

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

No. 2020-P-0257

Bristol County, ss.

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Joyce Rowley, Appellant  
On Behalf of Ruth and Emily

V.

City of New Bedford, Appellee

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On Appeal From Bristol County Superior Court-New Bedford

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Appellant's Brief

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Date: 06/05/20

Joyce Rowley  
PO Box 50251  
New Bedford, MA 02745  
Pro Se  
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### **STATEMENT OF ISSUES**

Appellant Joyce Rowley's Petition for endorsement of a Writ of Habeas Corpus was denied by the lower court without the requisite hearing under Mass. G. L. 248 §37. The lower court's decision, as stated, was based on its interpretation of a "person" and that Appellant's federal Endangered Species Act lawsuit regarding the writ's subjects had already determined the matter

Appellant brings two issues on appeal. First, whether the lower court erred by not requiring the defendant to show cause for confining the subjects, Asian elephants Ruth and Emily. Inherent in this issue is whether the lower court erred in its determination of the definition of "person."

Second, whether the lower court erred in denying the writ on the basis of Appellant's federal Endangered Species Act case.

### **STATEMENT OF THE CASE**

Appellant petitioned for a Writ of Habeas Corpus on behalf of Asian elephants Ruth and Emily under Mass. Gen. Law c. 248 §36 on December 27, 2019 in the New Bedford Superior Court (RA1:3). The Superior Court denied the petition that same day, declaring that the court was not persuaded by Appellant's argument that Ruth and Emily were persons under the law and that the matter had been decided in the federal case, Rowley v. City of New Bedford, 2019 U.S. Dist. Lexis 16389 @ 20-21

(RA1:25).<sup>1</sup> Appellant filed a Notice of Appeal on January 28, 2020 (RA1:26). The case was entered on February 20, 2020. Under the COVID-19 Order (SJC 3/17/20 as amended) all deadlines were extended to June 5, 2020 and so this filing is timely.

### **STATEMENT OF THE FACTS**

Asian elephants Ruth and Emily have been held against their will at Buttonwood Park Zoo in the City of New Bedford, MA for over 33 years (RA1:7). The City claims to have purchased Emily in 1964 and accepted Ruth at the zoo in 1986 (RA1:8).

Appellant has visited the zoo for over nine years, and for 6 years on a near-daily basis, watching Ruth and Emily for hours at a time (RA1:7). As she testified in her petition, she observed both elephants attempting to undo the locked gate to escape on multiple occasions (RA1:11, Exhibit 2, Ruth unlocking gate, and RA1:12, Exhibit 5, Emily ramming gate, <https://youtu.be/9PpudviT3QA>, RA1:12). Ruth also attempted an escape during a blizzard (RA1:12, Exhibit 3 and 4). These were not isolated events. Since filing the Petition, Appellant continues to witness both elephants attempting to ram the gate and unlock it to be free.

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<sup>1</sup> That case is now on appeal before the First Circuit Court of Appeals (Rowley v. City of New Bedford, MA, 19-2000, 1st. Circuit, 2019).

Ruth and Emily have been kept in a concrete barn since 1986. The floor was changed to soil several years ago and their outdoor yards expanded to 20,000 s.f. (RA1:6))

Recently, steel bars were installed inside the 2,500 square-foot barn, creating three stalls approximately 20 feet by 40 feet each (RA1:6,7, Exhibits 1-1 through 1-4, photos of stalls). Ruth and Emily are over 10 feet long. Due to the placement of the bars, they can only walk about two steps by four steps in their stalls (RA1:7).

When the zoo is closed for 16 hours each day, Ruth and Emily are confined in the barn (RA1:7). Also, while the zoo is closed, there is no one available to remove the elephants' waste. Therefore, Ruth and Emily walk, stand, eat and sleep amid their considerable feces and urine (RA1:7).

Elephants also "dust" with soil to coat their skin, hold in moisture, prevent black fly and other insect bites, and when outside, protect against sunburn. When confined in the barn for 16 hours, Ruth and Emily can't avoid using waste-contaminated soil to dust (RA1:7). As a result, they both have infected sores on their cheeks and haunches from lying in waste-contaminated soil; infected tusches,<sup>2</sup> and infections on their feet (RA1:7).

Elephants have cognitive skills equal to primates and humans (RA1:6). They have self-cognition, and social, spatial and temporal memories

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<sup>2</sup> Female Asian elephants don't have tusks, but have "tusches" which are like canine teeth.

(RA1:10,11). It is widely recognized that they mourn their dead and grieve (RA1:11).

Elephants' lives mirror humans. They are long-lived (RA1:11). Their young are dependent on and must learn from their mother's skills needed to survive (RA1:11). They live in complex social structures that include collaboration and cooperation, and a matriarchal hierarchy with allomothers to share child care. Elephants are autonomous in choosing mates, raising young together with family, and exploring the world.

In their rangelands, elephants are born free and enjoy bodily liberty as humans do.

### **ARGUMENT**

Upon receiving the petition for a writ of habeas corpus for Ruth and Emily, the lower court immediately denied it. In effect, the lower court stated that Ruth and Emily were not persons, citing G.L. 248 S. 1, *Persons Entitled to Writs; Exceptions*:

"Whoever is imprisoned or restrained of his liberty may, as of right and of course, prosecute a writ of habeas corpus, according to this chapter, ..."

As argued below under the discussion on personhood, Ruth & Emily are "whoever's" not "whatever's." If the law has only two entities, persons or things, Ruth and Emily are clearly not "things."

Thus, the lower court's ruling contravenes G. L. 248 §37, which is non-discretionary:

"Upon the filing of such petition, the court *shall cause notice* to be served upon all the supposed custodians or persons alleged to be detaining or holding in custody *said person, as stated in said petition*, or as otherwise known, *ordering* them to appear before said court at a time and place named therein, to be examined as said court shall order;..." (Emphasis added.)

The show cause requirement is for custodians holding persons "as stated in the petition." The petition clearly stated Ruth and Emily as the named persons.

The statute must be taken as a whole so that "effect is given to all its provisions, so that no part will be inoperative or superfluous," (2A N. Singer, Sutherland Statutory Construction §46.05 (5th ed. 1992); and the statute must be viewed "as a whole" (2A N. Singer, Sutherland Statutory Construction § 46.05, at 154 (6th ed. 2000)).

By failing to hold a hearing, the defendant was not required to appear and provide a legal argument for holding Ruth and Emily captive as is demanded by law.

#### I. ESA not determinative of personhood

The federal district court's decision on Appellant's Endangered Species Act (ESA) claim does not determine whether Ruth and Emily are legally held nor does it define "persons." The federal district court held:



"That [Endangered Species] Act, as the Fish and Wildlife Service has authoritatively interpreted it and in conjunction with the Animal Welfare Act, contemplates that endangered species may be kept in captivity. See 50 C.F.R. § 17.3 (excluding from the definition of "take," as "applied to captive wildlife," "generally accepted" husbandry practices satisfying Animal Welfare Act standards);..." (Rowley, @ 20-21)

Appellant argues that the ESA does not establish personhood, but only settles legal questions of harm and harassment against members of endangered species.

As the federal district court stated in its decision, the purpose of the Endangered Species Act is to:

"(1) provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, (2) provide a program for the conservation of such endangered species and threatened species, and (3) take appropriate steps to carry out the United States' commitments in various international treaties and conventions regarding species conservation. 16 U.S.C. § 1531(b)." (Rowley, @ 3)

Captive wildlife, for the purpose of the ESA is defined as: "... living wildlife held in a controlled environment that is intensively manipulated by man for the purpose of producing wildlife of the selected species..."(50 C.F.R. §17.3).

Neither the ESA nor the US Fish and Wildlife Service's regulations give authority for the wholesale captivity of any and all endangered species. As argued on appeal in that case, Ruth and Emily were not held captive for breeding and so do not meet the definition allowing an exception to the

harassment clause of the regulations.

And assume, for argument's sake, that Asian elephants were delisted from the federal endangered species list. The US Fish and Wildlife Service would not have jurisdiction over Ruth and Emily, nor any role in this matter.

## II. Personhood

Massachusetts' courts have consistently allowed for broadening interpretations of "person," relying on the lack of specific language by the legislature. The Massachusetts Constitution redefined its jurisdiction from "man" to "person," in 1976, but without a legislative definition of "person." (Mass. Const. Article 1 (1780), Article of Amendment 106 (1976)).

Appellant points to the ever-broadening definition of "person" to meet changes in public policy.

In the case of Joseph Saikewicz, a developmentally disabled 67-year-old man residing at Belchertown State School diagnosed with terminal cancer, the Supreme Judicial Court of Massachusetts held that:

"We recognize at the outset that this case presents novel issues of fundamental importance that should not be resolved by mechanical reliance on legal doctrine..."

And:

"We take the view that the substantive rights of the competent and the incompetent person are the same in regard to the right to decline potentially life-prolonging treatment...The factors which distinguish the two types of persons are found only in the area of how the State should approach the preservation and implementation of

the rights of an incompetent person." (Superintendent of Belchertown State School v. Joseph Saikewicz, 373 Mass. 728 (1977) @ 737)

In the novel 1984 vehicular homicide case where a "viable fetus" was granted the status of "person," :

"Even if we assume that Legislature did not consider the issue, we may assume that the Legislature intended us to define the term "person" by reference to established and developing common law."

And:

"Where the Legislature uses nonspecific terms in criminal statutes, this court frequently provides necessary construction and definition from the common law." (Commonwealth v. Daniel Cass, 392 Mass. 79 (1984) @ 2, Emphasis added)

The court then went on to state that viable fetus was human, and humans were always deemed as persons under the law.

In 1999, Massachusetts corporations were recognized by the court as persons, absent clear contrary language: .

"The Legislature has directed that "[i]n construing statutes ... unless a contrary intention clearly appears ... [the word] `person' ... shall include corporations, societies, associations and partnerships" (emphasis added). G.L. c. 4, § 7, Twenty-third." (Sarvis v. Boston Safe Deposit and Trust, 47 Mass. App. Ct @10 (1999))

Yet a corporation, as an entity, has little in common with a "human" person under the Massachusetts Constitution. It can neither be given nor deprived of liberty or seek safety and happiness. But Ruth and Emily can, and are doing just that: they are being deprived of liberty and are seeking liberty, safety (sanctuary) and happiness.

At least one Massachusetts court considered that animals may also have "inherent legal rights," in addition to their property value to humans. In a footnote to an animal cruelty case, the Appeals Court notes that "There is a debate whether the law should protect animals through of their having inherent rights or through their ownership by human beings and the scope of that protection." (Commonwealth v. Luigi Epifania, 80 Mass. App. Ct. 71 (2011)).

Twice New York courts have granted writs of habeas corpus on behalf of animals in the past five years: in 2015 for chimpanzees Hercules and Leo held at Stony Brook University, (Nonhuman Rights Project v. Stanley, et al, 16 NYS 3d 898 (2015), writ attached), and in 2018 for Asian elephant Happy held at the Bronx Zoo although the petition was denied. (Nonhuman Rights Project v Breheney, et al, unpublished, writ attached, 11/16/18)..

In 2018, on appeal from New York's Third Department denied writs for chimpanzees Tommy and Kiko, held separately in a warehouse and a commercial storefront, the appellate judge opined:

"The issue whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus is profound and far-reaching. It speaks to our relationship with all the life around us. Ultimately, we will not be able to ignore it. While it may be arguable that a chimpanzee is not a "person," there is no doubt that it is not merely a thing." (Matter of NhRP, Inc. Ex Rel Tommy v Lavery, 2018 NYS Slip Op 03309).

