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Case No: CO/3442/2007

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07 October 2008

Before:

THE RIGHT HONOURABLE SIR ROBIN AULD

Between:

THE QUEEN
On the application of

**ROYAL SOCIETY FOR THE PREVENTION OF CRUELTY TO
ANIMALS**

Applicant

- and -

**THE SECRETARY OF STATE FOR ENVIRONMENT,
FOOD AND RURAL AFFAIRS**

Defendant

Mr Rhodri Thompson QC and Ms Kate Cook (instructed by Leigh Day & Co.) for the
Applicant

Mr Hugh Mercer QC (instructed by DEFRA Legal Gp) for the **Defendant**

Hearing dates: 22nd – 23rd July 2008

**Judgment Approved by the court
for handing down**

SIR ROBIN AULD:

Introduction

1. This case concerns the legality of a statutory provision for control of disease by mass and speedy killing of poultry for use as a last resort in the event of serious outbreak of a highly contagious and dangerous disease.
2. The Royal Society for Prevention of Cruelty to Animals (“the RSPCA”), by this claim for judicial review, challenges the legality, in terms of *vires* and compatibility with EU Law, of the Secretary of State’s provision by regulation of a measure of control of last resort, known as “ventilation shutdown”, for the killing of birds in the event of a serious outbreak of avian disease, including influenza.
3. It is common ground that viruses of avian origin pose a serious risk to public health. They are highly transmissible among flocks, to other birds and to humans. In 2003 there was a serious outbreak in Holland of avian influenza in which 89 persons – mostly poultry workers – were infected with an influenza virus and, in which a veterinary surgeon died. The World Health Organisation has reported that as at 17th April 2008 there 381 such infections, 240 of them fatal.
4. Ventilation shutdown is cutting off the ventilation in buildings in which birds are housed so as to kill them by hyperthermia or organ failure. The term appears to have been coined by the Department for Environment, Food and Rural Affairs (“DEFRA”) in 2006 when making contingent plans to combat sudden and serious outbreaks of disease dangerous to poultry handlers and to the general public. It is helpfully and more precisely described by Dr Mohan Raj, a veterinary scientist employed as a Reader in Farm Animal Welfare at the University of Bristol as part of his written evidence for the RSPCA on this claim:

“... the act of switching off the automated ventilation system, or sealing off the natural ventilation of poultry housing. The intended consequence is that, without ventilation, the temperature in the house should rise such that the birds are killed as a result of hyperthermia causing organ failure. The legislative definition envisages that heat may need to be introduced into poultry houses to achieve a lethal rise in temperature in certain circumstances.”

5. The regulatory provision, came into effect on 2^{9th} April 2006 by way of amendment,¹ (“the 2006 Amendment”) to paragraphs 1 and 2 of Schedule 9 to the *Welfare of Animals (Slaughter or Killing) Regulations 1995* (“the 1995 Regulations”), adding ventilation shutdown to a number of permitted methods of killing animals already prescribed by those Regulations for the purpose of disease control. It was prompted by reports of poor welfare standards being applied to the killing of poultry during outbreaks of avian flu in Turkey, and following an outbreak of avian flu in Norfolk in 2006.

¹ *The Welfare of Animals (Slaughter or Killing) (Amendment) (England) Regulations 2006* (2006) No 1200)

