Neutral Citation Number: [2009] EWHC 105 (Admin)

Case No: CO/2553/2008

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/02/2009

**Before:**
**PRESIDENT OF THE QUEEN'S BENCH DIVISION**
**MR JUSTICE MADDISON**

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**Between:**

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| **Director of Public Prosecutions (Crown Prosecution Service CCU South West)** | **Appellant** |
| **- v -** | |
| **Anthony Wright** | **Respondent** |
| **The Queen on the Application of Maurice Scott, Peter Heard & Donald Summersgill** | **Claimants** |
| **v** | |
| **Taunton Deane Magistrates' Court** | **Respondents** |

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**Mr Kerry Barker & Ms Rebecca Bradberry** (instructed by **CPS Bristol**) for the **Appellant**
**Mr Philip Mott QC** (instructed by **Knights Sols**) for the **Respondent**

**Mr Philip Mott QC** (instructed by **Clarke Willmott, Taunton Sols**) for the **Claimants**
**Mr Kerry Barker & Ms Rebecca Bradberry** (instructed by Sols) for the **Respondents**

Hearing dates: 16/17 December 2008

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# Approved Judgment

**Sir Anthony May – President of the Queen's Bench Division:**

1. This is the judgment of the Court.

**Introduction**

2. The Hunting Act 2004 was controversial during its prolonged Parliamentary history between 1997 and its enactment in 2004. Its application and effect remain controversial. The length of Parliamentary time spent on the issue of hunting was virtually unprecedented in modern times. The Parliamentary history of what became the 2004 Act is summarised in paragraph 12 to 21 of the judgment of a division of this court in *R (Countryside Alliance) v Attorney General* [2005] EWHC 1677 (Admin). That judgment dismissed judicial review challenges to the lawfulness and integrity of the 2004 Act on the grounds that it was a disproportionate, unnecessary and illegitimate interference with the claimants' rights to choose how to conduct their lives; with market freedoms protected by European law; and an unjust interference with economic rights. This court held that the 2004 Act was rational and proportionate legislation to achieve a legitimate democratic aim which withstood human rights and European law objections. Appeals against this judgment to the Court of Appeal and the House of Lords failed ([2006] EWCA Civ 817; [2007] UK HL 52), the main lines of this court's reasoning being upheld.

3. The 2004 Act was enacted by being passed in the House of Commons alone on a free vote by a substantial majority of Members of Parliament from all major parties. The ban of hunting wild mammals with dogs which it imposed did not represent legislation promoted by the Government. It did not represent the policy of the Government, but rather the will of the House of Commons expressed in a free vote. The legislative aim which this court discerned at paragraph 339 of the *Countryside Alliance* case – which the Court of Appeal and the House of Lords adopted - was a composite one of preventing or reducing unnecessary suffering to wild mammals overlaid by a moral viewpoint that causing suffering to animals for sport is unethical and should, so far as practical and proportionate, be stopped. There were, however, competing considerations such that the ban on hunting wild mammals with dogs was not absolute. Perhaps the main relevant competing consideration was the need to retain the lawful possibility of using dogs to control wild mammals which farmers and others are entitled to regard as pests.

**The Hunting Act 2004**

4. Section 1 of the 2004 Act provides that "a person commits an offence if he hunts a wild mammal with a dog, unless his hunting is exempt". Section 3 creates offences by a person who knowingly assists hunting which is banned under section 1. Part 2 of the Act has provisions for enforcement. A person guilty of an offence under the Act is liable on summary conviction to a fine not exceeding level 5 in the standard scale – currently £5,000. In addition, section 9 provides for the forfeiture of any dog, hunting article or vehicle used in the commission of the offence, pursuant to which the court might in some cases deprive a defendant of property of considerable value. So far as is material to these proceedings, this is not, in our view, mere regulatory criminality to be equated with minor motoring offences or routine licensing matters. Although the offences created by the Act are summary only, the subject matter is of great social and emotional importance to a large number of people, both the proponents and opponents

of the ban on hunting with dogs. The prosecution which these proceedings mainly concern took 4 days before the magistrates and 5 days on appeal to the Crown Court.

5. The time limit for bringing a prosecution is the normal 6 months for summary offences. There is no requirement, such as there is for some motoring offences, of a notice of intended prosecution to be given within 14 days of the alleged offence.

6. The ban on hunting a wild mammal with a dog does not extend to hunting which is exempt. By section 2 of the Act, hunting is exempt if it is within a class specified in Schedule 1. We reproduce Schedule 1 in full as an appendix to this judgment. In short descriptive summary, exempt hunting includes:

i) stalking a wild mammal, or flushing it out of cover, if the conditions in paragraph 1 of the Schedule are satisfied. The conditions include that:

a) the stalking or flushing out is undertaken to prevent or reduce serious damage which the wild mammal would otherwise cause;

b) it does not involve the use of more than two dogs; nor

c) the use of one dog below ground otherwise than in accordance with paragraph 2.

The conditions in paragraph 2 include that the purpose of the stalking or flushing out is to prevent or reduce serious damage to game or wild birds kept for the purpose of their being shot; and that reasonable steps are taken to shoot the wild mammal dead as soon as possible after it has been flushed out from below ground.

ii) Hunting rats (paragraph 3) or rabbits (paragraph 4);

iii) Retrieving hares which have been shot (paragraph 5);

iv) Flushing a wild mammal from cover for falconry (paragraph 6);

v) Recapturing a wild mammal which has escaped or been released from captivity or confinement provided that it was not released or permitted to escape for the purpose of being hunted (paragraph 7);

vi) Rescuing an injured wild mammal using not more than two dogs above ground on condition that reasonable steps are taken as soon as possible to relieve its suffering (paragraph 8); and

vii) Hunting a wild mammal for the purpose of its observation or study using not more than two dogs above ground (paragraph 9).

7. All nine paragraphs of Schedule 1 have close variants of a condition that the exempt hunting takes place on land which belongs to the person hunting or which he has been given permission to use for that purpose by the occupier or owner. Several of the paragraphs have conditions that "reasonable steps are taken" to ensure that the wild mammal is shot dead and that each dog is kept under sufficiently close control to ensure that it does not prevent or obstruct the shooting.

8. By section 4 of the Act, it is a defence for a person charged with an offence under section 1 in respect of hunting to show that he reasonably believed that the hunting was exempt.

9. The 2004 Act came into force on 18 February 2005. There have since been a number of prosecutions for alleged offences contrary to section 1 of the Act. The matters before this court come from the West Country. Some prosecutions have been brought privately by the League Against Cruel Sports Ltd.

**The Proceedings**

10. On 4 August 2006, Anthony Wright, the Huntsman of the Exmoor Foxhounds, was convicted by magistrates of hunting foxes with dogs contrary to section 1 of the 2004 Act. He was fined £500 and ordered to pay £250 costs. The prosecution, brought by The League Against Cruel Sports Ltd, arose out of events on 29 April 2005, a few weeks after the 2004 Act came into force. The information was laid on 27 October 2005, two days before the end of the six month period. Mr Wright appealed to the Crown Court. The Director of Public Prosecutions took over the case from the private prosecutor. The appeal was heard by the Recorder of Exeter, HHJ Cottle, and justices on 5 to 9 November 2007. Judgment was given on 30 November 2007. It proceeded on a ruling of law that the burden of disproving that hunting was exempt under Schedule 1 was on the prosecution and that the standard of proof was the criminal standard. The appeal was allowed.

11. On 4 June 2008, Lloyd Jones J gave the DPP permission to apply for judicial review and ordered that the case should be heard at the same time as an application for judicial review in *R (on the application of Scott) v Taunton Deane Magistrates' Court,* which is now also before this court. On 18 July 2008, this court ordered the Crown Court in Mr Wright's case to state a case. This case is now before this court.

12. In the *Taunton Deane Magistrates* case, Maurice Scott, Peter Heard and Donald Summersgill are charged with unlawful hunting. They are concerned with stag hunting; and Donald Summersgill was, incidentally, the first named human rights claimant in the *Countryside Alliance* case – see paragraph 32 of the judgment. Earlier in the year, in a third case not before this court, DJ Parsons had convicted two members of the Quantock Stag Hounds of offences under section 1 of the Act, it being agreed by the parties that, by virtue of section 101 of the Magistrates' Court Act 1980, the burden of proving that hunting was exempt under Schedule 1 of the Act was on the defendants. On appeal in that case to the Taunton Crown Court, Wyn Williams J and Justices regarded that as clear.

13. In Mr Wright's case, however, the prosecution had been conducted before the magistrates on the basis that the burden of disproving exemption under section 1 was on the prosecution. In the Crown Court, the prosecution had raised the issue, and HHJ Cottle had ruled that the burden was on the prosecution to establish to the criminal standard that the hunting was not exempt hunting. There was some delay in bringing Mr Wright's case to this court. So DJ Parsons sensibly, but unusually, decided to make a binding pre-trial ruling in the *Taunton Deane* case, so that it might be a vehicle for the question to be raised on judicial review. He ruled that, if a defendant wishes to rely on one of the exemptions in Schedule 1, it is for him to satisfy the court that his hunting was indeed exempt. In the event, the Wright case

raises this issue, and it is agreed that no separate issue arises in the *Taunton Deane* case.

