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Prosecuting under Animal Welfare Legislation: Why Time is of the Essence?

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Abstract

This article exams both the legislative provisions and authorities surrounding the application of jurisdictional time limitations in commencing criminal proceedings for animal protection offences in the magistrates' court and highlights the difficulties and consequences that are often encountered without paying careful attention to them. In particular, the article focuses on how the courts have construed s.31 of the Animal Welfare Act 2006 and seeks to evaluate the legal principles derived from those authorities in a comprehensive way to assist the reader with a better understanding from both a prosecution and defence perspective. The article

also looks at the changes to be made to sentencing provisions by the Animal Welfare (Sentencing) Bill 2019 and, importantly, the reclassification of several offences as triable either way and the impact this will have on the prosecution of animal protection offences.

Introduction

According to the RSPCA 2018 Annual Report, the charity dealt with 1,182 cases that warranted a prosecutorial decision, of which 747 defendants were convicted for a total 1,678 offences leading to a success rate of 92.5%¹. In contrast, the CPS in the same year dealt with just under 495,000 prosecutions

¹ Trustee's Report & Accounts 2018, www.rspca.org.uk

with an 83.7% conviction rate². Nevertheless, the RSPCA, being a registered charity, has no special prosecutorial status or authority and simply acts in the capacity of a private prosecutor when commencing criminal proceedings.

Whilst the DPP has a statutory power under s.6(2) of the Prosecution of Offences Act 1985 (POA 1985) to intervene in such proceedings, which can be either discontinued or continued, (subject to an evaluative assessment of the sufficiency of the admissible evidence and the public interest), it is a recognised right, preserved under s.6(1) of the POA 1985, of a private citizen to enforce the criminal law by commencing criminal proceedings, as confirmed by the Supreme Court in *Gujra v CPS* [2013] 1 AC 484 and reinforced in *R (Kay) v Leeds Mags Court* [2018] 4 WLR, & *Charlson v Guildford Magistrates* [2006] 1 WLR 3494³.

Unlike an individual citizen, the RSPCA is supported by a dedicated prosecutions department together with the necessary resources to commence proceedings under animal welfare legislation.

Whilst other agencies, such as Local Authorities⁴, DEFRA, CPS and the FSA principally enforce other legislation protecting the welfare of farmed animals and slaughterhouses⁵, the primary aim of the RSPCA is the safeguarding of domesticated animals⁶. There is little doubting the valuable contribution the RSPCA make to criminal enforcement in protecting animals, but it is this vested interest that has led to criticism⁷ and an independent review of its operations⁸. Recently however District Judge Barron sitting at Folkestone Magistrates Court questioned the independency of the

² Annual Report & Accounts 2018-19, www.cps.gov.uk

³ See para 46 in *Soni (Wasted Costs Order)* 2019 EWCA Crim 1304

⁴ See *Qualter v Preston Crown Court* [2019] EWHC 2583

⁵ Welfare of Farmed Animals (England) Regs 2007 SI 2078, Welfare of Animals (Slaughter or Killing) Res 1995 SI 731, Welfare at Time of Killing (England) Regs 2015 S1, Mandatory Use of closed Circuit

Television in Slaughterhouses (England) Reg 2018 SI 556.

⁶ Prosecution should be instigated on “good grounds” and all enquires and other remedies being exhausted, see *RSPCA v Johnson* [2009] EWHC 2702

⁷ HofC EFRAC Report “Animal welfare in England: domestic pets” 2016-17

⁸ Wooler Review 2014 published at www.rspca.org.uk



RSPCA in respect of biased publicity surrounding the case of Mark Burgess and its legitimacy to conduct its own prosecutions.⁹

Nevertheless, the current role of the RSPCA does have the support of the Government who do not consider it necessary to designate the RSPCA as a specialist prosecuting authority¹⁰. Accordingly, as a professional body, there is a public interest in ensuring that any prosecution instigated by the RSPCA is done so properly and with sufficient regard to the

jurisdictional and procedural obligations underpinning criminal proceedings¹¹. In particular are the differing statutory time limits to bringing a prosecution which must be adhered to. However, any oversight could lead to either a stay of proceedings or a conviction being quashed and a consequential loss of confidence. It is this failure which has resulted in a number of appeals coming before the High Court. This article will therefore seek to analyse the statutory time limitations in light of these judgments and

⁹ See report (page 5) in Times newspaper Thursday 26 Sept 2019

¹⁰ See page 5 of Govt response to the EFRAC report, 7 Feb 2017 HC 2017

¹¹ See *Valiati v DPP* [2018] EWHC 2908

provide some guidance to prosecutors.

Animal Protection Offences

The main primary piece of legislation is the Animal Welfare Act 2006. A codifying Act that seeks to draw together previous legislation promoting the welfare and protection of animals¹² on the one hand and the prevention of cruelty/harm on the other. An animal for the purposes of the Act (s.1) must constitute a non-human subphylum vertebrate species (i.e. reptiles, birds, mammals). The range of offences available essentially fall into two main categories.