6. The 1995 Regulations were in implementation of *Council Directive 93/119/EC on the protection of animals at the time of slaughter or killing* (“the 1993 Directive”). I also draw attention to Council Directive 2005/93/EC on Community measures for the control of avian influenza ..., (the 2005 Directive), supplemented by a Commission Decision, 2006/416, establishing measures for the control of avian flu, imposing clear obligations on Member States to that end. Recitals to the 2005 Directive identified it as a “serious, highly contagious disease of poultry”, that “may in some circumstances affect humans and may then pose a serious risk to public health”. The 2005 Directive distinguished between measures required for low and high pathogenic avian flu virus, imposing more rigorous and minimum standards for the latter, namely “killing without delay under supervision in accordance with its provisions and animal welfare legislation”.
7. The RSPCA’s case is that the 2006 Amendment is incompatible with, and *ultra vires*, the 1993 Directive and also with general EU requirements as to proportionality and legal certainty of national implementing measures. In summary, the RSPCA maintains that, as a matter of law, having regard to those provisions, the Secretary of State, in introducing ventilation shutdown as an addition to permitted methods of killing of birds has failed to have sufficient regard to: 1) acknowledged welfare difficulties for birds subjected to ventilation shutdown; 2) availability of alternative methods of meeting the risk of serious outbreak of avian influenza; and 3) uncertainty in its practical implementation. The RSPCA’s claim does not amount to or include a *Wednesbury* challenge to the Secretary of State’s decision to add that method of permitted bird slaughter in the exercise of his responsibility in the field of public health.
8. The Secretary of State maintains that the 2006 Amendment is not incompatible with or *ultra vires* the 1993 Directive or general EU requirements of proportionality and/or certainty, in that ventilation shutdown has been introduced for use only as a last resort in circumstances where other permitted methods of slaughter may be judged insufficient for control of serious outbreak of avian influenza. Since the introduction of the amendment, and in recent response to the RSPCA’s expressions of concern, he has prepared draft operating instructions for the use of ventilation shutdown if and when circumstances require.

Statutory Framework

The 1993 Directive

9. The 1993 Directive, adopted pursuant to Article 43 of the EC Treaty, took as its starting point the EU Council’s approval, by Council Decision 88/306/EEC, of the European Convention for the Protection of Animals for Slaughter. As indicated in the 8th and 9th Recitals, its central purpose was to establish common minimum standards “for the protection of animals at the time of slaughter or killing” and to spare them “any avoidable pain or suffering”. The 12th and 13th Recitals refer to the declaration on the protection of animals annexed to the EC Treaty, calling upon the EC Institutions and Member States, “when drafting and implementing Community legislation on the common agricultural policy, to pay full regard to the welfare requirements of animals”, whilst also recognising the Community’s obligations “arising out of the principle of subsidiarity laid down in Article 3b of the Treaty”.

10. The 1993 Directive, in Article 1.1, provides for its application, inter alia, to:

“... , stunning, slaughter and killing of animals bred and kept for the production of meat, skin, fur or other products and to methods of killing animals for the purpose of disease control.”
11. Article 1.2 provides, inter alia, the following definitions for the purpose of the Directive:

“5. stunning: any process which, when applied to an animal, causes immediate loss of consciousness which lasts until death

6. killing: any process which causes the death of an animal;

7. slaughter: causing the death of an animal by bleeding; ...”
12. Article 3 of the 1993 Directive sets out the principle central to determination of this claim, namely:

“Animals shall be spared any avoidable excitement, pain or suffering during ... stunning, slaughter or killing.”
13. Chapter II of the 1993 Directive deals with killing of animals in slaughterhouses. Article 5(1) (c) and (d) provide that they are to be “stunned before slaughter or killed instantaneously in accordance with Annex C, or bled in accordance with Annex D”. Annex C specifies a number of permitted methods of stunning or killing, which do not include ventilation shutdown, but the nature of some of which has some bearing on issues in this case. They are:

“A. Stunning

 1. Captive bolt pistol
 2. Concussion
 3. Electronarcosis
 4. Exposure to carbon dioxide

B. Killing

 1. Free bullet pistol or rifle
 2. Electrocutation
 3. Exposure to carbon dioxide

C. The competent authority may, however, authorise decapitation, dislocation of the neck and the use of a vacuum chamber as a method of killing for certain specific species, provided that Article 3 is complied with and that the specific

requirements [for killing] laid down in point III of this Annex are met.”

14. Chapter III of the Directive deals with killing outside slaughterhouses. Article 10(1) and Annex E provide for the manner of killing of, inter alia, birds, “for purposes of disease control”, save where, as provided by Article 11, “an animal has to be killed immediately for emergency reasons”. Annex E, by reference to any method permitted under Annex C, but only where it causes “certain death”, continues:

“In addition, the competent authority may, in compliance with the general provisions of Article 3 of this Directive, permit the use of other methods for killing conscious animals, ensuring in particular that:

- if methods are used which do not cause immediate death (for example, captive bolt shooting), appropriate measures are taken to kill the animals as soon as possible, and in any event before they regain consciousness,
- nothing more is done to the animals before it has been ascertained that they are dead.”