**The Case Stated**

14. The case stated, dated 3 September 2008, poses the following questions for the opinion of this court:

> "(1) whether the combined effect of section 101 of the Magistrates' Courts Act 1980, and the provisions of the Hunting Act 2004, are such as to place a burden on the defendant to prove the exemptions set out in Schedule 1 to the Hunting Act 2004?
>
> (2) whether the term "hunt" a wild mammal with a dog used in section 1 of the Hunting Act 2004 includes the activity of searching for a wild animal for the purpose of stalking or flushing it?"

HHJ Cottle ruled that, and he and the Justices decided the case on the basis that, the answer to each of these questions was No.

15. As to the second question, the prosecution in another case had contended (and now contend in this case) that "hunting" includes searching for or hunting for a wild mammal as yet unidentified or unidentifiable. On that interpretation, it seems that a whole day's activities could be covered by a single information even if no wild animal was ever found. The judge did not accept this interpretation, as there was a difference between "hunting a wild mammal" and "hunting for a wild mammal", and in the case of doubt the more restricted interpretation should be adopted. However, the distinction between "hunting" and "hunting for" a fox was easier to state than to recognise.

16. As to the first question, it is of course capable of arising in relation to any part of the lengthy Schedule 1 definition of exempt hunting; and Mr Barker for the DPP understandably raises the spectre of wholly unworkable legislation, if the prosecution are required to disprove to the criminal standard every single potentially relevant piece of the Schedule 1 jigsaw. Mr Mott QC, for Mr Wright (and also for the Taunton Deane claimants), equally understandably, submits that it would be utterly oppressive if a prosecutor had to prove little more than presence out of doors with dogs, to place the burden of proving every contentious element in Schedule 1 on a defendant. There would be a real risk that the court would be constrained to convict in a case when the court was not sure of the defendant's guilt.

17. Each advocate supposes circumstances in which the one party or the other, prosecutor or defendant, would conduct the proceedings without any sense or co-operation, each declining to say what their real case was. Mr Mott supposes a private prosecution which simply sought to challenge those engaged in lawful activity to prove that they were not acting unlawfully. Mr Barker points out that Crown Prosecutors have a code designed to ensure that prosecutions are brought responsibly. He points out that video evidence of what may happen over large tracts of countryside may be incomplete and inconclusive. Defendants, properly advised, would say nothing; and there is no

requirement in summary proceedings for a defence statement of the matters which will be put in issue.

18. The Crown Court observed generally that their experience of Mr Wright's case had led them to conclude that the relevant law was far from simple to interpret or to apply. Any given set of facts might be susceptible to differing interpretations. It was an unhappy state of affairs which left all those involved in a position of uncertainty.

**Facts**

19. The facts of Mr Wright's case were quite complicated and extensive. The case stated records that the court heard a considerable body of evidence over several days. The case does not rehearse the evidence in detail, but the summary of the facts, and the Court's decision resulting from them, occupy paragraphs 8 to 14 and most of paragraphs 36 to 62, in all some 6 pages of closely typed prose.

20. In the barest outline, the issues arose under paragraph 1 of Schedule 1. There were two incidents of flushing out a fox from cover. As to condition 1 of paragraph 1, the prosecution admitted that at least one of the purposes was to prevent or reduce serious damage which the foxes would otherwise cause to livestock. The evidence was that the lambing season was not over until perhaps mid-May. The Court was satisfied that the primary purpose of the hunting was that set out in paragraph 1(2)(a)(i) of the Schedule. Certainly the prosecution had failed to prove that it was not.

21. Condition 2 (landownership or permission) and condition 3 (not more than two dogs) do not appear to have been much in issue.

22. As to condition 4, Mr Marfleet, on a quad bike, had a terrier in a box and a spade. But neither the terrier nor the spade were used, and the Court did not accept that Mr Marfleet had any intention of using the spade, which he always had on his quad bike, for any unlawful activity. He in fact used it to bury the fox he was later to shoot. As to condition 5(a), the court was satisfied that a first fox was flushed from cover and was being hunted. Considering much detailed evidence, the court observed that the steps taken did not result in the fox being shot dead as soon as possible after being flushed from cover. As things turned out, Mr Marfleet, the marksman, had not positioned himself in a suitable place to shoot the fox at that moment, because the fox unexpectedly negotiated a boundary fence and headed in a direction which was virtually opposite to where Mr Marfleet was. The court considered that the fact that an honest attempt to secure a particular outcome failed did not necessarily mean that reasonable steps were not taken to secure that outcome. The court was not sure that reasonable steps had not been taken.

23. As to condition 5(b), there was no obligation to keep dogs under close control for any purpose other than to avoid them obstructing or preventing shooting a flushed fox. There was no evidence that they did prevent or obstruct the shooting of the first fox.

24. On the second occasion, all that was established was that the fox was seen on film moving relatively quickly down a hillside, and each of two hounds separately were seen to follow the same route after very appreciable gaps. Mr Wright did not appreciate that a fox had been flushed out and never saw the fox at all. He said that he sounded his horn to bring the hounds under control as soon as he realised they

were pursuing a fox. The court was not sure he was not right about that. The state of the evidence fell short of establishing the primary facts. The court was not sure that the fox had been flushed from cover or was being "hunted". If it was, there was doubt in their minds as to whether Mr Wright knew that to be so. The court considered also what Mr Marfleet was doing on this occasion. He never saw a fox at all, although later he did shoot one dead.

25. Even if the court had concluded differently in relation to the two incidents and in relation to condition 5, they concluded that Mr Wright genuinely wished to comply with the Act; and that they were satisfied that he had proved that he reasonably believed, perhaps optimistically, that he had put in place the safeguards that he thought would ensure compliance with the requirements of the Act.

**The meaning of "hunts"**

26. We take the second question in the case stated first, because the meaning of "hunts" in section 1 of the Act could affect the answer to the first question. Indeed, we think that the prosecution case on the first question might be scarcely tenable if their most expansive case on the second question were correct.

27. It is uncontentious that, whatever "hunts" means in section 1, hunting is by definition intentional. Mr Barker accepts that any prosecution would need to prove to the criminal standard what the defendant's intention was.

28. Unlike the Protection of Wild Mammals (Scotland) Act 2002, the 2004 Act does not define "hunts" or "hunting", although the interpretation section 11 provides that a reference to a person hunting a wild mammal with a dog *includes* any case where a person engages or participates in the pursuit of a wild mammal. This is not all embracing, but it does suggest that hunting occurs when a person pursues an identified (or perhaps scented) quarry. Certainly one meaning of "to hunt" or "hunting" can, in an appropriate context, extend to searching for whatever you are hunting, but section 11 of this statute suggests otherwise.

29. Mr Barker suggested, with some hesitation, that we should look at and derive help from what Alun Michael MP, the Minister who promoted legislation which was not enacted, said in Parliamentary Committee on 4 February 2003, during consideration of the Hunting Bill which he had introduced in December 2002. These parliamentary proceedings were not even in the same Parliamentary session as that in which the 2004 Act passed in the House of Commons alone on a free vote. In our judgment, the statements are not helpful, nor, we think, admissible for the reasons given in paragraph 269 of the judgment in this court in the *Countryside Alliance* case. The same applies to a statement in the House of Lords by the Government Minister there with responsibility for the Hunting Bill on 21 October 2003. The Bill did not pass in the House of Lords. It is not, in our judgment, permissible nor possible to look for a corporate intention as to the meaning of the word "hunts" from the no doubt disparate states of mind of the individual Members of Parliament who rejected the legislation which the Government promoted in 2003 and enacted the 2004 Act on a free vote. It is necessary to determine the meaning from the terms of the Act itself, taken in its general context with such general help as may be obtained from the Parliamentary intention for the legislation which we have identified.

30. The answer to the second main question in the case stated turns on the meaning of the word "hunts" in section 1, the full terms of which are:

> "A person commits an offence if he hunts a wild mammal with a dog, unless his hunting is exempt."

Although the word "hunting" appears in the section (and Schedule 1 is headed "Exempt Hunting"), it is the word "hunts" which matters and which delineates what in this statute is hunting. We agree with Mr Mott that "hunts" is used transitively, and that its object "a wild mammal" indicates an identified quarry. A person who leaves their home on horseback or on foot intending to search for a fox may in a sense be going hunting, but he or she is not at that moment hunting a wild mammal, because no wild mammal has yet been found. As Mr Mott pointed out, there is no statutory offence of going equipped for hunting.

31. There are other indications to similar effect in Schedule 1. Paragraphs 7, 8 and 9 all begin with the words "The hunting of *a* wild mammal ....". Paragraph 5 begins with the words "hunting of *a* hare ...."; paragraph 6 with the words "flushing *a* wild mammal...". Paragraph 3 begins with the words "The hunting of rats...." and paragraph 4 with the words "the hunting of rabbits....."

32. More directly relevant to the facts of Mr Wright's prosecution are the opening words of paragraph 1(1) to Schedule 1 – "stalking a wild animal, or flushing it out of cover ....". You do not, generally speaking, stalk an unidentified wild mammal by merely searching for it, nor do you flush out an unidentified wild mammal from cover; and again the use of the words "a wild mammal" and "it" require that the wild mammal has been identified.