The first category contained in ss4-8 covers the ambit of cruelty, namely unnecessary suffering (s.4 offence)¹³, mutilation (s.5 offence), dock tailing (s.6 offence), poisoning (s.7 offence)¹⁴, and fighting (s.8

offence). All these offences can be committed in several ways, either as a primary offender or a secondary party, by permitting the prohibited act or omission. Each offence is wide ranging in its ambit (s.8 for instance dealing with fighting can be committed in 14 possible circumstances)¹⁵. Some are quasi-strict liability with a lawful authority or reasonable excuse defence, whilst others such as unnecessary suffering that involve the primary offender (s.4(1)) requires proof of *mens rea* either actual knowledge that the animal is suffering or *likely to suffer unnecessarily*, or objectively ought to have known this by his negligent act or omission, subject to a mistaken belief defence¹⁶. Similarly, a secondary party (provided they hold responsibility for the animal) will attract criminal liability by either (1) permitting or (2) failing in all the circumstances to take reasonable steps to protect the animal from the

¹² It is now a specified offence to use wild animals for circus performance-see the Wild Animals in Circuses Act 2019, see the case of Bobby Roberts and the ill-treatment of Anne an Asian elephant.

¹³ For the regulation of necessary suffering in animal testing, see the Animals (Scientific Procedures) Act 1986 & European Directive 2010/63/EU

¹⁴ In a different context on the meaning of poisoning in the OPPA 1861, see the

illuminating discussion in *R v Veysey* [2019] EWCA Crim 1332 & also *Cruelty Free International v SofS HD* [2017] EWHC 3295

¹⁵ For application see *Wright v RSPCA* [2017] EWHC 2643 & *RSPCA v McCormick* [2016] EWHC 928

¹⁶ This accords with the legislative intent-see the detailed judgment in *RSPCA v Grey* [2013] EWHC 500

cruelty of another. Although it is a necessary ingredient that the offender is aware of the potential harm, the culpability arises from unreasonably ignoring or avoiding it which is objectively determined¹⁷.

Section 9 sets out the second category covering welfare protection and specifically imposes criminal liability on those who hold an s.3 responsibly for an animal and fail to take all reasonable steps in all the circumstances¹⁸ to engage in good practice of ensuring the animal's needs are sufficiently catered for, in terms of environment, food and behaviour. Section 9 which clearly overlaps with an s.4 offence depending on the circumstances is less culpable than s.4 and therefore can be treated either as a separate offence or as an alternative to s.4 without being duplicative, provided the conduct relating to the s.9 offence is wider than the conduct of unnecessary suffering¹⁹. A more extensive list of

specified welfare protection duties exists for farm animals in the Welfare of Farmed Animals (England) Regs 2007 SI 2078²⁰. The offence creating provision is regulation 4 which imposes criminal liability on a responsible person who fails in their duty to take all reasonable steps to ensure a farmed animal²¹ is bred or kept in accordance with the 30 specified conditions contained in schedule 1.²²

Section 32 as amended by the Animal Welfare (Sentencing) Bill 2019

Section 32 of the AWA 2006 stipulates that the maximum sentence of imprisonment for all the offences is 6 months and or a fine²³ and therefore treated as minor summary offences triable only in the Magistrates Court²⁴. This was seen as wholly ineffectual, particularly in unnecessary suffering cases in which a number of reported

¹⁷ See *Riley v CPS* [2016] EWHC 2531

¹⁸ Any alleged failure is based on a "purely objective standard of care" which accords with the legislative intent of the Act- see *RSPCA v Grey* [2013] EWHC 500

¹⁹ See *RSPCA v Grey* [2013] EWHC 500

²⁰ As amended by 2010 SI 3033. These regulations were created by the relevant Minister using the power conferred on him under s.12.

²¹ Defined in reg 3

²² Reg 5 deals with poultry duties & reg 6 deals with compliance with the relevant code of practice in force.

²³ See Magistrates' Court Sentencing Guidelines on Animal Cruelty Offences on the imposition of sentencing, see also *Williamson v RSPCA* [2018] EWHC 880.

²⁴ See s.2 of the MCA 1980

cases involving appalling and sustained cruelty, and in some instances sadistically filmed and shared on social media for which the offenders received minimal punishment that often does not nearly reflect the gravity and culpability of the offending, as rightly being abhorrent²⁵. Section 142 of the Criminal Justice Act 2003 states that the aim of sentencing includes the punishment of offenders and the reduction in crime by imposing deterrent sentencing.

Neither of these objectives are being met by the existing sentencing range for animal cruelty. Recognising the inadequacies in sentencing and the tireless campaign led by Anna Turley MP, the Animal Welfare (Sentencing) Bill 2019 which has cross party support and is currently before Parliament²⁶. This radically reforms the sentencing provisions, by amending s.32 and reclassifying the offences contained in ss4-8, as either-way offences and increasing

the maximum sentence if convicted on indictment to five years. It will be expected that the Sentencing Council will revise the current guidelines and the level of culpability and harm, the indicative starting point, balanced against any non-exhaustive aggravating and mitigating factors.

The comparable offence in the Republic of Ireland which is subject to a 5 year term of imprisonment was recently considered in the sentencing case of *DPP v Kavanagh* [2019] IECA 110, in which the Court of Appeal upheld a sentence of 3 years imposed on the appellant who had pleaded guilty to 30 counts on an indictment containing 126 counts. The appellant had been involved in a large-scale operation of movement of dogs for commercial gain. Rightly describing the scenes at the farm of death and suffering as being “a truly shocking one” and “of exceptional seriousness” fully merited the sentence imposed.

²⁵ See the debate pack “Sentencing for animal cruelty” (CDP-22106/0202 3rd Nov 2016 presented by Anna Turley MP promoting her PMB which unfortunately was unsuccessful.

²⁶ Unfortunately the Bill failed to complete all its Parliamentary stages due to the sudden prorogation of Parliament.

Nevertheless, the Bill is expected to be reintroduced in the next Parliamentary session having been announced in the Queen’s Speech on the 14 Oct 2019. Given the support for the legislation this article is presented on the expectation that the Bill will pass in its current drafted form which is likely to be in 2020.