The 1995 Regulations.

15. The 1995 Regulations implemented the provisions of the 1993 Directive with effect from 1st April 1995. Regulation 4 gave effect to Art 3 of the 1993 Directive, namely to spare animals “any avoidable excitement, pain or suffering during ... stunning, slaughter or killing”. It read, so far as material:

“4. Humane treatment of animals

(1) No person engaged in the ... stunning, slaughter or killing animals shall –

- a. cause any avoidable excitement, pain or suffering to any animal; or
- b. permit any animal to sustain any avoidable excitement, pain or suffering.

(2) ... no person shall engage in the ... stunning, slaughter or killing of any animal unless he has the knowledge and skill necessary to perform those tasks humanely and efficiently in accordance with these Regulations.”

16. Regulation 7 provides for the Minister to issue, subject to the negative resolution procedure, codes of practice for the purpose of giving guidance in respect of the Regulations, breach of which by a person prosecuted for contravention of any Regulation can be relied upon by the prosecution as tending to establish guilt.
17. Regulation 17, which is in Part III of the Regulations concerned with slaughter or killing elsewhere than in slaughterhouses or knackery yards, and Schedule 9 implemented Article 10(1) of and Annex E to the Directive in their provisions for killing of any animal for the purpose of disease control. It provided that “[t]he slaughter or killing of any animal for the purpose of disease control shall be in accordance with Schedule 9”, paragraph 2 of

which, like Articles C and E of the 1993 Directive, set out permitted methods of slaughtering or killing animals for that purpose, variously indicating that death should be immediate or, if not immediate, swift and causing the minimum pain or distress to the birds:

“2 (a) free bullet;

(b) electrocution;

(c) exposure to carbon dioxide or to a lethal concentration of other gases or gas mixtures;

(d) for rabbits and birds, dislocation of the neck;

(e) captive bolt, provided that –

(i) the animal is pithed or the blood vessels in its neck are severed without delay afterwards and in any event before the animal regains consciousness;

(ii) apart from the requirements in (i) above, nothing more is done to the animal before it has been ascertained that the animal is dead; or

(f) lethal injection of –

(i) a drug with anaesthetic properties which causes rapid loss of consciousness followed by death; or

(ii) any other compound if preceded by the induction of anaesthesia.

(g) for birds, a pneumatic or cartridge operated percussive device producing immediate death, provided that nothing more is done to a bird before it has been ascertained that the bird is dead.”

18. Regulation 13(2), also in Part III implements Article 11 of the 1993 Directive, albeit in slightly more detailed terms as I now indicate in italics::

“This Part does not apply in the case of any animal which has to be killed immediately for emergency reasons *relating to the welfare of that animal.*”

The 2006 Amendment

19. The 2006 Amendment consisted of the addition, in the case of birds, of ventilation shutdown to the list in paragraph 2 of Schedule 9 to the 1995 Regulations of permitted methods of slaughter or killing animals for the purpose of disease control. Ventilation shutdown is defined IN paragraph 1 of that Schedule as:

“the cessation of natural or mechanical ventilation of air in a building in which birds are housed with or without any action taken to raise the air temperature in the building.”

20. The addition, which is in new paragraph 2(h), is expressed to be subject to a proviso comparable to that provided for slaughter or killing of animals in paragraph 2(e) by captive bolt and 2(g) by a percussive device, thus:

“2(h) for birds, ventilation shutdown provided that no one enters the building in which birds are housed save for monitoring purposes until it is ascertained that all of the birds are dead.”

21. The 2006 Amendment also introduced, by a new paragraph 6 to Schedule 9 to the 1995 Regulations, specific requirements for this form of killing for the purpose of disease control, indicating a clear intention that it was to be a method of last resort:

“(1) No person shall kill birds using ventilation shutdown except on the written authority of the Secretary of State who must be satisfied in the individual circumstances that any other method of killing listed in this Schedule is impracticable.