A recent international court ruling on the matter of Kavaan, an Asian elephant held at the Marghazar Zoo in Islamabad, Pakistan, made a similar analogy in deciding the case. After considering national and international laws, and specific animal rights cases including those of three other elephants<sup>3</sup>, that court established that there was a concurrence that animals are not "things" under law (Islamabad Wildlife Management Board v. Islamabad Metropolitan Corporation, et al, W.P. No.1155/2019, May 2020):

"Do the animals have legal rights? The answer to this question, without any hesitation, is in the affirmative. The Black's Law Dictionary (Sixth Edition) has defined 'Legal Right' as 'Natural rights, rights existing as a result of contract and rights created or recognized by law'. The Eleventh Edition defines the expression, a right related to or recognized by law". The human rights are inherent because they stem from the attribute of being "alive.". Life, therefore, is the premise of the existence of a right. Whether human rights or rights guaranteed expressly under the Constitution, they all have a nexus with 'life'. An object or thing without 'life' has no right. A living being on the other hand has rights because of the gift of 'life'. An animal undoubtedly is sentient being. It has emotions and can feel pain or joy..."

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<sup>3</sup> The Islamabad High Court analyzed a number of decisions on four continents: India bestowed legal rights not only on elephants Sundar and Sonu, but on all animals (2000, 2014); Argentina granted personhood to Sandra, an orangutan (2014), and Cecelia, a chimpanzee (2016); and in South Africa, the intrinsic value of animals as individuals was recognized as more than just an issue animal welfare (2016).

And:

"...Like humans, animals also have natural rights which ought to be recognized. It is a right of each animal, a living being, to live in an environment that meets the latter's behavioral, social and physiological needs." (Id, at p. 59-60).

### **CONCLUSION**

What this Petition and Writ sought and still seeks for Ruth and Emily is the most basic right, a birthright, to live freely, to enjoy bodily liberty, that which has been granted through personhood to humans regardless of their capacity to meet legal obligations--the voiceless, the incompetent, the ill. Ruth and Emily know and respond to their names. They know over 50 English language commands and phrases in addition to having a language of their own. They have emotions, a sense of self and a memory comparable to ours. They grieve. They mourn their dead. These traits make them entitled to personhood, as legal beings.

Appellant's writ simply asks why Ruth and Emily are being deprived of bodily liberty and demands that the City of New Bedford show how it has a legal right to do so.

Appellant respectfully seeks the following relief:

- (1) Remand for issuance of the writ of habeas corpus
- (2) Appointment as guardian ad litem at this time to be able to partake in decisions on Ruth's and Emily's' health and well-being.

(3) Custody of either elephants' remains should they perish in the Appellee's custody while this matter is in litigation. The Appellee's plan is to dispose of them at the City landfill. Appellant will ensure that they are given a proper burial.

Respectfully submitted,

/s/ Joyce Rowley  
Joyce Rowley  
PO Box 50251  
New Bedford, MA 02745  
Pro Se  
508-542-8297  
Prov52jr@yahoo.com

Date: 06/05/20

**ADDENDUM**

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Superior Court-New Bedford

#3

<b>JUDGMENT</b>		BRISTOL SS SUPERIOR COURT FILED	Trial Court of Massachusetts The Superior Court	
DOCKET NUMBER		1973CV01215	DEC 27 2019	Marc J. Santos, Clerk of Court Bristol County
CASE NAME		JOYCE ROWLEY Joyce Rowley on behalf of Ruth and Emily vs. City of New Bedford		COURT NAME & ADDRESS Bristol County Superior Court - New Bedford 441 County Street, 1st floor New Bedford, MA 02740
<p>This action came before the Court, Hon. Jackie Cowin, presiding, and upon consideration thereof,</p> <p>It is ORDERED and ADJUDGED:</p> <p>that the Petition for Writ of Habeas Corpus is DISMISSED.</p>				
DATE JUDGMENT ENTERED		CLERK OF COURTS/ ASST. CLERK		
12/27/2019		X 		
Date/Time Printed: 12-27-2019 12:38:38		SCV131: 05/2016		

12/27/19. This petition is denied because: 1) the Court does not adopt petitioner's argument that Ruth and Emily are "persons;" and 2) in any event, the Federal court has already determined that the elephants are lawfully held in captivity, negating the right to a writ. See G.L.C. 248, § 1; Rowley v. City of New Bedford, 2019 U.S. Dist. LEXIS 163898 at 20-21 (Young, J.).

1

DOCKET NO. 1973CV01215

In the matter of a Petition for a Writ of Habeas Corpus	)	
	)	BRISTOL, SS SUPERIOR COURT
JOYCE ROWLEY, pro se	)	FILED
on Behalf of RUTH and EMILY,	)	DEC 27 2019
Petitioner,	)	SUPERIOR COURT
v.	)	MARC J SANTOS, ESQ.
	)	CLERK/MAGISTRATE
	)	JUDICIAL DISTRICT OF BRISTOL COUNTY
CITY OF NEW BEDFORD,	)	
Commonwealth of Massachusetts,	)	
Respondent.	)	

**PETITION FOR  
A WRIT OF HABEAS CORPUS**

"Before the body is removed, the surviving elephant may be allowed ample time to inspect the remains of the deceased..."  
--2018 Buttonwood Park Zoo,  
Elephant Management Protocol, p.24

Petitioner Joyce Rowley, pro se, acting on behalf of Asian elephants Ruth and Emily, files this writ of habeas corpus seeking their immediate release from Buttonwood Park Zoo pursuant to Massachusetts General Law 248 Section 36, Petition to Obtain Personal Liberty. Rowley seeks that the Court determine that Ruth and Emily are legal persons under the law, and that they are held against their will unlawfully.

As demonstrated below, both elephants have shown their desire to leave the zoo. They have been held against their will for decades, without the right to autonomy--no choice of food, of climate, of partners or living conditions. Their captivity has caused them pain and suffering, and their living quarters are harmful to their health.

Their stalls are little more than prison cells (Exhibit 1, Photos of the interior of the "barn"

**G. L. 4 §7-23 Definitions of statutory terms; statutory construction**

Section 7. In construing statutes, the following words will have the meanings herein given, unless a contrary intention clearly appears:

Twenty-third, "Person" or "whoever" shall include corporations, societies, associations and partnerships.

**G.L. c.248 §1 Persons entitled to writ; Exceptions**

Section 1. Whoever is imprisoned or restrained of his liberty may, as of right and of course, prosecute a writ of habeas corpus, according to this chapter, to obtain release from such imprisonment or restraint, if it proves to be unlawful, unless—First, He has been committed for treason or felony, or on suspicion thereof, or as accessory before the fact to a felony, and the cause has been plainly expressed in the warrant of commitment.

Second, He has been convicted or is in execution upon legal process, civil or criminal.

Third, He has been committed on mesne process in a civil action in which he was liable to arrest and imprisonment, unless excessive and unreasonable bail was required.

**G.L. c. 248 §36. Petition to obtain personal liberty.**

Section 36. Whoever has reason to believe that another person is deprived of his liberty or held in custody in violation of the preceding section may file a petition, on the oath of the petitioner, in the probate court for the county where such person is believed to be detained, stating his name, age and general description, where, when and under what circumstances he was deprived of his liberty, where he is believed to be detained, the name of the person so depriving him of his liberty, if known, the name of his supposed custodian and any other material facts and circumstances.

**G.L. c.248 §37 Notice to Custodians, etc.**

Section 37. Upon the filing of such petition, the court shall cause notice to be served upon all the supposed custodians or persons alleged to be detaining or holding in custody said person, as stated in said petition, or as otherwise known, ordering them to appear before said court at a time and place named therein, to be examined as said court shall order; and may cause said person to be brought before it for examination as to his desire to be released and as to any other relevant matters.

## **Massachusetts Constitution**

### Article 1. (1780)

All men are born free and equal, and have certain natural, essential, and inalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring and possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. (Anulled by Amendments, Article 106)

### Article of Amendment, Article 106 (1976)

All people are born free and equal, and have certain natural, essential, and inalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring and possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness.

**16 U.S.C 1531, Congressional findings, and declaration of purposes and policy**

**1531(b) Purposes**

The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions as set forth in subsection (a) of this section.



### **50 C.F.R. 17.3, Definitions**

§ 17.3 Definitions. In addition to the definitions contained in part 10 of this subchapter, and unless the context otherwise requires, in this part 17:

*Captivity* means that living wildlife is held in a controlled environment that is intensively manipulated by man for the purpose of producing wildlife of the selected species, and that has boundaries designed to prevent animal, eggs or gametes of the selected species from entering or leaving the controlled environment. General characteristics of captivity may include but are not limited to artificial housing, waste removal, health care, protection from predators, and artificially supplied food.

FILED: NEW YORK COUNTY CLERK 04/20/2015 12:50 PM  
NYSCEF DOC. NO. 34

INDEX NO. 152736/2015  
RECEIVED NYSCEF: 04/20/2015

At I.A.S Part 12 of the  
Supreme Court of the State of  
New York, held in and for the  
County of New York, at the  
Courthouse thereof, 80 Centre  
Street, New York, NY, on the  
20 day of April, 2015

**BARBARA JAFFE**  
J.S.C.

PRESENT: HON. \_\_\_\_\_  
Justice of the Supreme Court

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

In the Matter of a Proceeding under Article 70 of the CPLR  
for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on  
behalf of HERCULES and LEO,

Petitioner,

-against-

SAMUEL L. STANLEY JR., M.D., as President of  
State University of New York at Stony Brook a/k/a  
Stony Brook University and STATE UNIVERSITY  
OF NEW YORK AT STONY BROOK a/k/a STONY  
BROOK UNIVERSITY,

Respondents.

RECEIVED  
APR 17 2015  
PART 12

ORDER TO SHOW CAUSE &  
WRIT OF HABEAS CORPUS

Index No.: 152 736/15

TO THE ABOVE NAMED RESPONDENTS:

PLEASE TAKE NOTICE, That upon the annexed Verified Petition of Elizabeth Stein,  
Esq. and Steven M. Wise, Esq. (subject to *pro hac vice* admission), filed the 19<sup>th</sup> day of  
March, 2015, the exhibits and affidavits attached thereto, the Memorandum of Law in  
support of the Verified Petition, and upon all pleadings and proceedings herein, the Respondents

SAMUEL L. STANLEY JR., M.D., as President of State University of New York at Stony Brook a/k/a Stony Brook University, and STATE UNIVERSITY OF NEW YORK AT STONY BROOK a/k/a STONY BROOK UNIVERSITY, or their attorneys, are hereby ORDERED to SHOW CAUSE at I.A.S. Part 12, Room 279, of this Court to be held at the Courthouse located at 80 Centre Street, New York, New York 10013 on the 6th day of May, 2015 at 10:30 o'clock in the fore of that day, or as soon thereafter as counsel can be heard, why an Order should not be entered granting the Nonhuman Rights Project, Inc. ("Petitioner"), the following relief:

- A. Upon a determination that Hercules and Leo are being unlawfully detained, ordering their immediate release and transfer forthwith to Save the Chimps;
- B. Awarding Petitioner the costs and disbursements of this action; and
- C. Such other and further relief as this Court deems just and proper.

It is THEREFORE:

ORDERED THAT, Sufficient cause appearing therefore, let service of a copy of this Order and all other papers upon which it is granted upon SAMUEL L. STANLEY JR., M.D., as President of State University of New York at Stony Brook a/k/a Stony Brook University, and STATE UNIVERSITY OF NEW YORK AT STONY BROOK a/k/a STONY BROOK UNIVERSITY, and upon ERIC T. SCHNEIDERMAN, Attorney General of the State of New York, by personal delivery, on or before the 22nd of April, 2015, be deemed good and sufficient. An affidavit or other proof of service shall be presented to this Court on the return date fixed above.