Whilst this is undoubtedly a welcome reform in the protection of animals. It will be interesting to see whether the RSPCA is able to absorb not only the financial implications with increased costs, but the extra demands placed upon it in the Crown Court, or will the CPS as a public prosecutor take on the more serious cases whilst the RSPCA continue to deal with the summary cases? It will be equally interesting to see what impact this change will have on how a defendant chooses to plead. They may prefer to test the evidence before a jury, rather than a Magistrates court, with potentially more disputed cases going to the Crown Court. Conversely, a risk of a higher sentence and the potential impact of any distressing images on the jury may encourage guilty pleas. Of obvious importance is that the welfare offence contained in s.9 remains a summary-only offence unaffected by the change and in effect becomes a less culpable offence to the now more serious s.4 offence. However, despite the potential overlap between the factual circumstances between the two offences, s.9 is not a specified linked summary offence for the purposes of s.40 of the Criminal Justice Act 1988 and cannot therefore be joined in the same indictment as an alternative to charging an indictable s.4 offence

and would have to be dealt with separately in the magistrates court. Neither can a count be added later in the Crown Court under s.6(3) of the Criminal Justice Act 1967. Without careful consideration it is easy to misconstrue the jurisdictional power of the court, a point highlighted in *R v Buckley* [2009] EWCA Crim 1178 and repeated in *R v Williams* [2011] EWCA Crim 1716. In both cases the Court of Appeal had to quash the sentences on the bases of being convicted of the lesser, non-aggravated form of having a dog dangerously out of control under s.3 of the Dangerous Dogs Act 1991, a summary-only offence not specified in s.40 and therefore not within the jurisdiction of the Crown Court.

Commencing criminal proceedings in the Magistrates' Court

Section 21 of the Access to Justice Act 1999 defines criminal proceedings as proceedings before any court for dealing with an individual accused of an offence. Likewise, Lord Bingham in *Majesty's Commissioner for Customs and Excise v City of London Magistrates' Court* [2000] 2 Cr App R 348 confirmed that "the general understanding that criminal

proceedings involve a formal accusation made on behalf of the State or by a private prosecutor that a defendant has committed a breach of the criminal law, and the State or the private prosecutor has instituted proceedings which may culminate in the conviction and condemnation of the defendant."

In bringing a private prosecution the informant, unlike the CPS, does not have to satisfy the evidential and public interest test. Whilst the criterion is much less onerous, it would be wise for organisations like the RSPCA to adopt either the code for crown prosecutors, or apply similar criteria²⁷. In *R (Kay) v Leeds Magistrates' Court* [2018] 4 WLR, the High Court emphasised that any private prosecutor, is still "subject to the same obligations as a Minister for Justice as are the public prosecuting authorities -including the duty to ensure that all relevant material is made both for the court and the defence."

Likewise, any professional advocate having conduct of a private prosecution must display "the highest standards of integrity" and

have full regard for the public interest and fulling their duties, not to mislead the court and ensuring the proceedings are fair. This unquestionably invokes the common law "duty of candour" of "full and frank disclosure", including any adverse information, which would assist the court and is now reflected in Part 7 of the CrimPR 2015.²⁸

Part 7 of the Criminal Procedure Rules 2015, as amended sets out the necessary conditions in applying for and issuing a summons. This is a two-stage procedure, the first step is the formal laying of information of the alleged offence(s), followed by the magistrates serving (issuing) a summons to attend court.

Rule 7.2 provides that the prosecutor must first serve on the court a written application which must fully conform with rule 7.3 by sufficiently identifying the relevant offence(s) which is known to law and providing brief particulars of the alleged conduct that constitutes the alleged offence(s). In addition, not only must a prosecutor (other than a public authority)²⁹

²⁷ See Wooler Review 2014 Chapter 6 and generally on the code *Queen(Torpey) v DPP* [2019] EWHC 1804

²⁸ See also *Suleman v Leeds District Mags* [2017] EWHC 3656

²⁹ s.17 of the Prosecution of Offences Act 1986



demonstrate that the application accords with any statutory time stipulations (rule 7.2) but must also, under rule 7.2(5&6), provide sufficient grounds to justify that the defendant has committed the alleged offences, endorsed by a statement of truth that all the material evidence is available and all relevant information is disclosed.

In *R (Kay) v Leeds Magistrates' Court* [2018] 4 WLR, the High Court provided valuable and useful guidance on the legal framework governing the summons procedure in the Magistrates Court. Sweeney J who gave the leading judgment, noted that the issuing of a court

summons is exclusively “a judicial function involving the exercise of a discretion which is subject to control by judicial review.” Any application for a summons is a preliminary step to instituting criminal proceedings, and that the guiding principles gleaned from the previous authorities oblige the magistrates to issue a summons promptly unless there are “compelling reasons not to do so” such as the application is time barred, lacks jurisdiction, is defective, vexatious, or an abuse of process. In *Westminster Mags (Johnston) v Ball* [2019] EWHC 1709, the High Court decisively ruled that the threshold test to issuing a

summons is not a low one as contended by the complainant. On the contrary “when determining an application for a summons a magistrate must ascertain whether the allegation is of an offence known to law, and if so whether the essential ingredients of the offence are *prima facie* present”³⁰.