(2) No person shall cause or permit birds to be killed using ventilation shutdown unless under the direct supervision of an official of the Secretary of State.”

22. Shortly before these amendments came into effect, the Government’s Chief Veterinary Officer, Debby Reynolds, in an open letter of 10th April 2006, gave assurances that humane and lawful killing methods would be used for disease control and eradication of avian influenza, assurances clearly with Article 3 of the 1993 Directive in mind that birds should be spared any avoidable excitement, pain or suffering:

“Concern has been expressed by some members of the public about the methods of killing birds when used in the control and eradication of avian influenza. I should like you to know that I believe that all killing for disease control should be done humanely in accordance with EU law. All such operations domestically will be done by competent, trained operators working to standard operating procedures and acting under veterinary supervision.

The ... [1995 Regulations (as amended)] provide a firm legal base in England. The procedures established aim to ensure that the birds become unconscious rapidly and remain so until they are dead. Checks will be done by veterinary staff to ensure that all birds are dead before carcasses are moved for disposal. It is out of the question that live birds would be, for example, buried alive, whether in plastic sacks or not.

...”

23. In an explanatory Memorandum accompanying the 2006 Amendment, DEFRA stated:

“3.2 When dealing with an outbreak of notifiable animal disease, it is essential to deal with it quickly and effectively. The majority of methods of killing birds currently permitted

under Schedule 9 to the 1995 Regulations are dependent on personnel being available in sufficient numbers to catch the birds prior to killing. In normal circumstances this is not an issue as teams of catchers are an integral part of the day to day operation of the poultry industry and catchers have been used successfully in previous disease outbreaks. However, when modern poultry units have tens of thousands of birds, obtaining catchers quickly and in sufficient numbers presents an unacceptable risk to swift and effective disease control.

3.3 In order to deal with that risk, the Department planned to amend the 1995 Regulations by making ventilation shutdown an additional method of killing should the need arise. However, now that we have Avian Influenza in the most densely populated part of England, we need this extra method available without delay to enable a rapid cull if necessary.

...

7.1 Ventilation shutdown (VSD), which involves sealing a poultry shed and turning off the ventilation, has not been a permitted method of killing birds in[the 1995 Regulations]. VSD will kill birds effectively, most likely from hyperthermia, over a period of 30-60 minutes. It is quick to implement and requires no resource or contact between humans and birds. It will be the only method of choice where more humane methods are not available.

7.2 The amendment was developed with the intention to permit this additional disease control method for circumstances when no other method, as outlined in Schedule 9 of the 1995 Regulations, could be practicably employed for the disease control killing of large numbers of birds.

...”

24. Further indications of DEFRA’s motivation for and expectations of ventilation shutdown, if it ever had to be used, were given in the following passages of a letter from it to the RSPCA on 6th October 2006, a few months after its introduction:

“... The circumstances in which Defra would consider any use of ventilation ... shutdown as a means of killing birds during an outbreak of notifiable disease have not changed from those set out in the ... [2006 Amendment]. Defra would consider its use where there was a significant threat to public health, or where resources to combat disease were significantly stretched as a result of multiple outbreaks.

Defra accepts that this method of killing birds is unlikely to be as humane as other conventional techniques that are available. This is why Defra would use ... [ventilation shutdown] only as

a method of last resort, when other conventional techniques could not be deployed and used to achieve effective control of disease. Its use will be considered on a case by case basis, and any decision to use ... [ventilation shutdown] would need to be approved by the Secretary of State or another official of sufficient seniority. In each case, Defra will undertake an assessment of whether any proposed use of ... [ventilation shutdown] on a particular premises is (a) likely to be effective and (b) can be conducted in compliance with relevant national and European legislation. Defra would only consider using ... [ventilation shutdown] where it was believed that the technique would effectively kill birds in an acceptable timeframe.

