legal effect of the Convention and Recommendation. Despite the inherent anomalies in the Directive as compared to the Convention and the Recommendation, the ECJ held that neither had any effect on the validity of the Directive. The Directive is the superior piece of legislation which accepts the continued use of veal crates, albeit for a limited period. The Convention allows for considerable discretion and is only indicative as to standards to be introduced and the Recommendation is not directly applicable or binding.

The second line of argument used by CIWF was that the UK should be entitled under *Article 36* of the *Treaty of Rome* to introduce restrictions on free trade. *Article 36* allows limitations to be placed on imports and exports on the grounds of public policy or morality in a particular Member State. CIWF argued that the clear abhorrence shown by the UK public to the use of veal crates amounted to a concern over public morality which should allow the UK to restrict trade in calves bound for the veal crates.

The ECJ held that the very presence of a specific Directive, even in such a contentious area as this, would normally prevent the introduction of legislation by Member States to circumvent it by using *Article 36*. To allow a Member State to do so would undermine the specific objective of the harmonization of trade. Animals, said the ECJ, are the objects of free trade and must be able to move freely between Member States and any restrictions on the free movement of calves would affect the structure of the market.

The ECJ said that any recourse to the use of *Article 36* to challenge the Directive might undermine the fact that the Community legislature had, by that Directive, already sought to reconcile the competing interests of animal protection and the smooth functioning of the organization of the common market in calves. Even the presence of derogations allowing some Member States to use veal crates until 2007 would not give rise to a challenge on moral grounds under *Article 36*. The ECJ stated that in such circumstances the UK is entitled to adopt stricter measures by measures applying only within its own territory. A ban on exports to other countries on account of poorer welfare provisions in those countries would fall outside the derogation allowed under *Article 11(2)* of the Directive.

The European Union explicitly recognised the need to reduce animal suffering as recently as June 1997 at the Amsterdam Inter-Governmental Conference (EU Treaty 1997). A legally binding Protocol was agreed which was added to the Treaty of Rome 1957. This recognises the fact that animals are sentient beings and requires Member States to 'pay full regard to the welfare requirements of animals' in formulating and implementing EU policies on agriculture, transport, internal market and research. It is also stated in the Protocol that cognisance should be taken of religious rites, cultural traditions and regional heritage of Member States.

On 02 April 1998 Commissioner Franz Fischler, the EU Commissioner responsible for Agricultural Policies, addressed a meeting of the European Parliament's Intergroup on the Protection and Conservation of Animals. He was asked whether the Protocol would affect decisions such as that in *R v MAFF ex p CIWF*. Minutes of the meeting indicate that the commissioner 'confirmed that animal welfare had been created as an objective in relation to the internal agriculture and transport market and to research policy'. He also said that 'the emphasis in the EU was not so much on food sufficiency but on food quality' (Intergroup on the Welfare and Conservation of Animals 1998; p 3). We suggest that this response leaves the specific question regarding *R v MAFF ex p CIWF* and veal crates unanswered.

In addition, there are occasions when the operation of the World Trade Organisation (WTO) has compromised animal welfare because of trade interests. On 13 October 1998, for example, an appellate panel of the WTO gave its ruling regarding a United States shrimp import ban for shrimps caught in nets without turtle exclusion devices which help them escape drowning when accidentally entangled in the nets. Even though turtles are a protected endangered species, the panel declared the ban to be illegal under international trade rules (Eurogroup for Animal Welfare 1998). A different WTO appellate panel also found that an EU ban on United States beef from cattle treated with hormones was contrary to WTO provisions despite EU concerns regarding animal welfare and food safety (Eurogroup for Animal Welfare 1999). As with *R v MAFF ex p CIWF*, this is evidence that animal welfare issues are often slow to be recognised if they come into conflict with matters of free trade.

Animal welfare implications

The EU has been the instigator of many reforms in relation to animal welfare. There is EC legislation regarding, for example, the transportation of animals (European Council 1995), the stunning of animals before slaughter (European Council 1974) and the use of animals in

scientific experimentation (European Council 1986) among many others (see Brooman & Legge [1997], chapter 5). Despite this, the EU remains, primarily, a protector of trade interests. The economic and political security of Europe through free trade is the paramount objective of the EU, not animal welfare. In *R v MAFF ex p CIWF*, the ECJ said that this had the effect that, where there is existing EU regulation of the market in veal, the Member States are under an obligation to refrain from taking measures which might undermine or create exceptions to it.

We suggest that this example shows there are lessons to be learned when animal welfare groups challenge the provisions of EC legislation as to whether legislation accords with conflicting EC legislation or with basic moral principles of the treatment of animals. It should not be forgotten that the EU has embraced and legislated for several basic principles of animal welfare. However, when animal welfare groups attempt to encourage individual Member States to legislate to prevent free trade with other Member States on the grounds of their insufficient welfare standards, they must bear in mind the central EU principle of free trade. It is unclear how far the 1997 Protocol on animal welfare incorporated into the Treaty of Rome 1957 will affect this contention. We suggest that there is considerable doubt as to the Protocol's effect, especially when the ECJ has subsequently indicated in *R v MAFF ex p CIWF* that the presence of EC legislation relating to specific welfare issues is conclusive.

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