IT IS FURTHER ORDERED, that answering affidavits, if any, must be received by Elizabeth Stein, Esq., 5 Dunhill Road, New Hyde Park, New York 11040, no later than 1st of May 2015 And Electronically Filed with NYSCEF System

~~May~~, 2015. ~~Reply papers, if any, must be served on or before the~~ ~~day of~~  
~~2015.~~

Dated: April 20, 2015  
New York, New York

Bj  
Honorable  
**BARBARA JAFFE**  
J.S.C.

ENTER:

At I.A.S Part \_\_\_ of the  
Supreme Court of the State of  
New York, held in and for the  
County of Orleans, at the  
Courthouse thereof, 1 South Main  
Street, Suite 3, Albion, NY on the  
16<sup>th</sup> day of ~~October~~, 2018  
*November*

PRESENT: HON. Tracey A. Bannister  
Justice of the Supreme Court

COPY

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ORLEANS

In the Matter of a Proceeding under Article 70 of the CPLR  
for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on  
behalf of HAPPY,

*TAB*  
~~PROPOSED~~ ORDER TO  
SHOW CAUSE

Petitioner,

-against-

Index No.: *18-45164*

JAMES J. BREHENY, in his official capacity as the Executive  
Vice President and General Director of Zoos and Aquariums of the  
Wildlife Conservation Society and Director of the Bronx Zoo, and  
WILDLIFE CONSERVATION SOCIETY,

Respondents.

TO THE ABOVE-NAMED RESPONDENTS:

PLEASE TAKE NOTICE, That upon the annexed Verified Petition for a Common Law  
Writ of Habeas Corpus and Order to Show Cause of Elizabeth Stein, Esq. and Steven M. Wise,  
Esq. (subject to *pro hac vice* admission), filed the second day of October, 2018, the exhibits and

affidavits attached thereto, the Memorandum of Law in support thereof, and upon all pleadings and proceedings herein, the Respondents JAMES J. BREHENY, in his official capacity as the Executive Vice President and General Director of Zoos and Aquariums of the Wildlife Conservation Society and Director of the Bronx Zoo, and WILDLIFE CONSERVAION SOCIETY, or their attorneys, are hereby ORDERED to SHOW CAUSE at I.A.S. Part     , Room     , of this Court to be held at the Courthouse located at Courthouse Square, 1 South Main Street Suite 3, Albion, New York 14411-1497, on the 14<sup>th</sup> day of December, 2018 at 11:30 o'clock in the fore of that day, or as soon thereafter as counsel can be heard, why an Order should not be entered granting the Nonhuman Rights Project, Inc. ("Petitioner"), the following relief:

- A. Upon a determination that Happy is being unlawfully imprisoned order her immediate release from Respondents' custody to an appropriate sanctuary, preferably the Performing Animal Welfare Society;
- B. Awarding Petitioner the costs and disbursements of this action; and
- C. Such other and further relief as this Court deems just and proper.

It is THEREFORE:

ORDERED THAT, Sufficient cause appearing therefore, let service of a copy of this Order and all other papers upon which it is granted upon JAMES J. BREHENY, in his official capacity as the Executive Vice President and General Director of Zoos and Aquariums of the Wildlife Conservation Society and Director of the Bronx Zoo, and WILDLIFE CONSERVAION SOCIETY, by personal delivery, on or before the 26<sup>th</sup> day of November, 2018, be deemed good and sufficient. An affidavit or other proof of service shall be presented to this Court on the return date fixed above.

IT IS FURTHER ORDERED, that answering affidavits, if any, must be received by Elizabeth Stein, Esq., 5 Dunhill Road, New Hyde Park, New York 11040, no later than the 3rd day of December, 2018. Reply papers, if any, must be served on or before the 10<sup>th</sup> day of December 2018.

Dated: 11/16, 2018  
Albion, New York

*Tracey A. Bannister*  
Honorable Tracey A. Bannister

ENTER:

**CERTIFICATE OF COMPLIANCE**

**Pursuant to Rule 16(k) of the  
Massachusetts Rules of Appellate Procedure**

I, Joyce Rowley, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 16 (a)(13) (addendum);

Mass. R. A. P. 16 (e) (references to the record);

Mass. R. A. P. 18 (appendix to the briefs);

Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents); and

Mass. R. A. P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the monospaced font Courier New at size 12 pt. and contains less than 50 total non-excluded pages.



**CERTIFICATE OF SERVICE**

Pursuant to Mass.R.A.P. 13(d), I hereby certify, under the penalties of perjury, that on June 5, 2020, I have made service of this Brief and Appendix upon the attorneys of record for Appellee by email on:

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JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD  
(JUDICIAL DEPARTMENT)

W.P. No.1155/2019

Islamabad Wildlife Management Board  
through its Chairman

Versus

Metropolitan Corporation Islamabad  
through its Mayor & 4 others

Petitionersn by : MrOwaisAwan, Advocate.  
Mr Muhammad Rustam Malik, Advocate.  
Mr Muhammad Waqas Malik, Advocate.

Respondents by : Syed Muhammad Tayyab, Deputy Attorney General.  
MrKashif Ali Malik, Advocate.  
MrAdil Aziz Qazi, Advocate.  
MrHaseebHassan, Advocate.  
Malik AbdurRehman, Advocate.

Sh. Ansar Aziz, Mayor, Metropolitan Corporation  
Islamabad.  
MsNaheed S. Durrani, Secretary Ministry of Climate  
Change.  
MrSulyman Shah, Joint Secretary (Admin), Ministry  
of Climate Change.  
Syed Ali Raza Zaidi, Dy. Director (Law), Ministry of  
Climate Change.  
MrAnisurRehman, Chairman, Islamabad Wildlife  
Management Board.  
Rana Tahir Mehmood, Director Environment, MCI.  
Mr Bilal Khilji, Dy. Director Zoo.  
Mr Ali Asghar, Dy. Director (Law), MCI.

Date of Hearing : 25-04-2020.

ATHAR MINALLAH, C.J.-

*"A good deed done to an animal is as meritorious as a good deed done to a human being, while an act of cruelty to an animal is as bad as an act of cruelty to a human being."*

*...Prophet Muhammad (SAW)*

The emergence of the dangerous infectious pandemic Covid-19 has had a profound impact on the human race and its way of life. It is a pandemic because it has spread over continents and has affected humans globally. The human race, despite its superior characteristics and qualities of cognition and intelligence, has become helpless before an invisible and lethal virus. It appears that humans may have to consider changing their outlook and lifestyle for good. It has threatened the very existence of the most superior form of life on this planet, humans, and has exposed its vulnerability. The arrogance of being superior to other living beings seems to have been forgotten in the face of the threat of an invisible and hitherto unknown enemy. Billions across the globe have voluntarily gone into 'captivity' fearing death and illness. It has denied the most superior being its natural instinct of having social relationships, opportunities of earning a livelihood have been lost, education in schools has been suspended. The human race is right now experiencing self imposed 'lockdown' to save itself from harm. It is unprecedented, probably never experienced before in human history, that holy places such as the Ka'bah, the Vatican, the Temple Mount, the Golden Temple, the Bodh Gaya, Sri Harmandir Sahib and many other revered religious sites are not allowing free access to worshippers. There is an eerie silence in the Tower of London, the Great Wall of China, Time Square of New York, Champs Elysees in Paris

and the streets of Venice in Italy and it is uncertain whether they will ever be the same when the pandemic is over. Nuclear bombs have lost importance while there is a rush to acquire ventilators to save lives. The race for acquiring superiority in manufacturing weapons to kill and destroy humans has been superseded by a race to develop a vaccine to fight a threatening virus. The pandemic seems to have changed the world for the time being. Has nature forced the human race to go into 'captivity' so as make it realize its dependence for survival on other beings possessed with a similar gift i.e life? Is it an opportunity for humans to introspect and relate to the pain and distress suffered by other living beings, animal species, when they are subjugated and kept in captivity and denied the conditions and habitats created for their survival by the Creator, merely for momentary entertainment? The experts of the United Nations have warned that as a consequence of the 'lockdown' the world is likely to face a serious mental health crisis. The petitions in hand, besides raising questions of public importance, have a nexus with the threat to human existence highlighted by the current pandemic crisis. It has highlighted the interdependence of living beings on each other, the desperate need to restore the balance created in nature and, above all, it has conspicuously brought the essence, meaning and significance of 'life' into the spotlight, The questions raised in these petitions are definitely in the context of the relationship of one form of life with another i.e. humans and

the other living creatures called 'animals'. This Court has been called upon to recognize that animals have rights which ought to be respected or, rather, it is the duty of the human species to protect these rights for its own survival. The Marghazar Zoo of the Federal Territory of Islamabad (*hereinafter referred to as the 'Zoo'*) and the treatment of living beings kept in captivity in its small and ill equipped enclosures is the subject matter of one of the petitions. A specific prayer has been sought to direct the respondents to relocate "Kaavan" the elephant to a sanctuary. In another petition prayers have been sought regarding a rescued Black Bear. The Bear was seized when it was being used for entertainment purposes by making it 'dance' and perform other tricks. It was in a shockingly distressing condition. A rope was passed through its muzzle and its teeth had been taken out in order to exercise control over it. An application was filed by one Farman Ali, son of Khan Mohammad, seeking to become a party to the proceedings. He asserted that he had bought the Bear from one Mohammad Riaz and that the latter was issued a license by the Punjab Wildlife Management Board. However, he could not produce any permission granted by the petitioner Board under the law enforced in the Islamabad Federal Capital Territory. The Bear was treated in a cruel manner and was rightly seized. The petitioner Board was, therefore, granted permission to shift and keep the Bear at the Balkasar Bear Sanctuary. It is noted that the applicant, namely Farman Ali, could not produce any

document issued under the Islamabad Wildlife (Protection, Preservation, Conservation and Management) Ordinance 1979 to establish his legal entitlement for possessing and presenting the seized Bear within the jurisdiction of the Islamabad Capital Territory for entertainment. The third petition is regarding the killing of stray dogs allegedly in a cruel manner. The Constitution of the Islamic Republic Pakistan 1973 (*hereinafter referred to as the 'Constitution'*), like most of the other constitutions, has been framed by humans for regulating themselves. It is the basic law laying down rules as to how humans are to be governed. The fundamental rights guaranteed therein or the various types of writs that can be issued by a constitutional court are in the context of only one living species i.e humans. It either contemplates a 'person' or a 'citizen'. Do other living beings, such as the species categorized as 'animals' and who share the gift of life with humans, have legal entitlements and thus enforceable 'rights'? Does the Constitution impose any duty or duties on the State and humans regarding the welfare of other species such as animals, their conservation and protection?