In terms of implementing ... [ventilation shutdown] operationally, the poultry shed would be sealed as soon as practically possible in the circumstances. The assessment as to whether a shed could be sealed adequately would be made on a case by case basis, and the information used to inform the assessment of likely efficacy of ... [ventilation shutdown]. Defra does not have information on the number of sheds that could be sealed. It is unlikely that it would either be necessary or desirable to withdraw food or water from birds prior to implementing ... [ventilation shutdown]. The use of supplemental heat provided to the shed would be considered in order to achieve the rapid rises in environmental temperature that would bring about induction of unconsciousness in birds through hyperthermia.

In circumstances where Defra did not believe that the use of ... [ventilation shutdown] would be effective, other conventional means of killing birds would be adopted.

...”

25. Mr Rhodri Thompson QC, for the RSPCA, invited the Court to consider what he described as three main issues:

1) whether the introduction by the 2006 Amendment of ventilation shutdown is compatible with and adequately implements Article 10(1) of and Annex E to the 1994 Directive given that:

(a) it does not cause immediate death;

(b) it does not guarantee rapid unconsciousness; and

(c) it does not guarantee death without regaining consciousness;

2) whether it conforms with the principle of proportionality inherent in Article 3 of the 1993 Directive and European Union law; and

3) whether it conforms with the European Union law principle of legal certainty.

26. In practical terms these issues are different ways of expressing the same question. It is whether ventilation shutdown, when used in an emergency and as a last resort to combat an outbreak of avian influenza, is in breach of EU law as failing to spare birds from avoidable pain or suffering because it does not guarantee rapid unconsciousness continuing until death.

Background

27. A starting point for consideration of this question is the view of the European Food Safety Authority (“EFSA”), an independent agency funded by the European Union to inform, through its scientific panels, the European Commission and others on matters requiring scientific risk assessment. One of those panels, the EFSA Scientific Panel on Animal Health and Welfare, has twice reported and advised in recent years on health and welfare aspects of avian influenza, including humane killing of poultry for disease control purposes. In the first report, issued in September 2005, shortly before the introduction of the 2006 Amendment, EFSA, at paragraphs 33 -35, identified a number of recommended methods. It also listed others that “should not be used”, including various forms of gassing – but made no mention of ventilation shutdown. In the second report, issued in May 2008, two years after the introduction of the 2006 Amendment, it expressed, at paragraph 8.3.4, under the heading “Methods that should not be used”, the following somewhat diffident caution against the use of ventilation shutdown as a method for killing birds with avian influenza:

“...ventilation shutdown ... has been suggested as an emergency method of killing birds with ... [avian influenza]. It is known that in hot weather when ventilation failure occurs with birds close to slaughter weight that high mortality through suffocation and heat stress can occur rapidly, especially in large, well insulated buildings. However, for younger birds, breeders, caged layers, etc especially in cooler weather or in older buildings anecdotal evidence suggests that death may be less rapid, and hence more traumatic, with no *guarantee* of a rapid complete kill.” [my italics]

28. Another influential body is the World Organisation for Animal Health (“WOAH”), originally established under a different name in 1924 under the auspices of the League of Nations. In 2005, it adopted a set of international guidelines on the killing animals for disease control purposes, which are to be found in Appendix 3.7.6 to its Terrestrial Animal Health Code. In a press release referring to those guidelines WOAH stated, consistently with the principles in the 1993 Directive, that controlling avian influenza at its animal source did not justify the use of inhumane methods of killing. However, like EFSA at that time, it made no reference, one way or the other, to ventilation shutdown. The guidelines included the following:

“When animals are killed for disease control purposes, methods used should result in immediate death or immediate loss of consciousness lasting until death; when loss of consciousness is not immediate, induction of unconsciousness should be non-aversive and should not cause anxiety.”

The guidelines went on to require continuous monitoring of the procedures by “the Competent Authorities” to ensure, inter alia, animal welfare, and that it be led by an official veterinarian with authority to appoint competent staff for the purpose.