The court must protect the criminal process from any malpractice or manipulation of it by the prosecution and must not be seen to condone such conduct. If the misconduct is such as to deprive the defendant of any protection under the law and suffer unfairness, then the proceedings ought to be stayed as an abuse of process. The relevant principles have been authoritatively clarified in *R v Maxwell* [2011] 1 WLR 1837 by the Supreme Court and based on two limbs, either it is now impossible to give the accused a fair trial, or a fair trial is still possible but offends the “court’s sense of justice and propriety.” The burden of proving an abuse is on the defendant on a balance of probabilities³¹. An insuperable hurdle given the power to stay

should only be used in exceptional cases, but very much dependent on the individual facts of each case in question.

Statutory Time limitations under the Animal Welfare Act

Unless otherwise stated, all summary offences are subject to s.127 of the Magistrates Court Act 1980 which places a statutory time limit on commencing criminal summary proceedings. This prevents the trial of an offence, unless the information was laid within six months from the time when the offence(s) was committed³². If the offence involves a course of conduct or acts committed “continuously or intermittently, over a period of time” then, as stated in *DPP v Baker* [2004] EWHC 2782, the time limit starts from the final incident.

For the purposes of calculating the duration of the statutory time restrictions, the High Court in *Rockall v DFRA* [2007] 1 WLR 2666 having reviewed the previous

³⁰ See also *R (DPP) v Sunderland MC* [2014] EWHC 61

³¹ See *DPP v Fell* [2013] EWHC 562

³² In *RSPCA v Webb* [2015] EWHC 3802, the High Court left open the question

whether proceedings for a civil order under s.20 of the AWA 2006 to dispose of any animals seized under s.18(5) amounts to a complaint and therefore subject to s.127.

authorities, ruled that the laying of information arose when the information is “made available to the justices, or the clerk to the justices, within time”, not when the summons is served, unless the contrary is specifically expressed in the offence creating provision or Act. Davies J recognised that whilst “institution” and “commencement” can be construed as having the same meaning, they are not “always synonymous”, it will very much be dependent on the context in which they are used. Provided the summons is properly served, then should the accused fail to attend at the magistrates’ court as directed, the court may in accordance with s.11 of the MCA 1980 proceed in their absence, provided the prosecutor is in attendance, or issue a warrant of arrest.

To proceed to trial when a summons is out of time, would amount to an abuse of process and the proceedings inevitably being stayed, nullified, or subject to a judicial review challenge³³. However, given the clear policy reasons in protecting animals and the difficulty in obtaining the

relevant evidence together with the potential delay in discovering the commission of the actual offence, Parliament has in s.31(1)(a) decreed an extended time limitation of three years to commence criminal proceedings from the actual date of the alleged offence, provided those proceedings are commenced within a period of 6 months from the date when sufficient evidence comes to the knowledge of the prosecutor (s.31(1)(b))³⁴. In light of the changes to be made by the Animal Welfare (Sentencing) Bill 2019 and the reclassification of the offences contained in ss.4-8 to triable either way, these are no longer subject to the time limits in s.31 by virtue of s.127(2) of the MCA 1980 and schedule 1 of the Interpretation Act 1978.

The alternative method of instituting proceedings by way of a written charge, a requisition (if permitted), together with a single justice procedure notice introduced by s.29 of the Criminal Justice Act 2003, is only available to designated “relevant prosecutors”, whilst a Local Authority is designated, the RSPCA is not and therefore must

³³ See *R v Aston* [2006] EWCA Crim 794, *RSPCA v Johnson* [2009] EWHC 2702

³⁴ It is for the prosecution to prove that the time limits have been complied with,

see para 31 in *Chesterfield Poultry v Sheffield Mags Court* [2019] EWHC 2953



follow the s.1 MCA 1980 procedure³⁵. Whilst this method is mainly aimed at simplifying the reporting of traffic offences, the High Court in *Brown v DPP* [2019] EWHC 798, as with laying of an information, drew a clear procedural distinction between issuing a written notice on the one hand and the actual serving of the documents on the other and that written charge will be deemed to have been issued on the date it was completed, provided this was within the 6 month time limit and not when served, or in the public

domain as contended by the appellants. In a cautionary warning to prosecutors, Irwin LJ noted that any “inordinate or unwarranted or unjustified but significant delay” between the issuing and actual service “should not and cannot go without a remedy” namely an abuse of process. To avoid any difficulties prosecutors should strive to ensure both the issuing and actual service occurred within the 6-month limitation period.

This is especially important if the difficulties highlighted in *Dougal v*

³⁵ See CJA (New method of instituting proceedings (Specification of relevant prosecutors) Order 2016 SSI 430

CPS [2018] EWHC 1367 are to be avoided, in which High Court distinguishing the decision *in R v Scunthorpe Justices exp McPhee* [1998] EWHC 228, unequivocally ruled that “if no information is laid within the period of six months, but an indictable offence is later charged and then subsequently amended to a summary offence, that amendment does not avoid the consequences of the statutory time limit” in s.127 of the MCA 1980. This, it is contended, would be equally applicable to s.31 and that a prosecutor will only be permitted to substitute, an s.4 unnecessary suffering allegation (when it becomes an either-way offence) with an s.9 welfare offence (a summary only offence) provided this arises from the same misdoing and if the original s.4 offence was brought within six months of the prosecutor having sufficient knowledge to bring proceedings, and within three years of the offence being committed. Otherwise the amended charge will be out of time and the court would have no jurisdiction to hear it.