2. When these petitions were filed, the conditions at the Zoo were alarming and the lives of the captive living beings were at risk. The management was under the control of the Corporation. However, after the initial hearings it had become obvious that the Corporation had neither the resources nor the

capacity and will to safeguard the wellbeing and welfare of the captive animals. The Federation, through the Secretary, Ministry of Climate Change and the Board of the petitioner entity, were directed to assist the management of the Zoo in order to protect the animals from harm. What ensued was not expected. Except for the petitioner Board and some passionate and dedicated private individuals including the counsels for the petitioners, others appeared to be more interested in gaining control of the management rather than securing the wellbeing of the animals. This Court had consciously given sufficient time to all the parties so that they could show their respective commitment in ensuring the wellbeing of the animals kept in captivity. Regretfully I have no hesitation in observing that such a commitment could not be displayed on the part of the authorities. It does not appear to be a priority to take immediate steps to provide the adequate habitat or abode for the behavioural, social and other needs of the 'animals' kept in captivity, nor can sufficient resources be allocated for this purpose. The caged living beings in the Zoo are undoubtedly in pain, distress and agony, definitely disproportionate to the purpose intended to be achieved by keeping them in this condition. As would be discussed in more detail, the conditions of captivity at the Zoo definitely amount to the criminal treatment of living beings. The Secretary, Ministry of Climate Change has submitted a report, explaining the efforts being made to improve conditions at the Zoo. The intent may be

noble but the measures described are cosmetic and not enough to put an end to the unimaginable suffering of the caged living beings. Should they be allowed to continue suffering unnecessary pain, distress and agony? Should "Kaavan" continue to constantly sway and bob his head against the wall of his small dilapidated shed, displaying decades of pain and distress? Which authority is competent and vested with jurisdiction to manage, administer and run the affairs of the Zoo? The question is whether the animals, i.e. non-human living creatures, have independent rights or, is there a duty on the part of the human race, through the State and its public functionaries, to protect, preserve and conserve such species? If the answer to the last question is in the affirmative, then it needs to be seen whether these obligations are being fulfilled in relation to the animals which have been kept in captivity in the Zoo? Whether the cruel treatment of animals breaches the right to life of the public at large? Whether the conditions in which these animals or living beings have been kept in the Zoo attracts the offences defined under the Prevention of Cruelty to Animals Act, 1890 (*hereinafter referred to as the 'Act of 1890'*) and section 429 of the Pakistan Penal Code, 1860 (*hereinafter referred to as the 'PPC'*)?

3. In order to answer the above questions, it would be beneficial to examine the relevant laws and the precedent law developed in our jurisdiction and elsewhere regarding the



status of animals, whether they have independent rights and the duties of humans to protect them. However, before proceeding, it would be appropriate to briefly describe the conditions at the Zoo and its inmates.

**A. The Marghazar Zoo (the 'Zoo')**

4. The capital of Pakistan, i.e. the Islamabad Capital Territory, is spread over an area of 1400 square miles at the foothills of the mountain range called 'Margallah'. After conducting extensive surveys and studies, Dr. C. A. Doxiadis, a renowned international town planner, submitted a final report consisting of three parts titled "Towards a new Capital", "Towards Islamabad" and "Programme and plan for Islamabad", respectively. The recommendations for the establishment of a new planned city, the capital of the Islamic Republic of Pakistan, was approved by the Federal Cabinet and the Capital Development Authority Ordinance, 1960 (*hereinafter referred to as the 'Ordinance of 1960'*) was promulgated. Pursuant thereto the Capital Development Authority was established to execute the establishment of the capital of the country in accordance with the approved master plan. Another relevant legislation, which will be discussed later, i.e. the Islamabad Wildlife (Protection, Preservation, Conservation and Management) Ordinance, 1979 (*hereinafter referred to as the 'Wildlife Ordinance of 1979'*), was also

promulgated. In 1978, the Zoo was established in the foothills of the Margalla Hills National Park in an area spread over 25 (twenty five) acres of land. It was initially managed and administered by the Capital Development Authority till its affairs were transferred to the Metropolitan Corporation Islamabad (*hereinafter referred to as the 'Corporation'*) in 2016. When these petitions were filed, the Zoo was being managed and administered by the Corporation and the condition of the animals held in captivity was deplorable. This Court sought assistance from the World Wildlife Fund for Nature Pakistan (*hereinafter referred to as the 'WWF-Pakistan'*) and the latter nominated Dr Uzma Khan as an expert. She was accordingly appointed as an amicus. The latter, alongwith representatives of the Board of the petitioner institution constituted under the Wildlife Ordinance of 1979, visited/inspected the Zoo. According to the report submitted by the amicus, when the Zoo was inspected, 878 non-human living creatures were kept in captivity to be exhibited to the visiting public. 89 were mammals representing 15 species, 769 birds of 38 different species while there were 20 reptiles belonging to three distinct species. A separate report was also filed on behalf of the Board constituted under the Wildlife Ordinance of 1979. The report submitted by the amicus appointed by this Court as well as the Board highlight extremely disturbing conditions in which the non human living beings have been kept in captivity and in complete disregard to their respective

natural habitats. The animals, because of these conditions, are definitely suffering pain, distress and agony. The animals have been kept in small cages and enclosures without basic and necessary facilities required for the needs of this non human living species. There can be no denial that these non human living beings have been kept in conditions which cause distress and pain and thus amounts to cruel treatment. A short description of the captive animals at the Zoo are as follows.-

**(a) "Kaavan", the Asian Elephant.**

"Kaavan" was gifted by the Government of Sri Lanka in 1985 when he was one year old. His abode was a small enclosure in the Zoo. For more than three decades Kaavan has been kept chained in a small enclosure described by the amicus and the Wildlife Management Board as small, with inappropriate conditions required to meet the physiological, social and behavioural needs of this extraordinary species of living beings that has been gifted with 'life'. It has been reported that the 'mahouts' have a negative relationship with 'Kaavan'. Elephant food is sold to the visitors so that the latter can feed 'Kaavan'. The funds generated are not recorded and thus go unaccounted. The health condition of 'Kaavan' is

also disturbing because it has been reported that growth, curving and split in toe nails is an indication of neglect and that it could cause serious consequences. The dry moat is a risk to the wellbeing of Kaavan. The diet given to Kaavan is sub standard and inadequate to meet its needs. This social living being has been kept in isolation since his female companion Saheli's death at the age of twenty two in 2012. According to the report submitted on behalf of the Wildlife Management Board, because of the conditions of captivity, Kaavan exhibits severe stereotype behaviour and may have also developed neurological problems. The management of the Zoo, because of shortage of funds, cannot maintain the cleanliness and hygiene of the enclosure and the small water pond. The management cannot even afford the purchase of lime stone chalking for this purpose. The distress, pain and suffering has been conspicuous to visitors during the thirty six years of captivity because of the constant bobbing and swaying of the helpless being. The visitors treat this as acts of entertainment by Kaavan but in reality it is an expression of loneliness, distress and suffering by the latter. It was reported in July last year that the mahouts had allegedly stolen/misappropriated

Kaavan's food and disciplinary proceedings were initiated against them. In March this year 'Kaavan' was forced to spend the night in the moat in cold weather because there was no one to rescue this majestic non human being. It has been reported that other animals from the wild such as wild Boars intrude into the enclosure because the fencing is dilapidated.

Asiatic Elephants have the attributes of a nomadic living being. They need to be constantly on the move and can cover more than ten kilometers a day. By nature they need a social structure to thrive and they exist in matriarchal herds. As will be discussed later, an elephant has exceptional abilities and one such member of the species, "Happy", an inmate of the Bronx zoo in the United States, has even passed the 'mirror test'. By now there is consensus that an Elephant has emotions and some are similar to those of a human. There also appears to be compelling evidence that zoo is not an appropriate place for this species and zoo's across the globe are considering to phase them out. They feel pain, distress, happiness as well as sadness. The birth of a baby elephant is celebrated while they cry and mourn the death of a member of

the herd. Nature has created elephants to live, survive and thrive in a particular habitat. The destruction of its natural habitat at the hands of the humans has brought this amazing species to a brink of extinction. The needs of this innocent creation cannot be met in the captive environment of a zoo. Zoos do not serve any purpose except to display their living inmates as exhibits to visitors. Keeping in view the nature of the species and the deploring conditions in the Zoo, Kaavan is indeed suffering and is being treated in a manner that has subjected him to unnecessary pain and suffering. He is lonely and the extent of his suffering is unimaginable. In 2018 the Corporation was considering an offer from a charitable organization to shift Kaavan to a sanctuary but for unspecified reasons it could not materialize. Despite the realization that the conditions of captivity had subjected Kaavan to unnecessary pain and suffering, no visible steps were taken to effectively put an end to it. Even during the proceedings before this Court, it has become obvious that an end to the pain, agony and suffering of Kaavaan is not in sight. For the afore mentioned reasons, therefore, this Court has no hesitation in declaring that the treatment of Kaavan for more than three

decades and his current status has subjected him to unnecessary pain and suffering. The management of the Zoo and the controlling authorities are presumed to know that such treatment is likely to cause loss and damage to the public because Kaavan belongs to them. The life of Kaavan is at risk and his wellbeing is undoubtedly compromised.

**(b) The two Brown Bears.**

The two brown bears have been kept in inadequately equipped and extremely small enclosures. Their hygiene, food requirements and health condition are severely neglected. The amicus, in her report, has described the confined area as a 'bare enclosure' because it is bereft of any shade while the indoor area is all made of concrete. The health condition of the Bears was poor and one needed immediate medical assistance.

**(c) The marsh Crocodile.**

The marsh crocodile was confiscated and since then has been kept in captivity at the Zoo in conditions which raise serious concerns for its well being, according to the reports of the amicus and

the Wildlife Management Board. When it was inspected it showed signs of serious illness. Its area of confinement was so small that it could hardly move. Climatically, Islamabad is not suitable for keeping the species caged in the Zoo. It was not seen outside its small enclosure for a long time because of its condition and the inappropriate weather.

**(d) Other captive non-human beings; lions, birds, wolves, ostriches etc.**

Like Kaavan and the two bears, the living conditions of other caged animals has compromised their well being and exposed them to harm. The conditions described in the reports of the amicus and the Wildlife Management Board makes it obvious that they have been subjected to unnecessary pain and suffering. The lion is known as the 'king of the jungle'. By nature they are social and live in groups called a 'pride'. Lions are declared as vulnerable and are listed in the Red List of Threatened Species by the IUCN. Once found in abundance in three continents, their presence has now been restricted to parts of Africa and India. They can live in a variety of habitats but by nature



they thrive in savannas, grassland and open woodlands. According to the reports submitted in these proceedings, the lions in the Zoo are visibly malnourished. The interior of the enclosure is cemented and the conditions of captivity definitely do not meet the minimum international standards required to keep animal species in captivity. The wolves have been kept in an enclosure which, according to the reports of the experts, is absolutely inadequate. The conflict between the balance created in nature and the human desire to subjugate other species has been aptly described by the French playwright and screenwriter in these words; 'God loved the birds and invented trees, Man loved the birds and invented cages'. The conditions of the caged birds in the Zoo manifests neglect and a severe shortage of resources. The rats are in abundance while the caged birds are deprived of their basic needs, so much so that perching is also denied to them. According to the reports brought on record the birds cannot perch because of the inadequately constructed cages. The feathers on the back of the Ostriches were found missing. The water ponds are not properly maintained. The water is polluted and shows signs

of neglect. Adequate animal husbandry facilities are also lacking.

In a nutshell, the conditions of captivity of living species in the Zoo undoubtedly and demonstrably manifests neglect and apathy. The facilities and resources are definitely lacking so as to provide for the behavioural, social and physiological needs of the captive non human living species. The visitors also do not appear to be aware of their responsibilities towards the helpless living beings who can only express the pain of suffering through abnormal behavior. It has been reported that the visitors tease the caged animals by throwing articles, pelting stones, poking at them or disturbing them with loud noise. This heckling and teasing of the caged animals further exacerbates their pain and agony. By no stretch of the imagination do the conditions of captivity at the Zoo meet the needs of the living species, rather they have been subjected to unnecessary pain and suffering, while the management is presumed to know that in such an eventuality the lives of the captive animals are at risk. It is ironic that the Zoo has never adopted or followed minimum standards

and guidelines, let alone the ones adhered to internationally.

The current conditions of the Zoo do not qualify it to be termed as a zoological garden. It is a mere menagerie because captive animals are displayed without being properly cared for. The existence of the Zoo in its present condition and the treatment of these non-human living beings definitely attracts criminal offences, as will be discussed later. The captivity of the animals in the Zoo, besides violating the fundamental right to life of humans, is otherwise illegal. The authorities in control of the management of the Zoo have kept the animals in conditions not permitted by the law and they have refused to fulfill obligations and duties imposed by the law despite repeated demands by members of the general public. They have also failed to produce any authorization or license required under the Ordinance of 1979.

