

# Crime brief

David Walbank KC reports on anthropomorphism in court & the legal protections accorded to animals



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## IN BRIEF

- ▶ Limits of the criminal law.
- ▶ Sexual harm prevention orders.
- ▶ Public protection.

In the heyday of the print media, budding young Marshall Halls would compete to see whose cases could generate the most lurid *Evening Standard* headlines. My own personal best was a billboard appearing on news stands across the metropolis, which barked out the news of the hour: ‘Stay of Execution for Devil Dog!’

I had been instructed by animal rights campaigners (with the vocal support of Carla Lane, the much-loved creator of *The Liver Birds* and *Bread*) to seek what was literally a stay of execution for Otis. Otis was a wholly innocent puppy, who had the great misfortune to be spotted by an ever-vigilant constable in the back of my client’s white van as it sped along the Blackwall Tunnel Northern Approach Road. The problem was threefold: the officer thought that Otis looked suspiciously like ‘a dog of the pit bull terrier type’; he was unmuzzled; and in an earlier criminal appeal that went all the way to the House of Lords, the highest court in the land had ruled that the back of my client’s vehicle was a public place. So it was that I was instructed to apply for judicial review of the original charging decision, praying in aid that one of the top judges at Crufts had since opined that Otis was not in fact a pit bull terrier, but a Great Dane cross.

The proximate cause of the headline in question was that the then Metropolitan Police Commissioner, Sir Paul Condon, had been prevailed upon to delay the carrying out of the destruction order, pending the outcome of my JR application. Subsequent anthropomorphic elements of the proceedings included: (i) Laws J (as he then was) granting leave to apply for judicial review, but rejecting

my submission that the substantive hearing should be expedited on the ground that poor Otis had been on doggy death row for more than 12 months, that being ‘the equivalent of seven years in human terms’, and (ii) the refusal of the Strasbourgh Court to entertain my pre-Human Rights Act reference based on allegedly egregious breaches of fundamental rights (to be fair, the rights of the owner rather than of the canine in question).

## Limited protections?

I was recently reminded of all this by a case, which was far from being a laughing matter, but which re-affirmed the limits of the court’s willingness to over-extend the protections of the English criminal law to the animal kingdom.

In *R v Kish* [2022] EWCA Crim 1161, the police had entered the defendant’s home and seized a number of his electronic devices. Upon examination, they were found to contain extreme pornography, including what the newspapers would doubtless describe as ‘unspeakable’ acts of bestiality. Mr Kish was charged under s 63(1) of the Criminal Justice and Immigration Act 2008. He changed his plea to one of guilty on the first day of trial and subsequently received a suspended sentence and was made the subject of a five-year Sexual Harm Prevention Order (SHPO). That SHPO contained perfectly standard restrictions relating to internet usage, file wiping software, file sharing programs and the storing of digital images. But it also prohibited the following:

- ‘(7) Residing, remaining or entering any property or building where any animal is present other than:
  - (a) such as is inadvertent or not reasonably avoidable in the course of lawful daily life; or
  - (b) with the consent of the animal’s owner

- (who has knowledge of his convictions) and with the express approval of the current ViSOR [Violent and Sex Offender Register] Team that monitor you in any place where you choose to reside.
- (8) Having any unsupervised contact or communication of any kind with any animal, other than [as above].
- (9) Entering into any work, voluntary or otherwise, or any organised activity which involves contact directly or indirectly with animals.’

In handing down judgment on an appeal against the inclusion of those prohibitions in the order, Mrs Justice Farbey set out the relevant parts of the Sentencing Act 2020: Section 343(2) states that:

‘The only prohibitions that may be included in a sexual harm prevention order are those necessary for the purpose of—(a) protecting the public or any particular members of the public from sexual harm from the offender, or (b) protecting children or vulnerable adults generally, or any particular children or vulnerable adults, from sexual harm from the offender outside the United Kingdom.’

By s 344(1)(a), ‘sexual harm’ means:

‘... physical or psychological harm caused – (a) by the person committing one or more offences listed in Schedule 3 to the Sexual Offences Act 2003 ...’

Farbey J then held as follows. The court understands the great distress that any sexual contact by a human with an animal will cause to that animal’s owner. However, the plain meaning of the statutory words reveals that the purpose of a SHPO is to protect members of the public from sexual harm and the only prohibitions that can be included are those necessary for that purpose. While the wording of the section makes plain that sexual harm is not limited to physical harm, and includes the psychological effects brought about by a sexual offence, it also stipulates that such harm has to be caused by a scheduled offence. The distress caused to the owner will be an aggravating factor of such conduct against an animal, as will the cruelty perpetrated. However, it would strain the language beyond the parliamentary intention to include animals among the potential beneficiaries of such orders.

NLJ

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