33. The requirements in all paragraphs about land ownership or permission also suggest that the mere intention to search for wild mammals is not within the expression "hunts a wild mammal" in section 1. The journey to a place where you intend to hunt a wild mammal if you find one may cross land owned by several different people.

34. The elaborate conditions in paragraph 1 – but also, we think, in paragraphs 2, 7, 8 and 9 - further suggest that "hunts a wild mammal" does not include the mere searching for a wild mammal. In paragraph 1, all five conditions must be fulfilled. But you will never reach the fifth condition unless you have identified the wild mammal and stalked it or flushed it out. It is, incidentally, by then "*the* wild mammal" which you were stalking or flushing out in paragraph 1(1)(a). It is not easy to see how a court is supposed to address that condition, if there might be the prosecution of a person who set off in search of foxes, but never found one; and who would defend a prosecution on the basis that, if a fox had been found, it was, or was to be, exempt hunting under paragraph 1 of Schedule 1. The Court can scarcely inquire whether, if a fox had been found, reasonable steps would have been taken to ensure that the fox was shot dead and that each dog would have been kept under sufficient close control.

35. There are some possible indications in favour of the construction for which the prosecution contends. One is in the words "after being *found* or flushed out" in paragraph 1(7)(a) – see also paragraphs 2(5)(a), 7(3)(a), and 8(7)(a). However, we do not consider that these can determine that the meaning of "hunts a wild mammal" in section 1 extends to searching for an unidentified wild mammal. The references in

paragraphs 7 and 8 are in the context of an identified wild mammal which has escaped from captivity or been injured. The reference to being found in paragraph 1(7)(a) is to stalking.

36. Mr Barker relied on the legislative purpose of the Act as discerned in paragraph 339 of the *Countryside Alliance* judgment. So far as this goes, we think that it supports the respondent's construction. The purpose was the composite one of preventing or reducing unnecessary suffering to wild mammals overlaid by a moral viewpoint that causing suffering to animals for sport is unethical and should, so far as practical and proportionate, be stopped. A wild mammal which is never identified as a quarry does not suffer. If it is said that searching for a wild mammal has a potential for causing suffering to wild mammals generally, an answer is that hunting wild mammals is not banned absolutely and searching for them for the purpose of exempt hunting is permitted.

37. In our judgment, for the reasons which we have indicated, the term "hunts" a wild mammal with a dog, as used in section 1 of the Hunting Act 2004, does not include the mere searching for an unidentified wild mammal for the purpose of stalking or flushing it. That said, the question whether a person "hunts" a wild mammal with a dog is heavily fact specific, and we do not attempt to define by reference to particular hypothetical factual circumstances when hunting takes place for the purpose of the 2004 Act and when it does not. The Crown Court were uncontentiously correct to hold that Mr Wright was hunting the first fox which he came upon on 29 April 2005. It was obviously open to question whether he was hunting the second fox which he never saw. It is not within the ambit of the case stated for us to decide whether the Crown Court was correct to decide that they were not sure on the limited evidence available that the second fox had been flushed from cover or was being hunted. They were, in our judgement, correct to concentrate the inquiry on the particular fox.

**Burden of Proof**

38. Section 101 of the Magistrates' Courts Act 1980 provides:

> "Where the defendant to an information or complaint relies for his defence on any exception, exemption, proviso, excuse or qualification, whether or not it accompanies the description of the offence or matter of complaint in the enactment creating the offence or on which the complaint is founded, the burden of proving the exception, exemption, proviso, excuse or qualification shall be on him; and this notwithstanding that the information or complaint contains an allegation negativing the exception, exemption, proviso, excuse or qualification."

39. It is uncontentious that, if there is a burden of proof on the defendant, it would be discharged on the balance of probabilities; and that, if the burden is on the prosecution to disprove that hunting is exempt, that would be to the criminal standard.

40. The form in which the first question was by agreement stated in the case, which we have set out in paragraph 14 above, is not identical with the form in which this court ordered the Crown Court to state it. That form of question asked whether section 101 of the 1980 Act and the provisions of the 2004 Act placed either a legal or persuasive

burden on the defendant to prove a Schedule 1 exemption or placed an evidential burden on the defendant. The question as stated is unspecific as to the kind of burden. We understand a legal or persuasive burden to be a burden placed on the defendant to prove on the balance of probabilities that his hunting is exempt hunting; failing which he will be convicted. An evidential burden is a burden to adduce an evidential case which raises an issue whether his hunting is exempt; whereupon the burden is on the prosecution to prove surely that in this respect it is not exempt – for the distinction see *R v Hunt* [1987] 1 AC 352 at 369 B-F and 376 A; and *R v Lambert* [2002] 2 AC 545 at 572 A-C. The prosecution do not have to disprove matters which the defendant's evidence or case do not properly raise.

41. It is of course a commonplace in criminal trials that evidence may raise the possibility of a defence of, for instance, accident or self-defence, which the prosecution then has the burden of disproving to the criminal standard. This can arise, when the evidence warrants it, even if the defence in question is not the defendant's main forensic case. It is an important part of the fundamental principle that a person is presumed innocent until he is proved guilty.

42. The leading case on the application of section 101 of the 1980 Act is *R v Hunt* [1987] AC 352, which examined the common law origins of the section. Since the decision in *Hunt*, the Human Rights Act 1998 has come into force. This requires additionally that the 2004 Act must be read and given effect to, so far as it is possible to do so, in a way which is compatible with a defendant's rights under article 6 in particular of the European Convention on Human Rights. By article 6(2) of the Convention, everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

43. *R v Edwards* [1975] 1 QB 27 was a decision of the Court of Appeal which preceded the enactment of section 101 of the 1980 Act. The issue was whether, on a charge of selling intoxicating liquor without a justices' licence contrary to section 160(1)(a) of the Licensing Act 1964, the prosecution had to prove that there was no justices' licence in force. The court held that, if on the true construction of an enactment it prohibited the doing of a certain act, except in specified circumstances, it was not for the prosecution to prove a prima facie case of lack of excuse or qualification. The onus shifted and it was for the defendant to prove that he was entitled to do the prohibited act. In the case before the court, it was for the defendant to prove that he had a justices' licence. This exception to the fundamental rule did not depend on either the fact, or the presumption, that the defendant had peculiar knowledge enabling him to prove the positive of a negative averment.

44. The judgment of the court was given by Lawton LJ, the other members being Lord Widgery CJ and Ashworth J. The judgment traces pleading practice, authority and statutory provision from the 17th century to section 81 of the Magistrates' Courts Act 1952, which was the immediate statutory predecessor of section 101 of the 1980 Act.

45. The Summary Jurisdiction Act 1848 (Jervis's Act) brought modern courts of summary jurisdiction into being. Section 14 of that Act was an attempt to adapt proceedings on indictment to the new type of court. The object of the proviso to that section – to the effect that, if the information or complaint should negative any exception, proviso or condition, the prosecution did not have to prove this negative, but the defendant might prove the affirmative – was to apply the common law relating

exceptions and provisos to the new courts. In the court's judgment, a line of authority to which they referred:

> "....establishes that over the centuries the common law, as a result of experience and the need to ensure that justice is done both to the community and to defendants, has evolved an exception to the fundamental rule of our criminal law that the prosecution must prove every element of the offence charged. This exception, like so much else in the common law, was hammered out on the anvil of pleading. It is limited to offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities. Whenever the prosecution seeks to rely on this exception, the court must construe the enactment under which the charge is laid. If the true construction is that the enactment prohibits the doing of acts, subject to provisos, exemptions and the like, then the prosecution can rely upon the exception.
>
> .....
>
> Two consequences follow from the view we have taken as to the evolution and nature of this exception. First, as it comes into operation upon an enactment being construed in a particular way, there is no need for the prosecution to prove a prima facie case of lack of excuse, qualification or the like; and secondly, what shifts is the onus; it is for the defendant to prove that he was entitled to do the prohibited act. What rests on him is the legal or, as it is sometimes called, the persuasive burden of proof. It is not the evidential burden."

46. In *R v Hunt*, the appellant was charged under section 5(2) of the Misuse of Drugs Act 1971 with unlawful possession of a controlled drug, morphine, contrary to section 5(1). Regulation 4(1) of the Misuse of Drugs Regulations 1973 provided that section 5(1) of the 1971 Act should not have effect in relation to controlled drugs specified in Schedule 1. Paragraph 3 of Schedule 1 referred to very small quantities of medicinal opium or morphine compounded so as not to be readily recoverable or in a yield which would not constitute a risk to health. The prosecution did not prove the proportion of morphine in the allegedly offending powder. The defence submitted that there was no case to answer, the prosecution having failed to disprove an ingredient of the offence. The House of Lords held, allowing the appeal, that, on its true construction, regulation 4(1) of the 1973 Regulations dealt, not with exceptions to what would otherwise be unlawful, but with the definition of the essential ingredients of an offence; and that, as it was an offence to possess morphine in one form but not an offence to possess it in another form, it had been for the prosecution to prove that the morphine in the possession of the appellant had been in the prohibited form, which it had not done, and no burden had fallen on the appellant under regulation 4(1) and paragraph 3 of Schedule 1.