**B. Which authority is empowered under the law to administer the affairs of the Zoo?**

5. As already noted above, the Capital Development Authority, established under the Ordinance of 1960, came into existence for making arrangements for the planning and

development of Islamabad within the frame-work of a regional development plan. The Ordinance of 1960 does not contemplate or provide for the management or administration of a zoo by the Capital Development Authority. On the other hand, the Wildlife Ordinance of 1979 was promulgated as a special law with the explicit object of providing for the protection, preservation, conservation and management of wildlife and the setting up of a national park in the Islamabad Capital Territory.

**(a) The Wildlife Ordinance of 1979.**

The Wildlife Ordinance of 1979 was promulgated to provide for the protection, preservation, conservation and management of wildlife and the setting up of a National Park in the Islamabad Capital Territory. The Wildlife Ordinance of 1979 extends to the entire area of the Islamabad Capital Territory. Section 2 defines various expressions. A 'wild animal' has been defined as an animal or bird specified in the First Schedule or Third Schedule *ibid*. Protected animals have been specified in the latter Schedule. Possession or trade of or otherwise dealing with an animal requires some form of authorization e.g a license or certificate issued by an Authorized Officer. An

authorized officer has statutory powers to seize an animal if found in possession of a person not authorized under the Wildlife Ordinance of 1979. Section 26 makes it a criminal offence and a person who keeps in possession, trades or otherwise deals with an animal in violation of the provisions of the statute is liable to be prosecuted, besides being charged under any other law. The authorized officer is also empowered to seize and confiscate an animal found to be dealt with in violation of the provisions of the Wildlife Ordinance of 1979. Clause (l) of section 2 defines "National Park" as meaning an area declared as such under section 21. Section 4 provides for the constitution of the Board of Wildlife Management. Section 20 provides for the declaration of a 'wildlife sanctuary'. The Federal Government, in exercise of its powers vested under section 20, has issued Notification No.3(15)/76-Capital Development Authority.III(3), dated 27<sup>th</sup> April, 1980 (*hereinafter referred to as the 'Wildlife Sanctuary Notification'*). The said notification is reproduced as follows.-

**"No.3(15)/76-Capital Development  
Authority.III(3), dated 27<sup>th</sup> April, 1980.  
In exercise of the powers conferred by sub-**

*section (1) of section 20 of the Islamabad Wildlife (Protection, Preservation, Conservation and Management Ordinance, 1979) (LXX of 1979), the Federal Government is pleased to declare the following areas of the Islamabad Capital Territory to be the Wildlife sanctuaries namely:*

*(1) All public open spaces, developed or underdeveloped within the municipal limits of Islamabad, excluding the areas declared to be a national park under the said Ordinance.*

*(2) Bannigallah hills bounded by Kurang river in the north, Mohra Noor in the west, Thal in the east and Belgh in the south; and*

*(3) C.D.A. Nursery at ChakShahzad."*

Likewise section 21 empowers the Federal Government to declare any area to be a National Park with a view to protect, preserve the scenery, flora and fauna in natural state. The Federal Government in exercise of its powers under section 21 has issued S.R.O. 433(I)/80 dated 28<sup>th</sup> April, 1980 and the same is reproduced as follows.-

**"No.S.R.O. 443(I)/80, dated 28<sup>th</sup> April, 1980.** *In exercise of the powers conferred by sub-section (1) of section 21 of the Islamabad Wildlife (Protection, Preservation, Conservation and Management) Ordinance, 1979 (LXX of 1979), the Federal*

*Government is pleased to declare the following areas to be the Margallah Hills National Park, namely:*

*(1) Margallah Reserve Forest comprising compartments Nos. 2 to 5, 7 to 23, 28, 30 to 38(i) and 41(ii).*

*(2) Military Grass Farm comprising compartments 1 to 25.*

*(3) Lands falling in villages Mangial, MalachDakhli, Phulgran, Mandla, JhangBagial, Malpur (Bijran), Rumli, Narias, PadohDakhli, NoorpurShahan, RattaHottar, Saidpur, DhokeJiwan, Gandiar, Kalinjar and Saniari.*

*(4) Area bounded by Shahrah-i-Kashmir in the north, Shahrah-i-Islamabad in the west and Murree Road in the south and east upto its junction with Shahrah-i-Kashmir; and*

*(5) Rawal lake and area within a distance of 2 Kilometers from the highest water mark of Rawal Lake."*

Section 22 empowers the Federal Government to declare in the prescribed manner an area to be a game reserve and pursuant thereto S.R.O. No.444(I)/80, dated 27<sup>th</sup> April, 1980 has been issued and the same is reproduced as follows.-

**"No.S.R.O. 444(I)/80.** *In exercise of the powers conferred by subsection (1) of section*

*22 of the Islamabad Wildlife (Protection, Preservation, Conservation and Management) Ordinance, 1979 (LXX of 1979), the Federal Government is pleased to declare the whole of the Islamabad Capital Territory, except the areas declared as wildlife sanctuary and national park, to be the game reserve."*

It is ironic that, although the Wildlife Ordinance of 1979 came into force on December 19, 1979, it was not made operative till this Court, in 2014, directed the Federal Government to constitute the Board. It is one of the most important legislations because of its close nexus with the preservation, protection and conservation of wildlife and the consequences of neglect for the future generations. It has a direct relationship with the right to life of the human species. It is even more ironic that the notified 'wildlife sanctuary' was gradually encroached upon and destroyed by the privileged. The Federal Government, the administration of Islamabad Capital Territory and the Capital Development Authority were complacent in this classic example of destruction of habitat. The invasive species i.e humans, have deprived the wildlife native species of its habitat, which was protected under the law. It manifests how humans



have undermined the rule of law and threatened the balance created by nature. Habitat loss has irreversible consequences, not only for the present but more so for posterity. Nonetheless, those who have invaded and destroyed the 'wildlife sanctuary' have and continue to violate the Wildlife Ordinance 1979. It was the duty of the State and the responsible authorities to have jealously guarded against any invasion or intrusion into the wildlife sanctuary, which is notified and protected under the aforesaid statute.

**(b) The Islamabad Wildlife (Protection, Preservation, Conservation and Management) Rules, 1983 (hereinafter referred to as the 'Rules of 1983')**

In exercise of powers conferred under section 41 of the Wildlife Ordinance of 1979, the Federal Government has made and notified the Rules of 1983. Clause (aa) of Rule 2 defines the Board as meaning the Board of Wildlife Management constituted under section 4 *ibid*. Rule 2A describes the constitution of the Board. It draws a distinction between ex-officio members and the non-official members. Section 4 of the Wildlife Ordinance of

1979 explicitly empowers the Federal Government not only to constitute the Board but to appoint its Chairman as well. The Federal Cabinet has recently amended rule 2A of the Rules of 1983 and a notification, dated 16-03-2020, has been issued giving effect thereto. The relevant portion is reproduced as follows.

*"(a) The Board shall consist of Minister-in-Charge of the Ministry of Climate Change or concerned Advisor to Prime Minister (if any), concerned Minister of State (if any), concerned Parliamentary Secretary (if any), concerned Special Assistant to Prime Minister (if any), Secretary, Ministry of Climate Change; Chairman, Capital Development Authority, Chief Metropolitan Officer, Metropolitan Corporation, Islamabad; Inspector General of Forests and Wildlife, Ministry of Climate Change; Secretary Forests and Wildlife, Punjab and Secretary Forests and Wildlife Khyber Pakhtunkhwa who shall be ex-officio members and the remaining members to be appointed by the Federal Government, who shall be non-official Members. The Minister Incharge may nominate any member as Chairperson of the Board for a specific meeting, in case he cannot chair the meeting himself."*

It is noted that, prima facie, having regard to the importance of the object and purpose of the Wildlife Ordinance 1979 and the powers and functions of the Board of Wildlife Management, the legislature intended that the Chairman of the Board will be appointed on a permanent basis and not by a person delegated the power. Whether the Federal Government is empowered to delegate the power of appointment of the Chairman to the Minister incharge of the Ministry of Climate Change requires to be reviewed in the light of section 4 read with section 38 of the Wildlife Ordinance 1979 and the law enunciated by the august Supreme Court in the case titled '*Messers Mustafa Impex, Karachi and others v. The Government of Pakistan through Secretary Finance, Islamabad and others*' [PLD 2016 SC 808]. Prima facie, the minister of the Ministry of Climate Change does not appear to fall within the expression 'officer' used in section 38. Since this question was not argued during these proceedings, therefore, this Court exercises restraint and expects that the legality would be examined by the Federal Government on its own. The functions and powers of the Board are described under rules 3 and 4 respectively. Rule 3(i) explicitly provides that taking policy decisions,

drawing plans, programs and executing them, inter alia, with regard to zoos in the Islamabad Capital Territory shall vest in the Board. It is obvious from a cumulative reading of the Ordinance of 1979 and the Rules of 1983 that all matters relating to the protection, preservation and management of wildlife, including a zoo in the Islamabad Capital Territory, are governed there under.

(c) **Islamabad Capital Territory Local Government Act 2015 (hereinafter referred to as the 'Act of 2015')**.

The Act of 2015 was promulgated to establish an elected Local Government system and, pursuant thereto, to devolve political, administrative and financial responsibilities and authority to the elected representatives of such Local Governments and to promote good governance, effective delivery of services and transparent decisions. Section 2(x) defines Local Government as meaning a union council or the Metropolitan Corporation established under the Act of 2015. The composition of the Metropolitan Corporation has been described in section 12. Section 72 provides that the Corporation shall be a body corporate having

perpetual succession and a common seal and it may acquire and hold property and enter into any contract and may sue and be sued in its own name. The functions of the Corporation are described in section 73 as those mentioned in the Third Schedule. The Corporation has taken a stance that the management and administration of the Zoo falls within its competence and jurisdiction in the light of clause (9) of the Ninth Schedule and the same is reproduced as follows.-

**"8. Cattle shows, zoo, etc.-** (1) *A local government may hold cattle shows, cattle fairs and cattle markets within the limits of its local area and charge such fee or tax per cattle head sold as the byelaws may provide.*

(2) *A local government may, with the previous approval of the Government, maintain or contribute towards the maintenance of zoological gardens.*

The learned counsel for the Corporation could not place any document on record to show that the Federal Government had granted approval in accordance with the law enunciated by the august

Supreme Court in the case titled '*Messers Mustafa Impex, Karachi and others v. The Government of Pakistan through Secretary Finance, Islamabad and others*' [PLD 2016 SC 808] in terms of the above provision. Moreover, clause (u) of the Third Schedule is also not attracted in the case of the management of a zoo. The Wildlife Ordinance of 1979 is a special law which was explicitly promulgated with the object to provide for the protection, preservation, conservation and management of wildlife and setting up of a National Park in the Islamabad Capital Territory. It is settled law that a special law prevails over a general law. Reliance is placed on the case of "*State Life Insurance Corporation of Pakistan through Chairman and others versus Mst. Sardar Begum and others*" [2017 SCMR 999]. As noted above, the Rules of 1983 expressly provide that the management of a zoo in the Islamabad Capital Territory is also within the domain of the Board of Management constituted under the Wildlife Ordinance of 1979 and it is one of its crucial functions.

It is declared, therefore, that the Zoo, its management and all other matters relating thereto

fall within the jurisdiction and competence of the Board of management constituted under the Wildlife Ordinance of 1979.