Sufficiency of Evidence Test and meaning of “Prosecutor: Section 31(1)(b)

Nevertheless, the legitimate aim underpinning the extension of time, must be balanced against the finality rule and the need for criminal proceedings to be concluded within a reasonable time so that any alleged offender is able to govern their lives with some degree of certainty and confidence. The legal test to be applied and which was confirmed in *Letherbarrow v Warwick CC* [2015] EWHC 4820, is not only must the prosecutor be satisfied “whether there is a *prima facie* case but whether the evidence is sufficient to justify a prosecution” in the public interest³⁶. The prosecutor must be astute and “apply his mind” to the case file and in doing so take full account of the public interest factor, including the account (if any) provided by the defendant and the strength of the prosecution’s case, only then will a prosecutor be in a position to have the relevant knowledge. It is at this critical point the 6-month time limit will start to elapse and the prosecutor must either proceed to initiate

sufficient evidence, and secondly it must be in the public interest to prosecute.

³⁶ As stated in *Chesterfield Poultry Ltd v Sheffield Mags Court* [2019] EWHC 2953, this is a two- stage test, firstly there be

proceedings, or discontinue, or invite further investigation.

Whilst s.30 gives expressed prosecutorial status to Local Authorities to bring proceedings under the Act, this does not preclude any other person or organisation from doing so³⁷. In *Lamont v RSPCA* [2012] EWHC 1002, the High Court rejected the contention of the appellant that this should be narrowly construed to mean only bodies or organisations with a statutory power to prosecute. Accepting that the issuing of summons under s.31(2) “is a considerable one” and “not a power lightly to be conferred upon any prosecuting authority”, when considered “in the context of the Act as a whole,” there is no basis to conclude that Parliament intended to impose such a narrow restriction by excluding interested parties, including individuals, from the policy of the Act. Accordingly, in *Letherbarrow v Warwickshire CC* [2014] EWHC 4820 the High Court asserted that the expression “Prosecutor” in s.31 refers to “the individual who is given responsibility for making the

important decision whether to prosecute.” That person must at least be identifiable to avoid any confusion. In *CPS v Riley* [2016] EWHC 2531, the High Court acknowledged a clear role distinction between those who, on the one hand investigate and gather the evidence (in this case the FSA), and the prosecutors on the other who assess the sufficiency and admissibility of that evidence (in this case the CPS, as the FSA have no expressed authority to prosecute directly)³⁸.

Likewise, in *R v Woodward* [2017] EHC 1008, the High Court felt bound by the decision in *Riley* which was factually indistinguishable from the disputed case. Accordingly, the District Judge having wrongly assumed that the FSA and the CPS as being one and the same, miscalculated the appropriate date as being when the FSA had gathered enough evidence to justify a prosecution, as opposed to when the CPS reviewing lawyer had considered the evidence independently in the public interest to warrant proceedings, which was

³⁷ See paras 26 in *Lamont v RSPCA* [2012] EWHC 1002

³⁸ Prosecuting offences in slaughterhouses transferred from DEFRA

to the CPS by the AG under s.3(2)(g) of the Prosecution of Offences Act 1985 ON 12 July 2011.

much later and therefore still within the time stipulation³⁹.

Whilst in *RSPCA v Johnson* [2009] EWHC 2702 the High Court, having reviewed the previous authorities and in particular the decision in *R (Donnachie) v Cardiff Mags Court* [2007] EWHC 1846, was unable to derive any “principle of law that knowledge in a prosecutor begins immediately any employee of that prosecutor has the relevant knowledge.” To rule otherwise would be unduly cumbersome on a prosecutor and contrary to the purpose of the legislation.

For the same reason the High Court in *CPS v Riley* [2016] EWHC 2531, gave warning to any prosecutor that the “long stop” three year time limitation, whilst providing a “margin of judgment”⁴⁰ “is not a charter for paper-shuffling,” and any subsequent avoidable delays, or absence of case management, or abuse of the privilege “will not avail a prosecutor where the relevant delay has exceeded the six-month

period in s.31(1)(b).” On the facts which involved the mistreatment of a cow about to be slaughtered (s.4 offence against the individual partners), the High Court ruled that whilst the evidence could have come before the prosecutor sooner, this was not sufficiently serious so as to render the proceedings unfair and that “whether in a case of egregious delay on the part of investigators impacting on the fairness of the proceedings there might be some other remedy, can safely be left to a case where the issue arises for decision”⁴¹.

Similar sentiments arose in *RSPCA v Johnson* [2009] EWCA 2702, when Pill LJ warned that “the prosecuting authority is not entitled, by passing papers from hand to hand and failing to address the issue, to delay the running of time”⁴². On the individual facts the defendant himself was the author of the delay in commencing proceedings by not engaging with the investigator, despite repeated attempts to do so and therefore the District Judge was

³⁹ This case involved allegations against directors and individuals of cruelty covertly filmed at a abattoir

⁴⁰ *R v Haringey Magistrates’ Court, ex p Amvrosiou* [1996] EWHC 14, at para 23 & *Burwell v DPP* [2009] EWHC 1069 at para 20 which involved s.11 of the Computer Misuse Act 1990

⁴¹ This could include specific directions, or a wasted costs order, or not award prosecution costs after conviction, or form part of sentence mitigation.

⁴² Pill LJ followed the approach in *Morgans v DPP* [1999] 1WLR 968

wrong to conclude that there had been an abuse of process by the prosecutor in not bringing proceedings when the ill-treatment had been discovered and the defendant being identified as the legal owner.

Whilst s.31 should be strictly adhered to, and the prosecutor rightly needs to act conscientiously when coming to a decision and exercise “especial care”⁴³ in doing so, at the same time it does not impose an arbitrary duty and embodies a degree of latitude. As the High Court clearly recognised in *R v Woodward* [2017] EWHC 1008, before coming to a decision the relevant prosecutor must be afforded a reasonable time to properly evaluate the material evidence disclosed by the investigator. Additionally, in *RSPCA v Johnson* [2009] EWHC 2702, Pill LJ acknowledged that it would be contrary to the public interest if a prosecution was commenced other than on “good grounds” and then only if the evidence has been properly considered by an “expert mind” with “appropriate skills to consider whether there is sufficient

information to justify a prosecution” provided always this is not misused to take full advantage of the extended time⁴⁴.