47. Lord Griffiths gave the leading opinion with which the other members of the House agreed. He rejected a sustained submission with reference to *Woolmington v DPP* [1935] AC 462 that *R v Edwards* was wrongly decided. *Woolmington* was concerned with a defence of accident to a charge of murder, not with the nature of a statutory offence or upon whom the burden of proving it might lie. Lord Griffith considered (at page 372E) the legislative history preceding section 101 of the 1980 Act. As had been pointed out in *Nimmo v Alexander Cowan & Sons Ltd* [1968] AC 107, in repealing section 14 of the 1848 Act and replacing it with section 39(2) of the Summary Jurisdiction Act 1879 (which was in substantially the same language as section 101 of the 1980 Act), Parliament was emphasising that it was the substance and effect as well as the form of the enactment that mattered when considering upon whom it was intended that the burden of proof should lie under any particular Act. There should be no difference of approach to the burden of proof according to whether the case was tried summarily or on indictment (page 373D). As Lord Wilberforce had said in *Nimmo v Alexander Cowan,* the equivalent Scottish section merely stated the orthodox principle that exceptions are to be set up by those who rely on them. The real difficulty, however, lay in determining upon whom Parliament intended to place the burden of proof when the statute had not expressly so provided. It presented particularly difficult problems of construction when what might be regarded as a matter of defence appeared in a clause creating the offence rather than in some subsequent proviso from which it might more readily be inferred that it was intended to provide a separate defence which a defendant must set up and prove (page 374 B-C). We interpolate to observe that this applies to the 2004 Act, where section 1 both creates the offence and exempts hunting which is in a class specified in Schedule 1; and section 4 provides a statutory defence for which the burden of proof is expressly placed on the defendant.

48. Lord Griffiths noted that in *Nimmo v Alexander Cowan* the House divided three to two on construction of the relevant statute. He then said at page 374 F:

> "However, their Lordships were in agreement that if the linguistic construction of the statute did not clearly indicate upon whom the burden should lie the court should look to other considerations to determine the intention of Parliament such as the mischief at which the Act was aimed and practical considerations affecting the burden of proof and, in particular, the ease or difficulty that the respective parties would encounter in discharging the burden. I regard this last consideration as one of great importance for surely Parliament can never lightly be taken to have intended to impose an onerous duty on a defendant to prove his innocence in a criminal case, and a court should be very slow to draw any such inference from the language of a statute.
>
> When all the cases are analysed, those in which the courts have held that the burden lies on the defendant are cases in which the burden can be easily discharged."

49. The clear disinclination to construe a statute as imposing an onerous duty on a defendant to prove his innocence carries through, in our view, to significant parts at least of the matters in Schedule 1 of the 2004 Act. It is not, we think, to be equated

with requiring a defendant to prove that he had the requisite formal licence. Proving that you own the land on which hunting takes place, or that you have permission from the owner or occupier to use it, may or may not be burdensome. Mr Barker submitted that it ought to be straightforward when the person going hunting knows that he may have to show that the hunting is exempt. Mr Mott QC submitted that defending a charge which may appear for the first time two days before the end of six months after the event may strain the recollection of whose permission was obtained and, indeed, over what land the hunt passed. On the other hand, proving that you took reasonable steps to have a flushed out fox shot as soon as was reasonably practical, could undoubtedly be onerous, as appears to have been the case in Mr Wright's prosecution.

50. Lord Griffith's concluded his analysis of the law in *R v Hunt* at page 375F as follows:

> "In *Reg. v Edwards* [1975] QB 27, 39-40 the Court of Appeal expressed their conclusion in the form of an exception to what they said was the fundamental rule of our criminal law that the prosecution must prove every element of the offence charged. They said that the exception:
>
> > "is limited to offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities".
>
> I have little doubt that the occasions upon which a statute will be construed as imposing a burden of proof upon a defendant which do not fall within this formulation are likely to be exceedingly rare. But I find it difficult to fit *Nimmo v Alexander Cowan & Sons Ltd* [1968] AC 107 into this formula, and I would prefer to adopt the formula as an excellent guide to construction rather than as an exception to a rule. In the final analysis each case must turn upon the construction of the particular legislation to determine whether the defence is an exception within the meaning of section 101 of the Act of 1980 which the Court of Appeal rightly decided reflects the rule for trials on indictment. With this one qualification I regard *Reg. v Edwards* as rightly decided."

51. The facts of *R v Lambert* [2002] 2 AC 545 occurred before the Human Rights Act 1998 had come into force and the House of Lords held that the relevant provisions of the 1998 Act were not intended to apply to things happening before the Act came into force. The majority of the House nevertheless held that section 28(2) and (3) of the Misuse of Drugs Act 1971 could, by the application of section 3(1) of the 1998 Act, be read compatibly with the presumption of innocence in article 6(2) of the European Convention on Human Rights as imposing only an evidential burden on the accused.

52. The appellant had been charged with possessing a Class A controlled drug with intent to supply contrary to section 5(3) of the 1971 Act. His defence was that, although he had been found in possession of a bag containing the drug, he had neither known nor suspected nor had reason to suspect the nature of the contents of the bag. Section 28

of the 1971 Act provided that the defence on which the appellant relied was "for the accused to prove". The relevant question for present purposes was whether this reverse burden of proof provision was compatible with the presumption of innocence in article 6(2) of the Convention. One question was whether it was possible to read section 28 compatibly with article 6(2) in accordance with section 3(1) of the 1998 Act by holding that the words "if he proves" merely required a defendant to discharge an evidential burden of proof rather than a legal or persuasive burden.

53. Lord Steyn, who dissented on the question whether the provisions of the 1998 Act were intended to apply to facts which occurred before the date when the Act came into force upon an appeal after that date, considered the significance of the presumption of innocence under article 6(2). He considered at page 569 the approach of the common law to the presumption of innocence, noting with reference to the decision of the European Court of Human Rights of *Salabiaku v France* (1988) 13 EHRR 379 at paragraph 28 that in a constitutional democracy limited inroads on the presumption of innocence may be justified. He considered whether section 5(3) of the 1971 Act read with sections 28(2) and (3) made inroads on article 6(2), concluding that they did. He accepted submissions that the defence put forward by the appellant under section 28 was an ingredient of the offence under section 5(3). It followed that section 28 derogated from the presumption of innocence. Lord Steyn then said at page 571A, paragraph 35:

> "I would, however, also reach this conclusion on broader grounds. The distinction between constituent elements of the crime and defensive issues will sometimes be unprincipled and arbitrary. After all, it is sometimes simply a matter of which drafting technique is adopted: a true constituent element can be removed from the definition of the crime and case as a defensive issue whereas any definition of an offence can be reformulated not on technicalities and niceties of language but rather on matters of substance. I do not have in mind cases within the narrow exception "limited to offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities": *R v Edwards* [1975] QB 27, 40; *R v Hunt (Richard)* [1987] AC 352; section 101 of the Magistrates' Courts Act 1980. There are other cases where the defence is so closely linked with mens rea and moral blameworthiness that it would derogate from the presumption to transfer the legal burden to the accused, eg the hypothetical case of transferring the burden of disproving provocation to an accused. In *R v Whyte* (1988) 51 DLR (4th) 481 the Canadian Supreme Court rejected an argument that as a matter of principle a constitutional presumption of innocence only applies to elements of the offence and not excuses. Giving the judgment of the court Dickson CJC observed, at p 493:
>
> > "The real concern is not whether the accused must disprove an element or prove an excuse, but that an accused may be

> convicted while a reasonable doubt exists. When that possibility exists, there is a breach of the presumption of innocence. The exact characterisation of a factor as an essential element, a collateral factor, an excuse, or a defence should not affect the analysis of the presumption of innocence. It is the final effect of a provision on the verdict that is decisive. If an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused."
>
> I would adopt this reasoning. In the present case the defence under section 28 is one directly bearing on the moral blameworthiness of the accused. It is this factor alone which could justify a maximum sentence of life imprisonment. In my view there is an inroad on the presumption even if an issue under section 28 is in strict law regarded as a pure defence."

54. We interpolate again to say, first, that the series of exemptions from unlawful hunting in Schedule 1 of the 2004 Act do not, in our view, come within the narrow exception described in *R v Edwards*, which must be limited to matters which are straightforward for a defendant to prove; and, secondly, that significant elements of Schedule 1 would permit a conviction in spite of a reasonable doubt in the mind of the court as to the guilt of the accused.

55. Lord Steyn next considered whether the inroads into the defendant's article 6 rights were both justified and proportionate. He was satisfied that there was an objective justification because sophisticated drug smugglers would otherwise pose real problems for the police and prosecuting authorities. In the present case, Mr Barker submits in effect that, unless there is a reverse burden of proof, prosecutions under the 2004 Act would rarely be viable. As will appear, we do not find this persuasive. There may, of course, be evidential difficulties, but those in the main derive, we think, from the intrinsic nature of the legislation and the dense content of Schedule 1. Parliament did not ban all hunting of wild mammals with a dog and the terms in which some such hunting is permitted may require close factual and evidential consideration. If precise evidence is difficult to obtain, that is the nature of the subject matter. Mr Mott's submission that a reverse burden of proof could cause acute evidential difficulties for defendants is as persuasive generally as Mr Barker's submission for the prosecution.