**C. Do animals have rights? Is there a duty on the part of the State and the human species to protect the wellbeing and welfare of the animal species?**

6. The question as to whether or not animals possess distinct rights has been considered by the courts in various jurisdictions and the jurisprudence reflects a divergence of opinions. It would, therefore, be beneficial to briefly survey the jurisprudence that has emerged in various jurisdictions.

**(a) Jurisprudence regarding the rights of animals.**

**(i) 'Sandra', the Orangutan**

A Criminal Appeals Court in Argentina handed down a judgment in December, 2014, declaring that the Orangutan, named Sandra, had been unlawfully deprived of her freedom. Sandra was born in 1986 and a Criminal Appeals Court in Argentina held that the 29 year old orangutan, Sandra, was unlawfully deprived of her freedom. Sandra, born in captivity in 1986, had lived in a restricted area in a zoo in Buenos Aires, Argentina. It was probably the first judgment

which declared the status of the Orangutan as a 'non human person'. The judgment granted the relief by treating and declaring that Orangutans had rights similar to those of the human species. The habeas corpus petition was allowed and as a consequence Sandra was freed from captivity. She was shifted and now resides in the Center for Great Apes in Florida, United States of America. This was the first case when a court recognized one of the animal species as having rights and thus its personhood.

**(ii) Chimpanzee, "Cecilia"**

In another landmark, jurisprudential development in November 2016, Judge Maria Alejandra Mauricio of Tercer Juzgado de Garantias in Mandoza, Argentina, ordered Cecilia, a female chimpanzee, who had lived in captivity in the Ciudad de Mandoza Zoo, to be freed. Cecilia had endured loneliness, confined in a cement cage for more than 30 years. It was argued, on behalf of Cecilia, that the latter had been illegally and arbitrarily deprived of the freedom of movement and was denied a decent life. The court, in its judgment, observed that the case involved the protection of collective good and value. It was held that the right to preservation of the natural



and cultural patrimony and the right to quality of life are part of the right to the environment. It was observed and held as follows.-

*"I understand that in the present case the collective good and value is embodied in the wellbeing of Cecilia, a member of the "community" of individuals of our zoo. This because Cecilia is part of the natural patrimony (law 22.421), but also her relation with the human community -in my opinion- makes her part of the cultural patrimony of the community.*

*For one reason or another, her wellbeing has to do with the protection of a collective patrimony. Likewise, it is part of the quality of life of the community, the protection of that patrimony is part of the physical-emotional balance (aforementioned judgment "Morales, Víctor H."), which is the same as Cecilia's wellbeing."*

It was further observed by the Court as follows.-

*"Cecilia's present situation moves us. If we take care of her wellbeing, it is not Cecilia who will owe us; it is us who will have to thank her for giving us the opportunity to grow as a group and to feel a little more human."*

The Court recognized and acknowledged that primates and non-human legal persons possess fundamental rights that they should be studied and listed by the State authorities. The relevant portion is reproduced as follows.-

*"Animals must have fundamental rights and the applicable legislation in accordance with such fundamental rights to protect the particular situation they encounter, following the evolutionary degree that science has determined they can reach. This is not about granting them the same rights humans have, it is about accepting and understanding once and for all that they are living sentient beings, with legal personhood and that among other rights, they are assisted by the fundamental right to be born, to live, grow and die in the proper environment for their species. Animals and great apes are not objects to be exposed like a work of art created by humans."*

The court explicitly observed that it was not granting the great apes the rights listed in civil and commercial law nor was it the purpose to create a catalogue of the rights of great apes. It was emphasized that it was about articulating a distinct category of non-human legal persons. After declaring Cecilia as a non-

human legal person, the habeas petition was granted and Cecilia was ordered to be transferred to the well known Sorocaba sanctuary in the Republic of Brazil.

**(iii) "Arturo" the Polar Bear**

Arturo was a polar bear and had lived most of his life in captivity at the Mandoza Zoo, Argentina. He was showing visible signs of depression after his companion 'Pelusa' died. Arturo, because of his condition, had become known as 'the world's saddest bear'. The South American weather added to his suffering. A petition was filed for relocating him to Canada but it did not succeed because of an adverse opinion of a panel of veterinarians. He ultimately died in the sweltering heat of Mandoza.

**(iv) Orca Whales**

A Court in the Netherlands was not inclined to order sending an orca whale, 'Morgan', to the waters off the coast of Norway because, in the opinion of the judge, the chances of its survival would have been bleak. However, it was allowed to be relocated for the purposes of research regarding the preservation of the species. The United States District Court, Southern District of California, ruled in a case relating to five orca

'killer whales' that the Thirteenth Amendment applied only to humans and thus relief could not be granted to a non human. The judge, despite holding that the orca whale lacked legal standing to bring a Thirteenth Amendment claim, nonetheless observed that 'it is not to say that animals have no legal rights, as there are many states and federal statutes affording redress to Plaintiffs, including in some instances, criminal statutes that "punish those who violate statutory duties that protect animals". The five orca whales, Tilikum, Katina, Corky, Kasatka and Ulises, were in possession of the Sea World at the entertainment centre in Orlando, Florida. It was the case of the Next Friend that the orca whales 'were born free and lived in their natural environment until they were captured and torn from their families'. It was contended that retention of the five whales in captivity violated the slavery and involuntary servitude provisions of the Thirteenth Amendment. The relief was denied on the sole ground that the five orca whales lacked locus standi because they were not human persons.

**(v) Training and Exhibition of animals**

The Kerala High Court in the case titled '*W. R. Nair and others etc, v. Union of India and others*' [AIR

2000 Kerala 340] observed that legal rights should not be the exclusive reserve of humans. The validity of a notification banning the training and exhibiting of five animals i.e bears, monkeys, tigers, panthers and dogs was challenged by the Indian Circus Federation. The relevant portion of the judgment is reproduced as follows.-

*"Though not homosapiens, they are also beings entitled to dignified existences and humane treatment sans cruelty and torture. In many respects, they comport better than humans, they kill to eat and eat to live and not live to eat as some of us do, they do not practice deception, fraud, or falsehood and malpractices as humans do, they care for their little ones expecting nothing in return, they do not proliferate as we do depleting the already scarce resources of the earth, for they practice sex restraint by seasonal mating, nor do they inhale the lethal smoke of tobacco poisoning the atmosphere and inflicting harm on fellow beings. All animals except the very lowest exhibit some degree of intelligent behaviour, ranging from learned responses to complex reasoning. Many believe that the lives of humans and animals are equally valuable and that their interests should count equally. Their contribution to the health of human is invaluable once it is remembered that nearly every advance in health care and combating human diseases has been based*

*on animal research. Animals also provide models for the study of human diseases. New drugs are tested on animals to help determine their potential for causing cancer or other diseases or for harming embryos and fetuses in the womb. Therefore, it is not only our fundamental duty to show compassion to our animal friends, but also to recognize and protect their rights."*

**(vi) Right to life under Article 21 of the Constitution of India extended to animals.**

The above observations by the High Court of Kerala were further developed by the Supreme Court of India in the case titled '*Animal Welfare Board of India v. A. Nagaraja and others*' [(2014) 7 Supreme Court Cases 547]. The treatment of animals during the festival of 'Jallikattu' celebrated in Tamil Nadu and bull cart races in the province of Maharashtra were challenged. The Supreme Court of India held as follows.-

*"When we look at the rights of animals from the national and international perspective, what emerges is that every species has an inherent right to live and shall be protected by law, subject to the exception provided out of necessity. Animal has also honour and dignity which it cannot be arbitrarily deprived of and its rights and privacy have to be*

*respected and protected from unlawful attacks”.*

**(vii) 'Sundar' the Elephant**

The High Court of Bombay in the case titled '*Dr Manilal V. Valliyate, The Constituted Attorney of people for Ethical treatment of animals v. The State of Maharashtra through Chief Wildlife Warden, etc.*' (Writ Petition No.2662/2013) decided a grievance relating to the welfare of Sundar, an elephant, who had been kept in captivity by a private citizen and the Wildlife Warden had issued an ownership certificate in this regard. It was alleged that Sundar was being treated in a cruel manner. The High Court pressed into service the doctrine of public trust and ordered relocation of Sundar in order to safeguard its welfare and from being treated cruelly.

**(viii) 'Sonu' the elephant**

The High Court of Chhattisgarh dealt with the case of a wild elephant named Sonu. The latter was detained and kept in captivity because, allegedly, it had killed five persons, injured others and had caused damage to crops. In its judgment, dated 18-08-2017, passed in Writ Petition No.06/2016, titled '*NithinSingvi v. Union of India through Secretary Ministry of*

*Environment and Forests, etc.*' the High Court acknowledged the need to protect wild animals from being treated in a cruel manner. The Court recognized Sonu's right to live in its natural habitat but left the matter of his release to the authorities after assessing his health condition.

**(ix) Chimpanzees- Kiko, Tommy, Hercules and Leo**

The New York Supreme Appellate Division, in June 2017, did not grant petitions seeking the release of four chimpanzees, namely Kiko, Tommy, Hercules and Leo. The Court held that the relief by way of habeas had a nexus with the entitlement to enjoy fundamental rights. In the opinion of the Court, animals had a different status and they lacked the capacity to possess legal rights e.g the right to bodily integrity and liberty. It was held that rights stem from personhood and only a 'person' had legal entitlements because the latter could be held accountable for his/her actions. The emphasis of the Court was on whether animals had the pre requisite of claiming a right i.e 'personhood'. In the opinion of the court, unlike human beings, chimpanzees could not bear any legal duties, submit to social responsibilities or be held



accountable for their actions and, therefore, they were incapable of bearing any legal responsibility and societal duties. It was on this basis that the court held that legal rights could not be conferred upon the four chimpanzees and consequently the fundamental right to liberty could not be claimed by seeking a writ of habeas corpus. In May 2018 permission to appeal the decision was denied and Judge Eugene Fahey, issuing his concurring opinion, had observed that ' the inadequacy of the law as a vehicle to address some of our most difficult ethical dilemmas is on display in this matter'. He further observed as follows.-

*"In the interval since we first denied leave --- ---, I have struggled with whether this was the right decision. Although I concur in the Court's decision to deny leave to appeal now, I continue to question whether the Court was right to deny leave in the first instance. The issue whether a non human has a fundamental right to liberty protected by the writ of habeas corpus is profound and far reaching. It speaks of our relationship with all the life around us. Ultimately, we will not be able to ignore it. While it may be arguable that a chimpanzee is not a 'person', there is no doubt that it is not merely a thing"*

**(x) The Constitutional Court of South Africa**

The Constitutional Court of South Africa, in its judgment dated 08-12-2016, titled '*National Society for the Prevention of Cruelty to Animals v. Minister of Justice and Constitutional Development and another*' {[2016] ZACC 46}, referred to the jurisprudence developed by the courts in South Africa relating to animal rights, their welfare and well being. It was observed that "the rationale behind protecting animal welfare has shifted from merely safeguarding the moral status of humans to placing intrinsic value on animals as individuals."The Constitutional Court recognized the nexus between guarding the interest of animals and the constitutional values.

**(xi) "Happy" the elephant in Bronx Zoo.**

As reported, 'Happy' was one of seven elephants brought to the United States. In 1977 Happy was relocated to a circus and later sent to the Bronx Zoo. His companion 'Grumpy' was euthanized in 2002 and since then he has been living in captivity in isolation. The Nonhuman Rights Group filed a petition seeking a writ of habeas for the release of Happy from the Bronx Zoo. During the proceedings, Happy had passed the 'mirror self recognition test' and thus

established self awareness as a cognitively advanced living specie. Judge Alison Tuitt was sympathetic to the plight of Happy and recognized the latter as an intelligent being with advanced analytical abilities akin to human beings. The Court regretfully denied the habeas corpus relief because it felt bound to follow the earlier decisions of the New York Court of Appeals. The relief was denied because 'Happy' was not a person and thus lacked the locus standi required for the grant of habeas corpus relief.