The whole question of prosecutorial time limits again came to be considered by the High Court in *Chesterfield Poultry Ltd v Sheffield Mags Court* [2019] EWHC⁴⁵. This case involved the application of regulation 41 in Welfare of Animals at Time of Killing Regs 2015⁴⁶ and whether or not the CPS had commenced proceedings in time. The case involved a prosecution brought by the CPS on behalf of the FSA into the treatment of chickens found dead at the defendant’s premises.

Having considered the previous authorities in some detail, Males LJ was firmly of the view that the relevant date for the purposes of calculating the time limits to prosecution is not when the prosecutor initially receives the file, or decides to authorise a prosecution in the public interest, as favoured by Hickbottom LJ in *Woodward*. The relevant date (if different to the authorisation date)

⁴³ Para 23(iii) in *R v Woodward* [2017] EWHC 1008

⁴⁴ See also para 57 for similar observations in *Lamont v RSPCA* [2012] EWHC 1002

⁴⁵ The judgment was handed down on the 6 November 2019

⁴⁶ An identical provision to s.31 of the AWA 2006

is when the prosecutor reviews and considers the file of evidence “so that knowledge of the content has been imparted” sufficiently to satisfy the statutory test (the review date). Accordingly, the High Court on clear authority rejected the claimant’s contention the relevant date was when the CPS received the file not when the file was later reviewed with a view to prosecution.

This will be determined on a case by case basis with some cases obviously being more complex than others depending on whether it is a multi-handed case of sustained offending over a period of time, or an isolated incident of maltreatment involving vulnerable individuals. Equally, the type of evidence to be reviewed, such as video evidence obtained covertly, hearsay and bad character evidence and points of law/admissibility needing Counsel’s opinion, the importance of obtaining veterinary expert opinion all take time to process and will often form part of an ongoing review. Nevertheless, it can never be justified for any prosecutor to hide behind the statutory time limits to simply postpone this decision unnecessarily as a convenient way to circumvent the statutory duty in s.31. This will be especially

important if the initial investigation is focused on a suspected s.4 offence which is not subject to s.31, but later due to a lack of evidence, downgraded to an s.9 inquiry which is.

Certificate of confirmation and a question of jurisdiction: Section 31(2)

Section 31(2) allows the prosecution to formally acknowledge the date on which sufficient evidence factually existed to justify a prosecution under the Act. This is not a mere formality, but a process to ensure certainty for both parties as to jurisdiction, subject to an extended time limitation. Recognising that this may give the prosecutor a certain amount of “undue power” in asserting the timescale, and therefore as a matter of policy, a certificate must strictly comply with the statutory requirements, the High Court in *Chesterfield Poultry Ltd v Sheffield Mags Court* [2019] EWHC 2953, rejected a claim that the presentation of a certificate invokes article 6. The issuing of a certificate is a formal step to inform the defendant that the proceedings are procedurally in time, and does not deny his right to a fair trial under Article 6.

Accordingly, the certificate in order to comply with s.31(2)(a) must provide the relevant date in which the prosecutor subjectively forms the opinion that there exists sufficient evidence which has come to his knowledge to justify a prosecution being in the public interest⁴⁷. Provided this is signed by or on behalf of the prosecutor⁴⁸, then it becomes conclusive evidence of the facts stated therein and cannot be rebutted or challenged unless as was strongly noted in *Downes v RSPCA* [2017] EWHC 3622, the defence can clearly show “that there is a prima facie case for undermining the certificate” on the basis that it is “plainly wrong”, or factually inaccurate, or tarnished by fraudulent behaviour, or “patently misleading.”⁴⁹

Even then Knowles J considered “that it will seldom be proper to open up a lengthy evidential inquiry into the decision-making process” since to do so would not only undermine the bindery effect of

s31(2) but it would also disrupt on-going proceedings. As stated by Males LJ in *Chesterfield Poultry v Sheffield Magistrates Court* [2019] EWHC 2953, whether a certificate is erroneous can only be determined on its face and without any regard to any extraneous material to the contrary which would be irrelevant and inadmissible. A defendant cannot therefore go behind the certificate in order to seek to undermine its validity in this regard, unless there is evidence of fraudulent misconduct, bad faith on the part of the prosecutor, or the prosecutor failed to act due diligently in deciding whether or not to prosecute rendering the proceedings unfair and an abuse of process. Essentially the prosecutor has the exclusive authority to determine the relevant date for the purposes of the time limits without necessarily being answerable or provide reasons for doing so and it is this that the court must be mindful of and guard against to ensure “that the conclusive provisions must not be manipulated

⁴⁷ See para 27 in *Chesterfield Poultry v Sheffield Mags Court* [2019] EWHC 2953

⁴⁸ There is no statutory requirement that the certificate itself must be dated and likewise the application for a summons-see para 12 in *Browning v RSPCA* [2012] EWHC 1003

⁴⁹ In *Lamont v RSPCA* [2012] EWHC 1002 William J emphasised that the expression “patently misleading” is not an additional ground, but simply denotes that it must be plainly (inaccuracy) wrong on its face,

to deprive a defendant of a time-bar defence.”