56. Lord Steyn in *Lambert* then said, under the heading of Proportionality, that objective justification was not an end of the matter. The State still had to show that the means adopted were not greater than necessary. For the 2004 Act, the State has shown in the *Countryside Alliance* litigation that the Act as a whole is necessary and proportionate in a democratic society to achieve rationally a legitimate legislative aim – see paragraph 337 of the judgment in that case in this court. That case, however, did not consider the detail of the reverse burden of proof issue, nor whether, if the Act, construed without reference to Human Rights considerations, did provide for a reverse burden of proof, that was both necessary and proportionate.

57. Lord Steyn referred to the difference between imposing a legal burden of proof on the accused and imposing an evidential burden. He said that a transfer of a legal burden amounts to a far more drastic interference with the presumption of innocence than the creation of an evidential burden on the accused. The former requires him to establish his innocence. The principle of proportionality required the House to consider whether there was a pressing necessity to impose a legal rather than an evidential burden on the accused. If there is a legal burden on the accused:

> "If the jury is in doubt on this issue, they must convict him. This may occur when an accused adduces sufficient evidence to raise a doubt about his guilt but the jury is not convinced on a balance of probabilities that his account is true. *Indeed it obliges the court to convict if the version of the accused is as likely to be true as not.* This is a far-reaching consequence: a guilty verdict may be returned in respect of an offence punishable by life imprisonment even though the jury may consider that it is reasonably possible that the accused had been duped. It would be unprincipled to brush aside such possibilities as unlikely to happen in practice. Moreover, as Justice has point out in its valuable intervention, there may be real difficulties in determining the real facts upon which the sentencer must act in such cases. In any event, the burden of showing that *only* a reverse legal burden can overcome the difficulties of the prosecution in drugs cases is a heavy one." (paragraph 38).

58. An offence under the 2004 Act is not, of course, punishable with life imprisonment; but we have already indicated our view that a conviction under the 2004 Act is not properly to be regarded as trivial nor the Act itself as mere regulation.

59. Paragraph 39 of Lord Steyn's opinion shows that problems supposedly faced by the prosecution are significantly reduced. In particular, where there is sufficient circumstantial evidence of an offence, it will usually be a complete answer to a submission of no case in the absence of exculpatory evidence. It should not be possible for an accused, in a case where his conduct calls for an explanation, to advance a submission at the end of the prosecution case that the prosecution have not eliminated a possible innocent explanation. Such submissions should generally in practice receive short shrift.

60. In the present case, we regard the spectre which Mr Barker attempted to raise in his written submission of the prosecution having to disprove every element of the relevant paragraph in Schedule 1 as entirely unreal. The prosecution can, of course, in an appropriate case set about proving or disproving what they may. But it will in practice usually be evident which paragraph of Schedule 1 the defendant relies on; and the prosecution will then succeed if they then disprove any one of the conditions in that paragraph. The nature of the facts and the available evidence will indicate which condition to aim at.

61. Lord Steyn then noted in paragraph 40 developments regarding the relative merits of the transfer of the legal burden on an important element or issue to the accused, as opposed to the creation of a mere evidential burden. In *R v Director of Public*

*Prosecutions, Ex parte Kebilene* [2000] 2 AC 326, Lord Bingham of Cornhill CJ in the Divisional Court had no doubt that, in the context of a serious offence (terrorism), a reverse legal burden of proof provision on a matter central to the wrong doing alleged against the defendant would breach article 6(1) of the Convention. On the appeal to the House, a majority had suggested that, once the 1998 Act was in force, reverse legal burden provisions may have to be interpreted as imposing merely an evidential burden on the defendant. Parliament responded by enacting sections 118 (1) and (2) of the Terrorism Act 2000 which provided for an evidential reverse burden. Of course, terrorism and offences under the 2004 Act are not in the same league, but we are disinclined from acceding readily to a submission that it is proportionate to bypass article 6(2) for summary offences in magistrates' courts because they are relatively trivial. Chipping away at a fundamental principle of the criminal law has obvious dangers.

62. Lord Hope of Craighead emphasised in paragraphs 78 to 81 the care which must be taken in construing statutory provisions with reference to section 3 of the 1998 Act. He noted in paragraph 88 that the article 6(2) right is not absolute and unqualified. The test to be applied is whether a modification or limitation of that right pursues a legitimate aim and whether it satisfies the principle of proportionality. A balance has to be struck between the general interests of the community and the protection of the fundamental rights of the individual. This will not be achieved if a reverse onus provision goes beyond what is necessary to accomplish the objective of the statute.

63. In the context of the 2004 Act, the interest of the community may be seen as the proper enforcement of the legislative ban on hunting a wild mammal with a dog. Since the ban is not absolute, the rights of individuals are, in a sense, two-fold. There is the fundamental right in article 6(2) of the Convention. There is also the right to engage in hunting a wild mammal with a dog which is exempt hunting. Speaking generally, we think that the wide content of Schedule 1 of the 2004 Act makes it unreal and disproportionate to suppose that Parliament intended that all hunting of wild mammals with a dog was taken to be unlawful unless the defendant proved that it was not. If someone is plainly hunting rabbits with dogs, there is no necessity for a presumption that their activity is unlawful.

64. Lord Clyde, noting that he would be slow to construe a criminal provision so as to impose a persuasive burden on a defendant, nevertheless (and Human Rights Act considerations apart) construed section 28(2) of the 1971 Act as imposing a persuasive burden of proof on the accused (paragraph 133). Although it was, in his view, not open to the appellant to invoke the 1998 Act (paragraph 148), it was appropriate to consider the matter for the future. Lord Clyde said in paragraph 153 that reasons could readily be adduced, four of which he gave, to support the imposition of the burden of proof on the accused in the context of section 28 of the 1971 Act. But he did not consider that such a result could be justified when one weighed the consideration of what is, or at least may be, at stake for the accused and the interests of the public (paragraph 154). For while it might be that offences under section 5 of the 1971 Act might be described as regulatory, they could lead to the most serious of consequences for the accused. If any error was to be made in the weighing of the scales of justice, it should be to the effect that the guilty should go free rather than that an innocent person should be wrongly convicted. By imposing a persuasive burden on the accused, it would be possible for an accused person to be

convicted where the jury believed he might be innocent. It did not seem to Lord Clyde that such a burden was acceptable looking to the potentially serious consequences of a conviction (paragraph 156).

65. The opinion of Lord Slynn of Hadley is fairly short on the point which we are presently considering. He inclined to the view that the apparent legal burden of proof imposed on the accused by section 28(2) of the 1971 Act would not be justified under article 6(2) of the Convention. He had no doubt that it was possible, without doing violence to the language or to the objective of that section, to read the words as only imposing an evidential burden. Such a reading would be compatible with Convention rights since, even if it may create evidential difficulties for the prosecution as Lord Slynn accepted, it ensured that the defendant did not have the legal onus of proving the matters referred to in section 28(2) which, whether they were regarded as part of the offence or as a riposte to the offence prima facie established, were of crucial importance. It was not enough that the defendant, in seeking to establish the evidential burden, should merely mouth the words of the section. The defendant must still establish that the evidential burden has been satisfied (paragraph 17).

66. Lord Hutton dissented on this point, although not, as we read his opinion, on the principles to be applied. He concluded (paragraph 198) that the difficulty in some cases of convicting those guilty of the crime of possession of a controlled drug with intent to supply, if the burden of proving knowledge beyond reasonable doubt rested on the prosecution, was not resolved by placing an evidential burden on the defendant and that it was necessary to impose a persuasive burden as section 28(2) and (3) does. He further considered that the transfer of the onus satisfied the test that it has a legitimate aim in the public interest and that there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

67. *R v Johnstone* [2003] 1WLR 1736 contains in the opinion of Lord Nicholls of Birkenhead (with which the other members of the House agreed on this point), an obiter consideration of whether section 92(5) of the Trade Marks Act 1994 imposed a legal or evidential burden on a defendant charged with "bootlegging". In paragraph 44, Lord Nicholls described an evidential burden as follows:

> "The accused must raise an issue sufficient to require the prosecution to disprove it as part of the burden of proof resting on the prosecution. If the accused raises such an issue, and the prosecution fails to disprove the facts raised by the issue, the defence succeeds. It is not necessary for the accused person himself to prove the facts set out in section 92(5)."

Lord Nicholls said in paragraph 48 that a "reasonable balance" had to be held between the public interest and the interests of the individual. Derogation from the presumption of innocence required justification. Identifying the requirements of a "reasonable balance" was not as easy as it might seem. One is seeking to balance incommensurables. He continued in paragraph 49:

> "At the heart of the difficulty is the paradox noted by Sachs J in *State v Coetzee* [1997] 2 LRC 593, 677, paragraph 220: "The more serious the crime and the greater the public interest in securing convictions of the guilty, the more important the

> constitutional protection of the accused becomes." In the face of this paradox all that can be said is that for a reverse burden of proof to be acceptable there must be a compelling reason why it is fair and reasonable to deny the accused the protection normally guaranteed to everyone by the presumption of innocence."

68. We note that other versions of this paradox may be constructed. A version espoused by Mr Barker is; the less serious the crime, the less important constitutional protection of the accused becomes. But again: the less serious the crime, the lesser the public interest in securing convictions of the guilty; and therefore the lesser the need for a legal burden of proof on the accused. There is a danger, of course, that these become just word games. We have already said that the 2004 Act is not only controversial, but of significant importance to the proponents and opponents of hunting with dogs alike.

