

IN THE MATTER OF:

MEMBERS OF THE BRITISH CAVING ASSOCIATION

AND

THE APPLICATION OF THE COUNTRYSIDE AND RIGHTS OF WAY ACT 2000 TO CAVING

OPINION

1. I am asked to advise members of the British Caving Association whether the right of public access to the countryside for the purposes of open-air recreation, which is provided under the Countryside and Rights of Way Act 2000 (“CROW”), applies where access is being sought for the purpose of recreational caving.

Summary of conclusions

2. In summary, for the reasons set out below, in my view:
 - a. Cave systems that are situated in an area consisting predominantly of mountain, moor, heath or down which has been identified as “open country” on a map produced by the appropriate authority are properly to be regarded as forming part of that open country, to which the right of access under CROW applies;
 - b. Caving is clearly a recreation;
 - c. The more difficult question is whether caving is an “open-air” recreation. The statutory term is undefined, and its scope is not entirely clear. It could be read narrowly as applying only to recreational activities taking place in a location which is open to the sky: this appears to be how Natural England has read it. Such a

definition would exclude most caving. However, I consider that the better view, which accords with the purpose of CROW, is that caving should be regarded as an open-air recreation. The intention of the legislation is to permit access to the countryside, for the purposes of the recreations that may be carried out in such areas. "Open-air" in this context is best read in the sense of "outdoor" (ie., not within a building). Excluding caving from the definition on the ground that caves are underground tunnels would lead to arbitrary distinctions. Some caves include shafts which are open to the sky. Caving as an activity is closely analogous to climbing, abseiling and canyoning, all of which are unquestionably covered by CROW. There is no good policy reason for permitting access to a cave entrance or open shaft, but not to an underground passage; or for permitting climbing and similar activities on access land, but not caving.

3. Accordingly, I consider that the right of access granted under CROW should properly be read as applicable to access to land for the purpose of recreational caving.

Caving

4. The activity of caving or potholing with which this opinion is concerned has been defined in my instructions as being normally an act of progression through passages in rock which usually have a "roof" of rock, but which may include large entrances or shafts which are open to the sky. Death's Head Hole, for example, has an entrance shaft open to the sky which is 80m deep. The passages may be natural, or may be abandoned mines. Some natural caves have entrances which have been dug out or enlarged. Some caves have structures, which may include gates or other barriers (such as a lid), at their entrances, through which cavers pass to enter the cave system.
5. Caving may include abseiling, climbing, scrambling, walking and crawling, frequently through water.
6. Caves are normally found in limestone. The geographical areas in England and Wales which contain the most significant cave systems are Derbyshire (the Peak District), Lancashire, the Yorkshire Dales, the Mendip Hills in Somerset, and South Wales.

The statutory framework

7. CROW's preamble describes its purpose, as far as is material, in the following terms:

“An Act to make new provision for public access to the countryside”.

8. Part I of CROW is headed “Access to the Countryside”, and Chapter 1 establishes a new statutory right of access to certain types of land.

9. Section 2(1) of CROW provides:

“Any person is entitled by virtue of this subsection to enter and remain on any access land for the purposes of open-air recreation.”

10. The central issues with which this opinion is concerned are thus the meaning of “access land” and the meaning of “open-air recreation”.

Access land

11. “Access land” is defined by section 1(1). It includes any land which:

- a. Is shown as “open country” on a map in conclusive form issued by the appropriate countryside body for the purposes of Part 1 of the Act;
- b. Is shown on such a map as registered common land;
- c. Is registered common land in any area outside Inner London for which no such map relating to registered common land has been issued;
- d. Is situated more than 600m above sea level for which no such map relating to open country has been issued; or
- e. Is dedicated for the Purposes of Part 1 under section 16 (a provision which entitles a landowner to dedicate land as access land);

but does not include excepted land or land treated by section 15(1) as accessible to the public apart from CROW.