**(xii) The Lahore High Court; Should constitutionally guaranteed rights be extended to animals?**

The learned Lahore High Court, in the case titled '*Muhammad Arif v. S.H. O. City Police, Depalpur and 5 others*' [PLD 1994 Lahore 521], while granting a petition of habeas corpus in relation to two persons found to be illegally detained alongwith their cattle, had raised the question of extending the constitutionally guaranteed right to animals. It was observed as follows.-

*"As, per Article 4 of the Constitution every citizen has the inalienable right to be treated in accordance with law and no action*

*detrimental to, life, liberty, body, reputation or property can be taken except in accordance with law. Under Article 24 of the Constitution no person is to be deprived of his property, except in accordance with law. Equality before law and equal protection of law is guaranteed to every citizen, under Article 25. If the Constitution is guaranteeing such wide protection to the citizens, why not the same protection to the cattle and animals of the country?"*

**(xiii) The High Court of Sindh declares cruel treatment of animal species as illegal.**

The High Court of Sindh in the case titled '*Ghulam Asghar Gadehi and others v. Senior Superintendent of Police Dadu and 4 others*' [PLD 2018 Sindh 169] declared that the traditional and cultural sport of donkey cart racing and bull cart racing fell within the ambit of the definition of 'cruelty' under the Pakistan Cruelty to Animals Act 1890.

**(xiv) 'The Houbora Bustard' Supreme Court**

The august Supreme Court, in the case titled '*Province of Sindh and others v. Lal Khan Chandio*

*and others'* [PLD 2016 SC 48], declared that the giving of a licence or permit to hunt the Houbara Bustard was illegal. The apex Court had elaborately discussed the reasons and wisdom for conserving and protecting the migratory bird and had explained the nexus with the environment and right to life of humans. It was observed as follows.-

*"The fundamental right to life and to live it with dignity (Articles 9 and 14 of the Constitution) is one lived in a world that has an abundance of all species not only for the duration of our lives but available for our progeny too. It has now been scientifically established that if the earth becomes bereft of birds, animals, insects, trees, plants, clean rivers, unpolluted air, soil it will be the precursor of our destruction/extinction. The United Nations World Commission on Environment and Development, chaired by the former Norwegian Prime Minister Gro Harlem Brundtland, published the report "Our Common Future" in 1987 (also known as the 'Brundtland Report') which was the forerunner of innumerable reports and treaties, including CITES and CMS."*

A larger Bench, consisting of five honourable judges of the Supreme Court, heard and decided the review petitions vide judgment titled '*Government of Punjab and others v. Aamir*

*Zahoor ul Haq and others'* [PLD 2016 SC 421] . The above mentioned judgment was set aside by a majority of four to one on the sole ground that complete or perpetual prohibition of hunting of the species was not intended, either under the relevant enacted laws enforced in Pakistan nor by the international treatise to which the State is one of the signatories. However, the need to protect and preserve the species, having regard to the eloquent observations reproduced above, were reaffirmed. The majority judgment emphasized the importance of the adequacy and propriety of the regulatory measures for ensuring the sustainability of achieving the noble object of preserving, protecting and managing wildlife. The majority judgment, in essence, endorsed the observations made in the judgment under review regarding the dependence of the right to life on jealously protecting the vulnerable species i.e the Houbora Bustard.

**(b) Universal Declaration of Animal Rights.**

In October 1978 a proclamation regarding the Universal Declaration of Animal Rights was issued at the headquarters of the United Nations Educational Scientific and Cultural Organization. It is an important document in

the sense that it proposes the recognition of the rights of a living species other than humans. It acknowledges that animals have a life and that they are sentient beings having some characteristics that are shared by humans. It univocally proposes to declare that animals have rights and that disregard and contempt for such rights would constitute crimes committed by humans against nature and animals. Article 1 of the Declaration provides that all animals are born with an equal claim on life and the same rights of existence, while Article 2 recognizes their entitlement to be respected. Sub article 2 of Article 2 explicitly declares that man, as an animal species, shall not arrogate to itself the right to exterminate or inhumanely exploit other animals and that it is its duty to use knowledge for the welfare of animals. Article 3 declares that no animal shall be ill-treated or shall be subjected to cruel acts and that if an animal has to be killed, this must be instantaneous and without distress. Articles 4 and 5 recognize the right of wild animals to liberty in their natural environment while animals of species living traditionally in a human environment to have the right to live and grow at the rhythm and under the conditions of life and freedom peculiar to their species.

(c) **The Treatment of Animals by various religions, particularly in the light of the injunctions of Islam.**

The emphasis and importance of 'life' and the protection of living beings cannot be overstated in every religion and faith. Be it Islam, Judaism, Christianity, Buddhism, Hinduism or any other religion, there is no dispute that 'life' is the most precious and superior creation of the Creator. There is consensus amongst all religions of the world that animals are 'sentient beings' i.e able to perceive and feel. However, the primary sources of law of Islam will be discussed in more detail because ninety seven percent of the population in Pakistan are its followers i.e Muslims. Moreover, Article 31 of the Constitution and its preamble expressly provides that 'steps shall be taken to enable the Muslims of Pakistan, individually and collectively, to order their lives in accordance with the fundamental principles and basic concepts of Islam'. The principles of interpretation and the tools for deriving a 'Hukam', command or Shariah, from the recognized sources such as the Quran or Sunnah (Traditions of the holy Prophet (SAW) ) is based on the premise or foundation of 'preservation of life'. Life is most important because it is the best creation of Allah, the Creator. 'Life' is not restricted to human life but includes



all forms of life, whether a breathing animal or a plant. Human has been made superior to other forms because of its cognitive attributes, intelligence and the ability to think and reason. The other forms of life are not inferior but each have a specific and distinct purpose.

There are several verses in the holy Quran which explicitly relate to animals and some are as follows.-

*"And He created cattle; you derive warmth from them and various other uses; and from them you obtain food **Surrah An-Nahl 16:5***

*"And they carry your loads to many a place which otherwise you would be unable to reach without great hardship; Verily your Sustainer is most compassionate, a dispenser of justice **An-Nahl 16:7***

*"And it is He who has created horses, mules, and donkeys, for you to ride and as an adornment; And he has created other things of which you have no knowledge."**Surrah An-Nahl 16:8***

*"We have made animals subject to you, that ye may be grateful."**Surrah Al Haj 22:36***

*"Although there is no animal that walks on earth and no bird that flies on its two wings*

*which is not God's creature like yourself.* **"Surrah Al-Anam 6:38**

*"Seest thou not that it is Allah Whose praise all beings in the heavens and on earth do celebrate, and the birds (of the air) with wings outspread? Each one knows its own (mode of) prayer and praise, and Allah knows well all that they do.* **"Surrah An-Noor 24:41**

*"transgress not in the balance, and weigh with justice, and skimp not in the balance. . .earth, He set it down for all beings.* **"Surrah Ar-Rahman 55:8-10.**

The sacredness of 'life' in the form of animal species and the respect it deserves is explicit from the above verses. Likewise, there are an overwhelming number of Sunnah/Ahadith reported in various credible compilations of hadith such as Sahih al-Bukhari, Sahih Muslim, Sunan Abu dawood, Jami al-Timidhi, Sunan ibn Majah etc., which highlight the rights of the animal species and the duties of humans to protect them from harm, unnecessary suffering and pain. It also unambiguously shows the respect and care displayed by the holy Prophet (SAW) for the animal species. It manifests respect for the creation of Allah in one of its best forms i.e life. Some reported Ahadith are as follows;

*"The worst of shepherds is the ungentle, who causes the beasts to crush or bruise one another."*

"There is a reward for helping any living creature"

*"The holy Prophet (SAW) passed by a man who was dragging his sheep by its ear. He (SAW) said 'leave its ear and hold it by the side of the neck because pulling an animal by ear was painful"*

*"It was reported by Abdur Rehman ibn Uthman that when a physician consulted the Prophet (SAW) about using frogs in medicine, he forbade him from killing them"*

*"On one occasion the holy Prophet (SAW) narrated a story that a man felt very thirsty while travelling. He came across a well and went down to quench his thirst. When he came out he saw a dog panting and licking mud. He went down again and fetched water for the dog because it was thirsty. People asked the Prophet (SAW) 'O Allah's Messenger is there a reward in serving the animals. He (SAW) replied, 'Yes there is reward for serving any living being"*

*"You will not have secure faith until you love one another and have mercy on those who live upon the earth."*

*"Fear God in these mute animals, and ride them when they are fit to be ridden, and let them go free when . . .they (need to) rest."*

*"There is no man who kills a sparrow or anything beyond that, without its deserving it, but God will ask him about it."*

*"The grievous things are: shirk (polytheism); disobedience to parents; the killing of breathing beings . . ."*

*"May God curse anyone who maims animals."*

*"Whoever is kind to the creatures of God is kind to himself."*

*"It was narrated by Abu Hurariah that the Messenger of Allah forbade killing shrikes, ants, hoopoes, and frogs" while Ibn Abbass narrated that the Messenger of Allah forbade killing ants, bees, hoopoes and shrikes"*

The above are some of the Quranic verses and Ahadith highlighting the importance of the animal species and the duty of care that humans owe to them. This was fourteen hundred years ago and much before the English philosopher and reformer, Jeremy Bentham, referred to the rights of animals. It is obvious that Islam regards animal species as sentient living beings and creations of Allah, who is the Creator. It is for this reason that animals deserve care,

compassion and respect. Killing or harming an animal unnecessarily or inflicting unnecessary pain and suffering is forbidden. It is inconceivable that, in a society where the majority follow the religion of Islam, that an animal could be harmed or treated in a cruel manner. All religions acknowledge the rights of the animal species and the duty of humans to protect them from being harmed or treated in any manner that would subject them to unnecessary pain and suffering.

**(d) The Prevention of Cruelty to Animals Act, 1890**

The Act of 1890 was promulgated with the object of preventing cruelty to animals. Section 2(1) defines an 'animal' as meaning any domestic or captured animal. Section 3 provides the penalty for causing cruelty to animals or sale or their killing. Section 3(a) makes overdriving, beating, or otherwise treating any animal so as to subject it to unnecessary pain or suffering illegal. The person found guilty of treating an animal in such a manner is liable to be sentenced with imprisonment besides the imposition of a fine. The expression 'or otherwise treats an animal so as to subject it to unnecessary pain and suffering' has a very wide meaning and scope. Moreover, the statute has been enacted for the benefit of the animal species in

order to safeguard against any treatment that would subject any animal to unnecessary pain or suffering. It is settled law that beneficial statutes must not be construed too restrictively and rather should be given the widest possible interpretation. The Zoo, for example, merely serves the purpose of displaying or exhibiting its animals to the visitors. The animals are held in captivity in such enclosures and conditions which, instead of providing an opportunity to study the animals, must be adversely affecting the visitors. There does not appear to be much awareness in society, judging by the conduct of the visitors. The Zoo does not make any positive contribution whatsoever to the society. With the advancement of technology there are far better and more informative opportunities to observe and gain knowledge about the animal species. Above all, and as already held, the Zoo definitely does not provide facilities nor has the resources to be able to provide for the behavioural, social and physiological needs of the animals, who have been deprived of their natural habitats and have been kept in shockingly deplorable conditions. This Court, therefore, has no hesitation in declaring that the animals in the Zoo have been subjected to unnecessary pain and suffering. The condition of the Zoo, described in the various reports, speaks volumes for the distress, pain and suffering of

all the animals. The authorities responsible have thus exposed themselves to be proceeded against under the Act of 1890.