69. Lord Nicholls in *Johnstone* summarised recent authority on a reverse burden of proof in paragraph 50 as follows:

> "The relevant factors to be taken into account when considering whether such a reason exists have been considered in several recent authorities, in particular the decisions of the House in *R v Director of Public Prosecutions, Ex parte Kebilene* [2002] 2 AC 326 and *R v Lambert* [2002] 2AC 545. And there is now a lengthening list of decisions of the Court of Appeal and other courts in respect of particular statutory provisions. A sound starting point is to remember that if an accused is required to prove a fact on the balance of probability to avoid conviction, this permits a conviction in spite of the fact-finding tribunal having a reasonable doubt as to the guilt of the accused: see Dickson CJ in *R v Whyte* (1988) 51 DLR ($4^{th}$) 481, 493. This consequence of a reverse burden of proof should colour one's approach when evaluating the reasons why it is said that, in the absence of a persuasive burden on the accused, the public interest will be prejudiced to an extent which justifies placing a persuasive burden on the accused. The more serious the punishment which may flow from conviction, the more compelling must be the reasons. The extent and nature of the factual matters required to be proved by the accused, and their importance relative to the matters required to be proved by the prosecution, have to be taken into account. So also does the extent to which the burden on the accused relates to facts which, if they exist, are readily provable by him as matters within his own knowledge or to which he has ready access."

70. The House of Lords decisions reported under the name *Sheldrake v DPP* [2005] 1 AC 264 concerned two matters: the first (*Sheldrake*) a charge of being in charge of a motor vehicle after having consumed excess alcohol contrary to section 5(1)(c) of the Road Traffic Act 1988; the second (*Attorney General's Reference (No 4 of 2000),* a charge of belonging to, or professing to belong to, a proscribed organisation contrary to section 11(1) of the Terrorism Act 2000. Section 5(2) of the 1988 Act provides

that it is a defence for the person charged to prove that there was no likelihood of him driving whilst the proportion of alcohol remained likely to exceed the prescribed limit. Section 11(2) of the 2000 Act provides that it is a defence that the organisation was not proscribed when the person charged became a member or professed to be a member and that he had not taken part in its activities at any time while it was proscribed. The House of Lords held that each of these sections imposed or was intended to impose a legal burden on a defendant; that the provision in section 5(2) of the 1988 Act was directed to a legitimate object; did not go beyond what was necessary and reasonable and had resulted in a conviction which could not be regarded as unfair; but (by a majority) that the provision in section 11(2) of the 2000 Act should be read down to impose an evidential burden only, because there was a real risk that a person who was innocent of any blameworthy or properly criminal conduct but was unable to establish a defence under section 11(2) would be unfairly convicted, thereby resulting in a clear breach of the presumption of innocence.

71. Lord Bingham of Cornhill gave the leading opinion, with which Lord Steyn and Lord Philips of Worth Matravers agreed. Lord Rodger of Earlsferry agreed with Lord Bingham's general exposition of the applicable case law of the European Court of Human Rights relating to Article 6(2), but disagreed as to its application in the *Attorney General's Reference*. Lord Carswell agreed with Lord Rodger.

72. Lord Bingham said at paragraph 1 that an evidential burden is not a burden of proof. It is a burden of raising on the evidence in the case an issue as to the matter in question fit for consideration by the tribunal of fact. If the issue is properly raised, it is for the prosecution to prove, beyond reasonable doubt, that that ground of exoneration does not avail the defendant.

73. Lord Bingham summarised in paragraph 3 to 5 of his opinion the pre-Convention common law relating to the burden of proving statutory exceptions and considered the normal presumption that Parliament does not intend to make criminals of persons who are in no way to blame in what they did. But there were instances where Parliament had by clear words or necessary implication intended to attach criminal consequences irrespective of an individual state of mind or moral blameworthiness. There were many such instances in legislation regulating the conduct of economic or social life. Such offences are often regarded as not truly criminal, since the penalty inflicted is not dire and little or no stigma attaches to conviction. We note that offences under the 2004 Act do require proof of intention, since the prosecution accept that hunting is by definition intentional. We have already indicated that we do not regard the 2004 Act as falling within what Lord Bingham called "this sterile regulatory area".

74. Lord Bingham said in paragraph 7 that the two statutory provisions in question in *Sheldrake* were not obscure or ambiguous and would, before the inception of the 1998 Act, have been interpreted as imposing a legal burden of proof on the defendants. We note that the same is not unambiguously so of section 1 of the 2004 Act. Lord Bingham said that the crucial question was whether the European Convention and the Strasbourg jurisprudence interpreting it had modified in any relevant respect our domestic regime and, if so, to what extent.

75. It had been repeatedly recognised in Strasbourg case law that the presumption of innocence is one of the elements of a fair criminal trial. But a restrictively worded, rebuttable and reasonable presumption can be compatible with Article 6(2) of the

Convention – see *XV United Kingdom* (1972) 42 Collection of Decisions 135. Lord Bingham referred as some length to *Salabiaku v France* quoting in particular paragraph 28, to which we have already referred, to the effect that the Court's decision sanctions, but in a qualified way, the application of factual and legal presumptions.

76. Having examined in paragraphs 13 to 20 a number of other Strasbourg decisions, some of which upheld statutory presumptions imposing a legal burden on the accused and some of which did not, Lord Bingham said at paragraph 21:

> "From this body of authority certain principles may be derived. The overriding concern is that a trial should be fair, and the presumption of innocence is a fundamental right directed to that end. The Convention does not outlaw presumptions of fact or law but requires that these should be kept within reasonable limits and should not be arbitrary. It is open to states to define the constituent elements of a criminal offence, excluding the requirement of mens rea. But the substance and effect of any presumption adverse to a defendant must be examined, and must be reasonable. Relevant to any judgment on reasonableness or proportionality will be the opportunity given to the defendant to rebut the presumption, maintenance of the rights of defence, flexibility in application of the presumption, retention by the court of a power to assess the evidence, the importance of what is at stake and the difficulty which a prosecutor may face in the absence of a presumption. Security concerns do not absolve member states from their duty to observe basic standards of fairness. The justifiability of any infringement of the presumption of innocence cannot be resolved by any rule of thumb, but on examination of all the facts and circumstances of the particular provision as applied in the particular case."

77. Lord Bingham then considered the leading United Kingdom cases since the Human Rights Act 1998, to most of which we have already referred. He did not agree with the Court of Appeal in *Attorney General's Reference (No 1 of 2004)* [2004] 1 WLR 2111, that there was a significant difference of emphasis between the approach of Lord Steyn in *Lambert* and that of Lord Nicholls in *Johnstone*, and that *Johnstone* should be preferred. Both cases were authoritative and differences of emphasis were explicable by the difference in the subject matter of the two cases. Lord Bingham said, at paragraph 31, that the task of the court is never to decide whether a reverse burden of proof should be imposed on a defendant, but always to assess whether a reverse burden enacted by Parliament unjustifiably infringes the presumption of innocence. He also gave extended consideration to the task of the court, should the occasion arise, in the application of section 3 of the 1998 Act. He quoted at length in this respect from the opinion of Lord Hutton in paragraphs 44 and 45 of *R v A (No 2)* [2002] 1 AC 45. He then said at paragraph 28:

> "The interpretative obligation of the courts under section 3 of the 1998 Act was the subject of illuminating discussion in *Ghaidan v Godin-Mendoza* [2004] 2AC557. The majority

> opinions of Lord Nicholls, Lord Steyn and Lord Rodger of Earlsferry in that case (with which Baroness Hale of Richmond agreed) do not lend themselves easily to a brief summary. But they leave no room for doubt on four important points. First, the interpretative obligation under section 3 is a very strong and far reaching one, and may require the court to depart from the legislative intention of Parliament. Secondly, a Convention-compliant interpretation under section 3 is the primary remedial measure and a declaration of incompatibility under section 4 an exceptional course. Thirdly, it is to be noted that during the passage of the Bill through Parliament the promoters of the Bill told both Houses that it was envisaged that the need for a declaration of incompatibility would rarely arise. Fourthly, there is a limit beyond which a Convention-compliant interpretation is not possible, such limit being illustrated by *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 and *Bellinger v Bellinger (Lord Chancellor intervening)* [2003] 2 AC 467."

78. *R v Keogh* [2007] 2 Cr App R 9 page 112 is a decision of the Court of Appeal Criminal Division which applies the main lines of authorities to most of which we have referred. The defendant, a Crown Servant, charged with making damaging disclosure without lawful authority contrary to sections 2(1) and 3 (1) of the Official Secrets Act 1989, successfully appealed against a ruling that the statutory defences in subsections 2(3) and 3(4) of the 1989 Act required him to prove that he did not know and had no reasonable cause to believe that his disclosure related to defence or international relations or that it would be damaging. His appeal was allowed, the Court holding that, to achieve compatibility with article 6(2) of the Convention, the natural meaning of the two subsections should be read down pursuant to section 3 of the 1998 Act, so as to treat the burden of proof that they imposed as no more than an evidential burden. It was held that placing a burden on the defendant of proving lack of knowledge or absence of reasonable cause required him to disprove a substantial ingredient of the offence; that it would not be fanciful to conceive a situation in which a jury would find a defendant guilty of an offence under section 2 despite entertaining reasonable doubt as to whether the defendant knew or had reasonable cause to believe that the document related to defence or that its disclosure would be damaging; that a reverse burden of proof was not necessary because the prosecution should be able themselves to establish this in an appropriate case from such matters as the nature of the material disclosed and extrinsic facts about the defendant which did not depend on his subjective knowledge; and that it would completely unbalance the trial if the prosecution were to wait until the defendant had given evidence before advancing a positive case in relation to his state of mind. The Act could operate effectively without the reverse burden imposed by the subsections.