12. I am instructed that in England, there are some caves which are on registered common land, and some which are on dedicated land (including land belonging to the Forestry Commission), but that the great majority of English caves lie on land which has been identified in the appropriate maps as “open country”. I am told that there is no equivalent analysis for Wales.

13. “Open country” is defined at section 1(2) as meaning land which:

- a. appears to the appropriate countryside body to consist wholly or predominantly of mountain, moor, heath or down, and
 - b. is not registered common land or coastal margin.
14. The “appropriate countryside body” is defined in the same section as Natural England (in relation to England) and the Natural Resources Body for Wales, in relation to Wales.
15. By paragraph 2 of Schedule 1 to CROW, land covered by buildings or the curtilage of such land is “excepted land”, excluded from the definition of access land set out above.
16. By paragraph 14 of Schedule 1, a building includes any structure or erection, but does not include any fence or wall, or anything which is “a means of access” as defined by section 34 of CROW.
17. By section 34, a means of access includes:
- a. any wall, fence or hedge bounding the land, with or without a gate, stile or other works for regulating passage through the opening;
 - b. any stairs or steps for enabling persons to enter on the land or part of the land; or
 - c. any bridge, stepping stone or other works for crossing a watercourse, ditch or bog on the land or adjoining the boundary of the land.

Open-air recreation

18. In stark contrast to the elaborate definition of access land summarised above, CROW does not define the term “open-air recreation”.
19. My instructions have carefully tracked the legislative history of the use of this term. It appears originally to have derived from the Access to Mountains Act 1939, which was never brought into force. It was then included in section 5 of the National Parks and Access to the Countryside Act 1949 (“the 1949 Act”).
20. Section 5(2) of the 1949 Act defines areas to be designated as national parks as “those extensive tracts of country in England to which it appears to Natural England that by reason of (a) their natural beauty, and (b) the opportunities they afford for open-air recreation, having

regard both to their character and to their position in relation to centres of population, it is especially desirable that the necessary measures shall be taken ...”.

21. There is no definition of the term “open-air recreation” in this earlier legislation.
22. The 1949 Act was, however, preceded by the report of a committee, known as the Hobhouse Report. That Report uses the term “open-air recreation” (also without defining it). It also includes an Appendix which discusses the proposed national parks. In relation to the Peak District, it states:

“While the many caves and potholes provide ample scope for exploration, climbers who prefer the upper air may spend long days on the gritstone crags”.

23. The same Appendix states, in relation to the Yorkshire Dales:

“Beneath its surface is a widely-famed underworld of potholes and caves, such as Gaping Gill, Alum Pot and Stump Cross Caverns.”

24. This material provides some support for the notion that the phrase “open-air recreation” was originally envisaged as encompassing caving, just as it included climbing, walking and other similar activities.

Principles of statutory construction

25. The function of a court when construing legislation is to interpret it in accordance with the intention of Parliament. Key principles include the following:
 - a. Legislation should be interpreted in accordance with its language and purpose;
 - b. Language is to be interpreted in the context of the rest of the legislation, and in the broader context of the policy which the Act was intended to pursue. Courts should strain to avoid an interpretation that tends to undermine the overall purpose of the legislation;
 - c. An interpretation which leads to an arbitrary or absurd result should be avoided.

Open Country

26. As set out above the category of “open country” is the most important form of access land on which cave systems are situated. As I understand it, for most of the relevant areas, there are caves which simply fall within an area designated as open country on a relevant map. There

are, however, at least two instances (Eldon Pot in Derbyshire, and Marble Steps in Yorkshire) in which the cave entrance has been excluded (for unknown reasons) from the area identified as open country on the map. In those cases, the requirements of section 1(1) would not be met, and the cave entrance would not be situated in open country as defined in the legislation.