It follows therefore that if the defence is able to show that the certificate is tainted by fraud, or plainly wrong and therefore “inaccurate on its face”⁵⁰, then clearly from the judgment in *Burwell v DPP* [2009] EWHC 1069, the certificate could not be relied upon in such circumstances and the jurisdiction of the court must be an open to challenge, either by judicial review under s.29 of the Senior Courts Act 1981, or alternatively as an abuse of process if merited on the facts. Nevertheless, whilst these are appropriate routes to a challenge the validity of a certificate depending on the grounds, the High Court in *Lamont v RSPCA* [2012] EWHC 1002, (preferring the decision in *Atkinson v DPP* [2004] EWHC 1457, to that in *Burwell v DPP* [2009] EWHC 1069, and *Azam v Epping FDC* [2009] EWHC 3177), felt that it would be unwise to be “unduly proscriptive” and that “there are considerable practical advantages if a challenge to the jurisdiction” is dealt with by Magistrates’ at a preliminary hearing, rather than “satellite litigation by way of judicial review.”

If the magistrates decline jurisdiction, then this would clearly be a final determination, and therefore subject to a possible challenge under s.111 of the MCA 1980 by way of case stated on a point of jurisdiction is not disputed. On the other hand, if the magistrates do accept jurisdiction, this brings into question whether this is a final determination on a point of jurisdiction by reason of the decision itself being final, although not the proceedings, which formed the opinion of the High Court in *R (Donnachie) v Cardiff Magistrates* [2007] 1 WLR 3085 or, as stated in *Steames v Copping* [1985] QB 920, a preliminary ruling accepting jurisdiction as a matter of law is not final outcome, since the on-going proceedings remain in-tact and cannot be appealed under s.111 until such time they are concluded.

This conflict of opinion was resolved in *Downes v RSPCA* [2017] EHC 3922 with the High Court preferring the decision in *Steames* having been correctly decided which was directly to the point of law in issue, whereas the decision in *Donnachie* was a judicial review challenge to the decision to refuse to state a case. Neither does the decision in

⁵⁰ See para 48 in *Chesterfield Poultry Ltd v Sheffield Mags Court* [2019] EWHC 2953

Steames appear to have been cited in *Donnachie* and thus in the opinion of Holroyde LJ, *Donnachie* “should be regarded as made *per incuriam* and should no longer be followed on this specific point”.

Knowles J expressed a similar view and ruled that there is no power for a court to state a case in circumstances in which a decision is made to accept jurisdiction under s.31 of the AWA 2006. In such circumstances his Lordship accepted that whilst a claim for Judicial review remains open to the aggrieved party, the magistrates “should not adjourn, unless there are particularly good reasons to do so” or if leave in the meantime is granted to seek a judicial review. In all other cases “it will very usually be better to carry on and complete the case, allowing for all matters to be raised on appeal at the conclusion of the case in the normal way”, or “if appropriate to do so in a special case” formally state a case to the High Court.

Finding the reasoning in *Downes* as “highly persuasive”⁵¹, the High Court in *Highbury Poultry Farm v CPS* [2018] EWHC 3122, had no

hesitation in applying the guidance in *Downes* to the instant case in which a ruling by the District Judge that the offence contained in Regulation 30(1)(g) of the Welfare of Animals at Time of Killings Regs 2015 SI 1782 imposed strict liability and was only open to challenge by judicial review. Kay J with whom Hickinbottom LJ agreed, observed that whilst such a ruling may adversely affect the position of the defendant, the proceedings still remained “extant” until such time after the outcome of a contested trial, or the defendant decides to plead guilty. Either way, only then would an appeal by case stated be permissible, otherwise the most sensible and effective approach is by judicial review.

Section 31(2) simply denotes “for the purposes” of identifying the date the prosecutor formed their opinion. Accordingly, a certificate is conclusive proof of that fact, but is not essential to it, and is left entirely as a matter for the prosecutor to decide whether or not to use it, which can be issued at any time, during the proceedings and up to the closing of the prosecution case. Naturally the better course is to

⁵¹ despite what appears to be a relatively narrow ratio in the House of Lords decision in *Atkinson v USA* [1971] 1AC that

concerns a challenge to the decision of magistrates whilst acting an examining Justices.

serve a properly drafted certificate as determinative of the time limits being complied with.

A defective certificate does not render the proceedings automatically an abuse, unless promulgated by fraud. Instead the magistrates, regardless of the omission of a certificate, need to determine whether or not the proceedings were nonetheless properly brought within the statutory time limits, the burden of which clearly rests with the prosecution. In *Letherbarrow v Warwickshire CC* [2014] EWHC 4820, the High Court ruled that this can be fulfilled in one of two ways, either by issuing a new written certificate which can, as happened in *R v Woodward* [2017] EWHC 1008⁵², include the issuing of a second certificate to rectify any honest and genuine error made in the first one, or alternatively by “adducing evidence of fact showing who made the decision that a

prosecution was justified and when.” If the latter course is taken, then Hinkinbottom LJ in *Letherbarrow* was firmly of the view that “all evidence (including documentary) can, and must be considered.”

S.127 of the MCA 1980 and offences under the Welfare of Farmed Animals Regulations

Section 12(1) of the AWA 2006 provides the relevant minister with a discretionary power to make regulations specifically aimed at promoting the welfare and progeny of animals, including the creation of summary offences (s.12(2)). One such regulation is the Welfare of Farmed Animals (England) Regulations 2007 SI 2078 which came into effect on 1st October 2007. Any person responsible for a farmed animal⁵³ commits a summary offence⁵⁴ under regulation 7 if they fail, without

⁵² In *Woodward*, the prosecutor had inserted the wrong date to justify a prosecution by honest mistake, by noting the date when the evidence was collated, and not the correct date when he had sufficiency reviewed it. The DJ had erroneously concentrated on earlier certificate rather than whether the second certificate was valid.