79. The Court held that, assuming intentional disclosure, the offences under sections 2 and 3 of the 1989 Act were manifestly regardless of the defendant's state of mind. The analysis of the defendant's criminality required attention to be given to his state of mind at the moment when his intentional disclosure took place.

**Submissions**

80. Mr Barker points to the legislative aim of the 2004 Act (see *Countryside Alliance* case at paragraph 339). He says that in all cases the prosecution will have to prove that the defendant was hunting a wild mammal with a dog. Hunting is, by definition, intentional, so the prosecution will have to prove that element of the defendant's intent. The words in section 1 "unless his hunting is exempt" constitute an exemption within section 101 of the 1980 Act, and thus the burden of proving the exemption is on the defendant. If this were not so, the range of matters which the prosecution would have to prove or disprove would make the Act virtually unenforceable. In the magistrates' court, a defendant cannot be required to serve a defence statement. The character of the offence is within the "sterile regulatory area" of offences regarded as not being truly criminal because the potential penalty is not dire and little or no stigma attaches to conviction. A person lawfully hunting a wild mammal with a dog would know which exemption he intended to rely on. He would know the statutory ingredients of the exemption and could readily prove them. The prosecution could scarcely prove, for instance, that the defendant did not intend to hunt the wild mammal for its observation or study. In addition, the defendant has the protection of section 4 of the Act. It is, in all the circumstances, not unfair to impose a reverse burden on the defendant to prove that his hunting is exempt.

81. Mr Mott submits that, as a matter of statutory interpretation under common law principles, the 2004 Act does not create a reverse burden of proof in relation to the provisions of Schedule 1; or, if it does, it should be read down so as to be compatible with article 6 of the Convention. Section 4 of the 2004 Act does create a reverse burden, as to which there is no challenge for the purposes of these proceedings. It would have been easy to put exempt hunting into section 4 if it had been the Parliamentary intention to impose a reverse burden in respect of it but this was not done. Section 1 has the words "unless his hunting is exempt", not "unless *he proves that* his hunting is exempt". Section 4 would be pointless if section 1 imposed a reverse burden. Schedule 1 does not embrace exemptions, but delineates "exempt hunting", a shorthand term which is part of the definition of that hunting which is unlawful.

82. Mr Mott submits that the difficulties for a prosecution which Mr Barker's written submission envisaged are unreal. The prosecution would only have to disprove one element of the relevant part of Schedule 1 to achieve a conviction. The nature of the facts in a particular case would indicate which element to aim at, since a responsible prosecutor would not proceed with a charge in the first place without evidence which could properly show that the hunting was not exempt. If by contrast there were a reverse burden, the defence would have to prove substantial ingredients of the relevant subject matter to establish an exemption. This would be a substantial infringement of the presumption of innocence. Lack of co-operation from the prosecution would make the burden oppressive. In *Wright* in the magistrates' court, when the burden was accepted as being on the prosecution, the prosecution took issue with each of the five conditions in paragraph 1 of Schedule 1. The prosecution submissions failed to take account of the evidential burden, one of whose effects is that, so long as the prosecution raise a prima facie case, the prosecution does not have to deal with, and the tribunal of fact does not have to address, factual possibilities which the defence does not put in issue. By contrast, if the prosecution submission

were correct, they would only have to prove that one or more dogs were employed in the pursuit of a wild mammal, and everything else would be for the defendant to prove or disprove. This would cause serious imbalance and a substantial infringement of the presumption of innocence, which would occur in every single prosecution.

**Discussion and decision**

83. The respective submissions of the parties as to the burden of proof for exempt hunting as defined in Schedule 1 – to the effect that, on the one hand, enforcement would be unworkable and, on the other, that prosecutions would be unbalanced, oppressive and unfair – illustrate the quite unusual nature of this legislation. If the general aim was to ban the perceived cruelty of hunting wild mammals with dogs for sport, the ban is by no means absolute. Certain categories of hunting wild mammals with one or more dogs are permitted; and if the categories in Schedule 1 are to be regarded as exemptions from a general ban, they are diverse and of massive potential content in comparison with the kind of exemption with which section 101 of the 1980 Act is normally concerned. The scale of the matters in Schedule 1 does not fit them readily into the class of exceptions from the fundamental rule of our criminal law that the prosecution must prove every element of the offence charged as limited in *Edwards* in the passage quoted by Lord Griffiths in *Hunt* at page 375F. The practical difficulties relied upon respectively by Mr Barker and Mr Mott, in so far as they are real difficulties, arise from the nature of the legislation.

84. In contrast with section 4 of the Act, which expressly places a legal burden on the defence which is not said in this litigation to offend article 6 of the Convention, section 1 does not impose any express burden on the defence, and only does so at all, if the words "unless his hunting is exempt" bring the section within section 101 of the 1980 Act. It is not at all clear that it does do this, and we see some force of Mr Mott's submission that the existence and terms of section 4 are an indication that it may not. The words "exempt" and "exempt hunting" are used, but, as Lord Steyn said in *Lambert* page 571A, the court should look to the substance, rather than to syntactical drafting techniques which may be arbitrary – see also *Hunt* at 372F. Where, as we think here, the linguistic construction of the statute does not clearly indicate upon whom the burden should lie, the Court should look to other considerations to determine the intention of Parliament – see *Hunt* at page 374F, where Lord Griffiths referred to the mischief at which the Act was aimed and the ease or difficulty that the respective parties would encounter in discharging the burden. Lord Griffiths was particularly there concerned that Parliament could never lightly be taken to have intended to impose an onerous duty on a defendant to prove his innocence in a criminal case.

85. Applying the principles in *Sheldrake*, we are clear that, if section 1 and Schedule 1 of the 2004 Act are to be construed as imposing a legal burden of proof on the defendant, that would be an oppressive, disproportionate, unfair, and in particular unnecessary intrusion upon the presumption of innocence in article 6 of the Convention. There are some matters in Schedule 1 which are within the knowledge of the defendant, as for instance the first condition in paragraph 1. There are some matters which it would be relatively easy for a defendant to prove, as for instance the necessary written permission for paragraph 2, although other matters of oral permission may not be so easy if the prosecution is brought towards the end of the 6 month period. But some of the matters in Schedule 1 are neither intrinsically easy to

establish nor within the defendant's knowledge, as for instance the fifth condition in paragraph 1, which appears to have been one of the main matters in issue in Mr Wright's case. That condition is a plain possible example of the risk, if there were a legal burden on the defendant, that the defendant might be convicted when the tribunal of fact was not sure that he was guilty.

86. We consider that many prosecutions would be unfairly unbalanced if section 1 and Schedule 1 placed a legal burden on the defendant. Where, for instance, a defendant intended that his hunting was exempt under paragraph 1, he would have to prove the substantial issues in the case, once the prosecution had established a prima facie case that he was in pursuit of a wild mammal with a dog. Equally, it would be an unbalanced trial if a defendant who was plainly hunting rabbits with dogs, had to prove matters of ownership or permission to use the land. In this instance, the prosecution should never be brought in the first place if the prosecution are unable to prove a case that made the rabbit hunting unlawful.

87. We do not consider that imposing a legal burden on the defendant is necessary to make the Act reasonably workable, subject to some intrinsic possible difficulties which derive from the nature and structure of the legislation. Mr Barker's written catalogue of supposed difficulties is quite unreal. The prosecution does not have to prove or disprove everything which might be theoretically conceived as capable of arising under Schedule 1. From the circumstances of the case and anything the defendant may have said when interviewed they will know before ever the prosecution is brought what facts appear to them to make the hunting (which they have to prove) unlawful – as if hunting which was flushing a wild mammal out from cover was conducted with more than two dogs; or in country where there were no lambs or other livestock to protect; or without a marksman to shoot the fox; or so that the dogs were not kept under reasonable control. As Mr Mott rightly said, the prosecution only have to prove a failure to conform with one condition.