(e) **Sections 428 and 429 of the Pakistan Penal Code, 1860 (hereinafter referred to as the 'PPC')**

Section 428 provides that whoever commits mischief by killing, poisoning, maiming or rendering useless any animal of the value of ten rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both. Likewise section 429 prescribes a punishment of imprisonment of either description for a term which may extend to five years with fine or with both against a person who commits mischief by killing, poisoning, maiming or rendering useless any elephant, camel, horse, mule, buffalo, bull, cow or ox, whatever may be the value thereof or any other animal of value of fifty rupees or upwards. The expression 'mischief' has been defined in section 425 as wrongful loss or damage to the public or any person with the intent to cause or knowing that it will be likely to cause destruction to any property or any such change in any property or in the situation

thereof as destroys or diminishes its value or utility or affects it injuriously. Explanation 1 explicitly clarifies that it is not essential to the offence of mischief that the offender intends to cause loss or damage to the owner of the property injured or destroyed. It is sufficient if he intends to cause or knows that he is likely to cause wrongful loss or damage to any person by injuring any property whether it belongs to that person or not. The animals in the Zoo are public property and the aforementioned offences could be invoked if the ingredients stand fulfilled.

(f) **The right to life of humans under Article 9 of the Constitution and its dependence on the protection, preservation and care of animals.**

The existence of the human species on this planet is dependent on other living organisms such as plants and animals. The habitats of animals are equally essential. The human civilization and its destruction of the habitat, ecosystems and obliteration of species has threatened the biodiversity of the planet. The United Nations has warned that if the wildlife is not protected then its extinction would expose the human race to the risk



of facing extinction. Wildlife is the most essential foundation of healthy ecosystems. The threat of climate change and its ensuing devastating consequences for the human race can only be avoided if environmental degradation and damage to ecosystems and biodiversity could be stopped. Protection and preservation of wildlife species is a precondition for meeting the challenges that stem from damage to the ecosystems and degradation of the environment. The welfare, wellbeing and survival of the animal species is the foundational principle for the survival of the human race on this planet. Without the wildlife species there will be no human life on this planet. It is, therefore, obvious that neglect of the welfare and wellbeing of the animal species, or any treatment of an animal that subjects it to unnecessary pain or suffering, has implications for the right of life of humans guaranteed under Article 9 of the Constitution. The Constitution of the Islamic Republic of Pakistan, 1973 guarantees the right to life of every person. The right to life is the most fundamental amongst human rights. The august Supreme Court in the case titled "*Ms Shehla Zia and others v. WAPDA*" [PLD 1994 SC 693] has observed and held that the word life is very significant because it covers every

facet of human existence. "Life includes all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally". Cruel treatment and neglect of the wellbeing of an animal in captivity, or exposing it to conditions which do not meet the animals behavioural, social and physiological needs, is an infringement of the right to life of humans. There is also another important aspect related to the right to life and cruel treatment of animals. Several credible research projects have been conducted, showing compelling evidence of violent crimes and cruelty to animals. Maltreatment of animals could have long term negative consequences. Experts are of the opinion that animals can play a positive role in the development of human personality. Researchers have found profound influences of a positive relationship between an animal and a child. The child tends to develop more empathy towards fellow human beings. In a nutshell, the relationship of the treatment of animals and the right to life of humans makes it an obligation of the State and its authorities to jealously guard against cruel and illegal treatment of animals. Protecting, preserving and conserving the animal species and preventing it

from harm is a constitutional obligation of the State and the authorities.

**Conclusion:- Status and rights of animals in the light of the above discussion.**

7. After surveying the jurisprudence developed in various jurisdictions it has become obvious that there is consensus that an 'animal' is not merely a 'thing' or 'property'.

There is also no dispute regarding the fact that no animal deserves to be subjected to cruel treatment. Animals have emotions and 'Happy' had also successfully cleared the mirror test. Directly or indirectly the rights of the animals are also acknowledged. Some courts have declared particular animal species as non-human persons while others have gone to the extent of granting them the same rights as those of the human species guaranteed under the constitution. The courts in the United States have gone to the extent of implicitly recognizing animals to be other than a mere 'thing' but the relief of habeas corpus was denied on the ground that they could not be treated as humans and that lack of personhood deprived them from having the locus standi to the grant of a writ. No constitution has been framed in the context of 'life' and, therefore, it gives rise to a conflict and confusion while granting relief to a form of life other than a human. As already noted, all the constitutions have been framed by humans to organize and regulate their

own species. Constitutions refer to either a 'person' or a 'citizen' but not to 'living beings'. Consequently, the writs are also with reference to a human or a person. There are writs other than habeas corpus, such as prohibition and mandamus. An infant, a comatose or a mentally challenged person is not different to an animal. It has never been the case of those arguing on behalf of animals to recognize that they have the same rights enjoyed by the human species. No relief has ever been sought on behalf of any animal to grant it freedom by releasing it from a zoo and thus allowing its free access to public places meant for humans. In the case in hand it has been argued that the animals in the Zoo are living in captivity and the conditions are such that the treatment has subjected them to unnecessary pain and suffering. Do the animals have legal rights? The answer to this question, without any hesitation, is in the affirmative. The Black's Law Dictionary (Sixth Edition) has defined 'Legal Right' as 'Natural rights, rights existing as a result of contract and rights created or recognized by law'. The Eleventh Edition defines the expression 'as a right related to or recognized by law'. The human rights are inherent because they stem from the attribute of being 'alive'. Life, therefore, is the premise of the existence of a right. Whether human rights or rights guaranteed expressly under the Constitution, they all have a nexus with 'life'. An object or thing without 'life' has no right. A living being on the other hand has rights because of the gift of 'life'. An animal undoubtedly is a

sentient being. It has emotions and can feel pain or joy. By nature each specie has its own natural habitat. They require distinct facilities and environments for their behavioural, social and physiological needs. This is how they have been created. It is unnatural for a lion to be kept in captivity in a restricted area. To separate an elephant from the herd and keep it in isolation is not what has been contemplated by nature. Like humans, animals also have natural rights which ought to be recognized. It is a right of each animal, a living being, to live in an environment that meets the latter's behavioral, social and physiological needs. The Act of 1890 in fact recognizes the animals natural right not to be treated in a manner that subjects it to unnecessary pain and suffering. It is the constitutional and statutory obligation of the State and its functionaries to ensure that these rights are not infringed. It is also a natural right of every animal to be respected because it is a living being, possessing the precious gift of 'life'. Humans cannot arrogate to themselves a right or prerogative of enslaving or subjugating an animal because the latter has been born free for some specific purposes. It is a natural right of an animal not to be tortured or unnecessarily killed because the gift of life it possesses is precious and its disrespect undermines the respect of the Creator. Moreover, as discussed above, the right to life of humans is dependent on the welfare, wellbeing, preservation and conservation of all animal species. Any treatment in violation of the provisions of the Act of 1890, or

subjecting an animal to unnecessary pain or suffering, is an infringement of the right to life guaranteed under Article 9 of the Constitution. The destruction and loss of habitat also violates the fundamental right to life of a human. The State is responsible to ensure that no animal is treated in violation of the provisions of the Act of 1890 and the Wildlife Ordinance 1979. In order to refrain an authority from doing anything not permitted by law or to compel them to do anything the law requires them to do, this Court is vested with the jurisdiction to issue a writ of prohibition or mandamus, as the case may.

8. In view of the above discussion, it is declared and directed as follows.-

- i. The Zoo i.e the Marghazar Zoo, Islamabad does not have the facilities or resources to meet the behavioural, social and physiological needs of the animals kept in captivity under inappropriate and illegal conditions.
- ii. The animals held in captivity in the Zoo have been kept in conditions that tantamount to subjecting them to unnecessary pain and suffering and thus in violation of the provisions of the Act of 1890 and the Wildlife Ordinance of 1979. There are neither adequate facilities nor

resources to provide living conditions that would meet the behavioural, social and physiological needs of the animals.

- iii. Kaavan, the elephant, has been treated cruelly by subjecting him to unimaginable pain and suffering for the past three decades and his continued captivity in the circumstances would expose the authorities to criminal consequences under the Act of 1890. The pain and suffering of Kaavan must come to an end by relocating him to an appropriate elephant sanctuary, in or outside the country.
  
- iv. The Chairman of the Board of Wildlife Management, constituted under the Wildlife Ordinance of 1979 will forthwith make arrangements, preferably in consultation with and the consent of the High Commissioner of Sri Lanka to relocate Kaavan to a suitable sanctuary within thirty days. The Board may seek assistance of experts and international entities/organizations in this regard.
  
- v. The Board constituted under the Wildlife Ordinance of 1979 shall relocate all the

remaining animals to their respective sanctuaries within sixty days from the date of receiving a certified copy of this judgment.

- vi. The Board constituted under the Wildlife Ordinance of 1979 will forthwith take over the management of the Zoo. The Corporation and the Chief Commissioner, Islamabad Capital Territory will assist the Board till the animals have been relocated.
- vii. The Minister in Charge of the Ministry of Climate Change and members of the Board shall be jointly and severally liable for the welfare and wellbeing of each animal till their relocation to their respective sanctuaries.
- viii. The Board shall not keep any new animal in the Zoo till a reputable international agency/organization, specializing in matters relating to zoological gardens, has certified that facilities and resources are available to provide for the behavioural, social and physiological needs of each species of animals.



- ix. The Board constituted under the Wildlife Ordinance of 1979 will inspect any other zoo established in Islamabad Capital Territory to ascertain the treatment of animals and take measures in accordance with law.
- x. The Black Bear, confiscated by the Board under the Wildlife Ordinance of 1979, will continue to stay in the Bear Sanctuary because it was in illegal possession in the Islamabad Capital Territory.
- xi. The Board will be assisted by the Chief Commissioner, Islamabad Capital Territory and the Inspector General Police in order to enforce the provisions of the Wildlife Ordinance 1979.
- xii. The Board shall ensure and take appropriate measures to enforce the provisions of the Wildlife Ordinance 1979 and the Act of 1890 so that no animal is treated in a manner that subjects it to unnecessary pain and suffering.
- xiii. The Federal Government may consider advising the respective provincial governments to include in the curriculum of Islamic Studies the

teachings of Islam regarding the importance of taking care of animals, their welfare and wellbeing, as highlighted in the Ahadiths and Quran. The media may also consider educating and informing the general public regarding the manner in which creation of Allah i.e animal species ought to be treated.

- xiv. The Board is the competent authority to prescribe a policy and mechanism regarding stray dogs. It is expected that the Board while formulating the policy will have regard to the best practices observed internationally and the injunctions of Islam which teaches treating animals in humane manner.
  
- xv. This Court exercises restraint in the contempt matter despite being satisfied that an attempt was made to frustrate the implementation of the order passed by this Court. The two officials who were issued show cause notices do not appear to have acted on their own. They were the only officials who had empathy for the helpless animals.

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9. The constitutional petitions are **allowed and disposed-of** in the above terms.

(CHIEF JUSTICE)

Announced in the open Court on **21-05-2020.**

(CHIEF JUSTICE)

Approved for reporting.

*Luqman Khan/-*

*Uploaded By : Engr. Umer Rasheed Dar*

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**Annexure 'A'**

<b>S. No.</b>	<b>Petition number and title</b>
1.	W.P. No. 1430/2019 titled ' <i>DrNadeem Omar v. Metropolitan Corporation Islamabad &amp; 2 others</i> '
2.	W.P. No. 4693/2018 titled ' <i>Faryal Nawaz v. Metropolitan Corporation Islamabad and 2 others</i> '
3.	CrI. Org. No. 182/2019 titled ' <i>DrNadeem Umar Tarar v. Rana Tahir &amp; another</i> '

Luqman Khan/\*