⁵³ Farmed animal is defined in reg 3 and means “an animal bred or kept for the production of food, wool, skin or other farming purposes but not fish, reptile or amphibian, wholly for competition, sporting activities, scientific testing or living wild.

⁵⁴ Under regulation 9 the offender on conviction is a risk of a six-month custody and or unlimited fine

lawful authority or excuse⁵⁵, to ensure under regulation 4 that all reasonable steps are taken to maintain high standards of welfare across a broad range of 30 specified welfare conditions listed in schedule 1, such as drink and feed, adequate lighting and ventilation.

However, the regulations are silent on which particular time limitation applied creating a level of uncertainty which had to be addressed by the High Court in *Staffordshire CC v Sherratt & Sigley* [2019] EWHC 1416. The respondent's faced multiple offences in relation to the poor welfare conditions of a number of cows and calves kept at two farms. Six of these specifically related to breaches of regulation 7, whilst another twelve were brought under s.9 of the AWA 2006.

All 18 offences were commenced 8 months after the commission date, bringing into question whether the regulation 7 offences were time barred and out of jurisdiction under s.127 or in time under s.31. Challenging the ruling of the District Judge that the former applied, the appellants contended that this

plainly conflicted with the purpose and substance of the Regulations. Whether the allegations related to domestic animals or farmed animals the same investigative challenges and policies aims arose and therefore any differences in prosecutorial time limits would be anomalous, illogical and prohibitive, especially, as in this case, the defendant is charged under both provisions but with potentially different prosecutions period. This contention was further advanced on the basis that the offence creating provisions are worded in substantively the same form and therefore ought to benefit from the same legal effect of s.31.

In rejecting these contentions, the High Court in the judgment of Flaux LJ ruled that as a matter of procedure, the statutory language leads inescapably to these different consequences. Without unequivocal language to the contrary, s.127 cannot be disapplied. Neither can any views formulated in any advisory material be elevated to statutory intent. Faux LJ alluded that if s.31 had been intended to equally apply to the 2007 Regulations, then this could

⁵⁵ Such expressions are well established and amount to a question of fact subject to supporting evidence-see *R v Jodie*

[2003] EWCA Crim 8 in the context of offensive weapons.

have easily have been provided for in s.12(3)(a) “in terms that an offence created by the Regulations would be treated as an offence under the 2006 Act.”

The High Court was fortified in its ruling by reference to s.12(5) which gives expressed authority for any regulatory offences to be treated as a relevant offence for the purposes of a search warrant under s.23, and that “the absence of any equivalent reference to s.31” is materially significant to suggest that Parliament must have intended to statutorily exclude any regulatory offence from the ambit of s.31 without expressed intent to the contrary. Strong reliance can also be found in other legislation and vividly illustrated in the Mandatory Use of Closed-Circuit Television in Slaughterhouses (England) Regs 2018 SI 556, implemented in accordance with s.12 of the AWA 2006. Regulation 14 is drafted in identical form as s.31, and shows a clear intent by Parliament to not only disapply s.127 but specifically grant a three-year prosecution period for offences in regulation 9 & 10 relating to any breaches of the duties in regulation 3 on the installation and retention of a CCTV in all areas where live animals are present.

Likewise, regulation 18 of the Food Safety & Hygiene (England) Regs 2013 SI 2996 gives equal effect to a three-year prosecution period for offences contained therein as does s.24 of the Food Safety Act 1990. Also, the Road Traffic Offenders Act 1988 in common parlance with other examples has its own self-contained prosecution time period in s.6. Whilst the distinction between the two statutory regimes is arguably rationally incoherent in terms of investigating the welfare of farmed animals as opposed to domestic animals, this can only be rectified by Parliament. In the meantime, when dealing with farmed animal cases, both investigators and prosecutors will undoubtedly have in mind the ruling in *Sherratt & Sigley* when considering the appropriate charge(s) and under which legislation.

However, if the prosecution decides to charge under s.9 of the AWA 2006, in what is clearly a farmed animal case, so as to avoid the strict 6- month time limit, then such a move is likely to lead to an abuse of process challenge on the grounds that it deprives the defendant of this procedural protection, clearly proscribed by Parliament in the regulations. No matter how inconvenient it is to the

prosecution, the rule cannot be circumvented simply by charging a different offence because the conduct in question overlaps both offences.⁵⁶

Concluding Remarks

It is incumbent on both investigators and prosecutors alike to ensure they fulfil their statutory duties under the Animal Welfare Act effectively. The importance of protecting animals from harm is obvious, but this must rightly be balanced against the need to avoid uncertainty and inordinate delay. The imposition of prosecution time limitations is not a burden, but a

measure of ensuring criminal proceedings for relatively minor offences are concluded in a timely manner. Those who investigate and prosecute animal welfare offences occupy a position of privilege under s.31 and therefore need to observe the exigencies of the provision which has the clear effect to extend the ability to bring criminal proceedings long out of time in contrast to the strict six-month rule in s.127 MCA 1980. Whilst the s.4-8 offences will no longer bound by this rule, this does not lessen the need to comply with the objectives of the Criminal Procedure Rules in dealing with cases expeditiously.

⁵⁶ See the reasoning of the House of Lords in *R v J* [2005] 1 AC 562 and also *R v Perrett* [2019] EWCA Crim 685