88. It would, therefore, we think, be necessary in accordance with section 3 of the 1998 Act to read down the imposition of a legal burden of proof, if the Act was otherwise to be construed as imposing one. The reading down would, in our judgment, result in the defendant having an evidential burden to raise matters of defence sufficiently to require the prosecution to deal with them. This would have the effect of making prosecutions reasonably practical when the prosecution has sufficient evidence for a viable case. It may not strictly be a requirement for the defence to proffer a defence statement. But a defendant to a charge under section 1 of the Act, who relies on matters of defence under Schedule 1 which are unheralded before the trial and only disclosed for the first time in evidence given at the trial may find himself disadvantaged for different reasons. First, if he was interviewed at an earlier stage and did not mention the matters on which he now relies, he will be at risk of an adverse inference pursuant to section 34 of the Criminal Justice and Public Order Act, 1994. Secondly, he may well be met with an application by the prosecution for an adjournment, and in any event he will be at risk of a punitive costs order against him. Thirdly, he may find that the final evidence in the case is evidence in rebuttal adduced by the prosecution. The risk of a punitive costs order could, of course, apply to an indiscriminate prosecutor. Thus, where the hunting in issue has, if it is lawful, to be exempt hunting, prosecutors should be circumspect in being in a position to show that

the hunting is for particular provable reasons not exempt; and sensible defendants should raise, at a proper time, the substantial matters of defence relied on.

89. We return to the question whether, the Human Rights Act apart, section 1 of the Act should be construed as imposing a burden on the defendant. We conceive that, in answering this question, which logic and the authorities suggest we must, we should have regard to the unusual features of this Act and suppose that it was Parliament's intention to enact a scheme which was both reasonably workable and fair. The Parliamentary intention was not to ban hunting wild mammals with dogs absolutely. A flexible approach to section 101 of the 1980 Act as delineated in *Hunt* does not, we think, for this unusual statute, require a black or white choice between a legal burden imposed on the defendant, or no burden at all. The Act should, within the limits of its subject matter and the content of Schedule 1, be reasonably workable if it is seen as imposing an evidential, but not a legal, burden on the defence. We so construe it, accepting that it does provide for a most unusually formulated bundle of diverse possible exemptions.

**Conclusion:**

90. For these reasons, our formal answers to the questions posed in the case stated are:

Question 1: No, but there is an evidential burden on the defendant.

Question 2: No.

Subject to further submission, if necessary, the claim for Judicial Review in the *Taunton Deane* case succeeds, and prosecution should proceed in accordance with this judgment.

**APPENDIX:**

## Hunting Act 2004 c. 37

## Schedule 1

## EXEMPT HUNTING

**1 Stalking and flushing out**

(1) Stalking a wild mammal, or flushing it out of cover, is exempt hunting if the conditions in this paragraph are satisfied.

(2) The first condition is that the stalking or flushing out is undertaken for the purpose of–

(a) preventing or reducing serious damage which the wild mammal would otherwise cause–

(i) to livestock,

(ii) to game birds or wild birds (within the meaning of section 27 of the Wildlife and Countryside Act 1981 (c. 69)),

(iii) to food for livestock,

(iv) to crops (including vegetables and fruit),

(v) to growing timber,

(vi) to fisheries,

(vii) to other property, or

(viii) to the biological diversity of an area (within the meaning of the United Nations Environmental Programme Convention on Biological Diversity of 1992),

(b) obtaining meat to be used for human or animal consumption, or

(c) participation in a field trial.

(3) In subparagraph (2)(c) " field trial" means a competition (other than a hare coursing event within the meaning of section 5) in which dogs–

(a) flush animals out of cover or retrieve animals that have been shot (or both), and

(b) are assessed as to their likely usefulness in connection with shooting.

(4) The second condition is that the stalking or flushing out takes place on land–

(a) which belongs to the person doing the stalking or flushing out, or

(b) which he has been given permission to use for the purpose by the occupier or, in the case of unoccupied land, by a person to whom it belongs.

(5) The third condition is that the stalking or flushing out does not involve the use of more than two dogs.

(6) The fourth condition is that the stalking or flushing out does not involve the use of a dog below ground otherwise than in accordance with paragraph 2 below.

(7) The fifth condition is that–

(a) reasonable steps are taken for the purpose of ensuring that as soon as possible after being found or flushed out the wild mammal is shot dead by a competent person, and

(b) in particular, each dog used in the stalking or flushing out is kept under sufficiently close control to ensure that it does not prevent or obstruct achievement of the objective in paragraph (a).

**2 Use of dogs below ground to protect birds for shooting**

(1) The use of a dog below ground in the course of stalking or flushing out is in accordance with this paragraph if the conditions in this paragraph are satisfied.

(2) The first condition is that the stalking or flushing out is undertaken for the purpose of preventing or reducing serious damage to game birds or wild birds (within the meaning of section 27 of the Wildlife and Countryside Act 1981 (c. 69)) which a person is keeping or preserving for the purpose of their being shot.

(3) The second condition is that the person doing the stalking or flushing out–

(a) has with him written evidence–

(i) that the land on which the stalking or flushing out takes place belongs to him, or

(ii) that he has been given permission to use that land for the purpose by the occupier or, in the case of unoccupied land, by a person to whom it belongs, and

(b) makes the evidence immediately available for inspection by a constable who asks to see it.

(4) The third condition is that the stalking or flushing out does not involve the use of more than one dog below ground at any one time.

(5) In so far as stalking or flushing out is undertaken with the use of a dog below ground in accordance with this paragraph, paragraph 1 shall have effect as if for the condition in paragraph 1(7) there were substituted the condition that–

(a) reasonable steps are taken for the purpose of ensuring that as soon as possible after being found the wild mammal is flushed out from below ground,

(b) reasonable steps are taken for the purpose of ensuring that as soon as possible after being flushed out from below ground the wild mammal is shot dead by a competent person,

(c) in particular, the dog is brought under sufficiently close control to ensure that it does not prevent or obstruct achievement of the objective in paragraph (b),

(d) reasonable steps are taken for the purpose of preventing injury to the

dog, and

(e) the manner in which the dog is used complies with any code of practice which is issued or approved for the purpose of this paragraph by the Secretary of State.

**3 Rats**

The hunting of rats is exempt if it takes place on land–

(a) which belongs to the hunter, or

(b) which he has been given permission to use for the purpose by the occupier or, in the case of unoccupied land, by a person to whom it belongs.

**4 Rabbits**

The hunting of rabbits is exempt if it takes place on land–

(a) which belongs to the hunter, or

(b) which he has been given permission to use for the purpose by the occupier or, in the case of unoccupied land, by a person to whom it belongs.

**5 Retrieval of hares**

The hunting of a hare which has been shot is exempt if it takes place on land–

(a) which belongs to the hunter, or

(b) which he has been given permission to use for the purpose of hunting hares by the occupier or, in the case of unoccupied land, by a person to whom it belongs.

**6 Falconry**

Flushing a wild mammal from cover is exempt hunting if undertaken–

(a) for the purpose of enabling a bird of prey to hunt the wild mammal, and

(b) on land which belongs to the hunter or which he has been given permission to use for the purpose by the occupier or, in the case of unoccupied land, by a person to whom it belongs.

**7 Recapture of wild mammal**

(1) The hunting of a wild mammal which has escaped or been released from captivity or confinement is exempt if the conditions in this paragraph are satisfied.

(2) The first condition is that the hunting takes place–

(a) on land which belongs to the hunter,

(b) on land which he has been given permission to use for the purpose by

the occupier or, in the case of unoccupied land, by a person to whom it belongs, or

(c) with the authority of a constable.

(3) The second condition is that–

(a) reasonable steps are taken for the purpose of ensuring that as soon as possible after being found the wild mammal is recaptured or shot dead by a competent person, and

(b) in particular, each dog used in the hunt is kept under sufficiently close control to ensure that it does not prevent or obstruct achievement of the objective in paragraph (a).

(4) The third condition is that the wild mammal–

(a) was not released for the purpose of being hunted, and

(b) was not, for that purpose, permitted to escape.

**8 Rescue of wild mammal**

(1) The hunting of a wild mammal is exempt if the conditions in this paragraph are satisfied.

(2) The first condition is that the hunter reasonably believes that the wild mammal is or may be injured.

(3) The second condition is that the hunting is undertaken for the purpose of relieving the wild mammal's suffering.

(4) The third condition is that the hunting does not involve the use of more than two dogs.

(5) The fourth condition is that the hunting does not involve the use of a dog below ground.

(6) The fifth condition is that the hunting takes place–

(a) on land which belongs to the hunter,

(b) on land which he has been given permission to use for the purpose by the occupier or, in the case of unoccupied land, by a person to whom it belongs, or

(c) with the authority of a constable.

(7) The sixth condition is that–

(a) reasonable steps are taken for the purpose of ensuring that as soon as possible after the wild mammal is found appropriate action (if any) is taken to relieve its suffering, and

(b) in particular, each dog used in the hunt is kept under sufficiently close control to ensure that it does not prevent or obstruct achievement of the objective in paragraph (a).

(8) The seventh condition is that the wild mammal was not harmed for the purpose of enabling it to be hunted in reliance upon this paragraph.

**9 Research and observation**

(1) The hunting of a wild mammal is exempt if the conditions in this paragraph are satisfied.

(2) The first condition is that the hunting is undertaken for the purpose of or in connection with the observation or study of the wild mammal.

(3) The second condition is that the hunting does not involve the use of more than two dogs.

(4) The third condition is that the hunting does not involve the use of a dog below ground.

(5) The fourth condition is that the hunting takes place on land–

(a) which belongs to the hunter, or

(b) which he has been given permission to use for the purpose by the occupier or, in the case of unoccupied land, by a person to whom it belongs.

(6) The fifth condition is that each dog used in the hunt is kept under sufficiently close control to ensure that it does not injure the wild mammal.