

High Court Rules on the Hunting Act

- **Exempt Hunting: Burden of Proof to fall on Prosecutors**
- **“Hunting” does not include searching**

The most Senior Judge in the Queen’s Bench Division of the High Court today handed down the long-awaited rulings as to how hunting should be defined and on who needs to prove what in exempt hunting cases.

These issues have arisen from two prosecutions. The first is that of Tony Wright – the Huntsman of the Exmoor Foxhounds – who was found not guilty of unlawful hunting in November 2007 at Exeter Crown Court. The Prosecution appealed against that decision claiming that the Crown Court wrongly determined that the burden of proof in exempt hunting cases should fall upon the Prosecution. Further, that the Court was wrong to rule that hunting did not include searching.

Running in parallel was a Judicial Review which arose from a case involving the Master Huntsman and Whipper-in of the Devon & Somerset Staghounds. In their case, a District Judge had ruled that the burden of proof lay on them as Defendants to prove that they were hunting within the terms of exemptions. The trial was adjourned in November 2007 to enable his ruling to be challenged.

The Hunting Act prohibits the hunting of a wild mammal with a dog unless the hunting is exempt. Those committing this offence are liable to a fine of £5,000 and a forfeiture of dogs, hunting articles or vehicles used in the commission of any offence. These are significant penalties. The High Court also acknowledged that hunting is of great social and emotional importance to a large number of people.

Accordingly prosecutions of this type were not trivial nor to be treated as matters of mere regulation. This is an important distinction. It is often the case that persons charged with minor regulatory offences will have the task of proving that they are within the terms of any exemption on which they might rely. For example, in motoring cases the Police need only prove which individual is driving a motor vehicle and thereafter it will be for that driver to prove that he has the appropriate licence. In such circumstances the fundamental principles that a person is presumed to be innocent and that it is for the Prosecution to prove the case against him are set to one side.

The exemptions in the Hunting Act however are complex. The Court took the view that they were not limited to straightforward issues that a Defendant could be expected to prove. The Court would be slow to set aside presumption of innocence in these circumstances. Additionally the Court was concerned that if the burden was placed on the Defendant to prove the exemption then all that the Prosecution would need to prove would be the pursuit of a wild mammal with a dog. Thereafter if the person accused was unable to prove all the elements of the exemption there was a clear risk that persons would be convicted even where the Court was in doubt as to whether the offence had been committed.

Kerry Barker, on behalf of the Crown Prosecution Service, argued that the placing of a burden on the Prosecution to disprove an exemption would make the legislation unworkable. By way of example, he argued that the Crown could scarcely be required to prove that Defendants did not have an intention to hunt wild mammals for the purposes of research and observation. Philip Mott QC, however, argued on behalf of those being prosecuted, that if the burden was to be placed on Defendants then the legislation should have said so. He also argued and the Court accepted that it would only be necessary for the Prosecution to prove non-compliance with one element of any exemption that is relied upon. The fact, for example, that hunting is taking place to protect livestock could accordingly be invalidated by the Prosecution if they proved that three dogs were used, or that hunting did not take place with the permission of the landowner.

The Judges described the legislation as being of a “quite unusual nature”. Of course, it includes a ban on hunting but also creates categories of lawful hunting. They did not consider that it was necessary to place the burden of proof on Defendants in order to make this Act reasonably workable.

On the definition of hunting it was common ground in this case that hunting must be intentional. The Prosecution will always have the burden of proving that a person charged with hunting had acted deliberately. The Prosecution had contended in Tony Wright’s case that hunting included searching for a wild mammal. On that basis a prosecution could follow where a person took a dog to find a wild mammal even though no such mammal was ever discovered. The Court has ruled on this issue that there must be an identified quarry. Searching for a mammal in order to hunt it will not be sufficient .

Overall, the Court did not agree with the submission of the Prosecutor that prosecutions under the Hunting Act would rarely be viable unless the burden of proving exemptions was placed onto a Defendant. The placing of this burden on the Defendant was an interference with the presumption of innocence and therefore a step which was not to be taken lightly. Instead the Court said that there should be an evidential burden on Defendants. They would need to raise these issues in their defence and it would then be for the Prosecution to deal with them.

A practical impact of this decision is that the Prosecution will have to consider the exemptions (known or potential) prior to bringing proceedings. They will have to prove that hunting is intentional and that Defendants are not operating under the terms of the exemptions which are set out in the Act. There have been few prosecutions since February 2005 when the Act came into force. Part of the reason for that may be that Police Forces and Prosecutors have been awaiting clarification on these fundamental areas. If the Prosecutors do not regard the Act as viable then there may now be fewer cases particularly where hunting is taking place under exemptions.

Of course, the Prosecution could pursue these arguments further. If so, permission will be required to take them to the House of Lords.