27. However, in cases where the cave entrance and cave system falls within the area identified as open country on the map, there is no reason under the legislation to regard the cave as not being situated on access land.
28. Natural England has suggested in email correspondence with Tim Allen of the BCA that caves systems might not properly be regarded as being covered by the CROW maps of mountain, moor, heath, down or registered common land (“MMHDC”), because the content of the maps is “driven by what is on the surface of the land as opposed to what is underneath it”, and caves “by definition” are not MMHDC.
29. I consider this to be a bad argument in law. The relevant question under CROW which determines whether a particular piece of land is to be defined as open country is whether it is shown as “open country” on the appropriate map. It will be so shown if it appears to Natural England to consist “predominantly” of MMHDC. Features within the area shown on the map which do not themselves consist of MMHDC are nevertheless “open country” if they are in an area which *predominantly* consists of such features, and are accordingly marked on the map as open country.

Open-air recreation

30. Natural England have stated in the same email correspondence that they consider the term “open-air” recreation to be different from, and narrower than, “outdoor recreation”. They consider caves which are “enclosed from the air” to fall outside this definition. They accept, however, that “some large open caves on the side of mountains” would fall within the definition in CROW.
31. There is a superficial attraction to this approach, based narrowly on the language of the legislation. However, in my view, more considered appreciation of the context and history of the term, and the overall statutory purpose, leads to the conclusion that Natural England’s construction is incorrect.
32. The Oxford English Dictionary defines “open-air” as meaning:

“Unconfined atmosphere, hence the unconfined space outside buildings, usually more or less exposed to the weather.”

33. The Collins Dictionary defines the term slightly differently, as follows:

“the place or space where the air is unenclosed; the outdoors.”

34. Both of these definitions, on analysis, contain two somewhat different strands of meaning: (1) outdoors – ie., outside a building; and (2) the place where air is unconfined, and open to the weather.

35. The term must be read in its proper context, and in accordance with the purpose of the legislation. The definition of “access land” contained in CROW, as set out above, specifically excludes land within a building. CROW, like the 1949 Act in which the term previously appeared, is clearly concerned with enabling access to the countryside to promote the enjoyment by members of the public of healthy, outdoor activities. The Hobhouse Report, considered above, lends support to this approach. It is of some significance that the authors of that Report appear to have considered that caving was a form of open-air recreation, in the sense that it was an outdoor activity which was frequently carried out in the areas to be designated as National Parks.

36. Overall, in my view, the context and purpose of the legislation support the interpretation of “open-air” as meaning, essentially, “outdoor” or “outside a building”, rather than being concerned with the unconstrained air open to the sky.

37. It is easy to see why Parliament was not intending to permit the public to access buildings. It is much harder to see why it should have been concerned to permit access only to locations with a view of the sky, or unconstrained air. Caving is an activity of the same kind as climbing, abseiling, scrambling, canyoning and walking, all of which are obviously intended to be included within CROW. There does not appear to be any policy reason for excluding caving from the scope of the Act.

38. It is harder still to see why Parliament should have intended, as Natural England apparently believe, to *include* within the scope of CROW caves which are “open to the sky”, on the side of mountains, or with open shafts, but to *exclude* cave systems with underground passages. The distinction is unprincipled. It tends to undermine the policy of the Act, by placing an arbitrary restraint on some forms of caving but not on others.

39. Caving clearly takes place out of doors, in the sense of being outside a building. The exclusion of means of access such as gates from the definition of buildings under CROW itself makes this clear.
40. Put shortly, the interpretation of “open-air” in CROW as meaning “open to the sky” rather than “outdoor” is in my view too technical and narrow, and does not accord with the policy of the act, or lead to a rational outcome.

Conclusion

41. The matter is not entirely free from doubt, since the term “open-air” is undefined, and may carry different shades of meaning. However, I conclude, for the reasons set out above, that the better view is that caving is a form of “open-air recreation” for the purposes of CROW, and that cavers are permitted to enter and remain on access land shown as such on the relevant maps, including cave systems falling within those areas, for the purpose of recreational caving.

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