29. Views of such scientific bodies, if clearly expressed and seen to be well-based and apt for the context, should be taken into account by Member States in their implementation of directives; see e.g. Case C-369/88 *Delattre* [1991] ECR I-1487, para 32, and Joined Cases C-439/05 P and C-454/05 P *Land Oberösterreich v Commission*, 13 September 2007. However, in my view, neither the EFSA advice nor the WOAH guidelines offer any clear guidance on the question posed in this case, whether as a matter of construction of the 1993 Directive or of binding EU principles, the 2006 Amendment’s provision for the use of ventilation shutdown is unlawful. As I have indicated, the passage in the EFSA advice is an expression of caution as to whether a non-aversive killing can be guaranteed. It does not amount to specific advice, on animal welfare grounds, against the use of ventilation shutdown, as a last resort, in the context of a serious outbreak of avian influenza. And the WOAH guidelines clearly contemplate the possibility of non-immediate unconsciousness, albeit coupled with competent and continuous monitoring, and made no mention of ventilation shutdown.

Evidence

30. The RSPCA relied on the written evidence of three witnesses, Dr Julia Wrathall, Professor Donald Broom and Dr Mohan Raj, all of whom gave primacy to the welfare of birds who might be subjected to ventilation shutdown and to the absence of any experimental work demonstrating that in any circumstance when used it would guarantee rapid unconsciousness enduring until death, and thus little or no pain or suffering to the birds.
31. Dr Wrathall is the Head of the Farm Animals Department in the Science Group of the RSPCA, with 12 years experience of working for the RSPCA on issues relating to the welfare and husbandry of farm animals. Her academic qualifications are in farm animal production and livestock physiology and endocrinology. She is not, however, a veterinary scientist and does not claim scientific expertise in relation to animal welfare issues. Her evidence was that ventilation shutdown has the potential to cause substantial suffering and distress to birds and that there was no experimental evidence to support DEFRA’s contention that its use would kill birds within 30 to 60 minutes as claimed in its Explanatory Memorandum to the 2006 Amendment or as to how quickly the birds would be protected from such suffering and distress by rapid and enduring unconsciousness before death. Mr Hugh Mercer QC, on behalf of DEFRA, acknowledged the absence of any experimental, as distinct from modelling, data in support of the claimed frame of time from shutdown to unconsciousness and to death. He pointed out the impossibility of determining experimentally in advance how quickly and surely ventilation shutdown would cause rapid unconsciousness and death in the many different circumstance in which, in an emergency, it might fall for use.
32. Dr Wrathall, in a comprehensive and detailed witness statement, considered the main alternatives and the varying sizes and types of poultry housing throughout the country to all or many of which, she maintained, ventilation shutdown would not be appropriate or necessary, even as a last resort:

“64. I cannot foresee circumstances arising in which the use of ventilation shutdown would be genuinely necessary and the consequent pain and suffering to birds genuinely unavoidable.

65. It is likely that, in the event of an outbreak of avian influenza, a combination of methods would need to be employed to suit the different circumstances on different commercial premises and hobby flocks. Large numbers of birds may be required to be culled on commercial premises where there may be thousands of birds in each shed and numerous sheds on the premises. Not all farms are on that scale, though, and backyard flocks involve much smaller numbers.

66. The most obvious methods for large-scale killing are gassing using mobile containerised gassing units brought onto farm premises, and whole house gassing. ... significant numbers of poultry can be killed by using ... [containerised gas units]: 4,000 to 5,000 birds an hour. My staff have observed a Defra time trial of this method and confirm this to be the case.

...

78. I cannot see that, in present circumstances, the risk to individual poultry workers or to public safety from avian influenza is so great as to require the use of ventilation shutdown as opposed to other available methods and the significant potential suffering to thousands of animals that would result.”

33. Professor Broom is Professor of Animal Welfare in the Department of Veterinary Medicine at the University of Cambridge and Vice-Chairman of EFSA. He stated that in a well-sealed building the efficacy of ventilation shutdown is good, though may still take many hours of “poor welfare” before death ensues and that in less well-sealed buildings there is a significant risk, following the same or probably longer period of such “poor welfare”, of death not ensuing. He concluded that ventilation shutdown should not be permitted, even as a last resort, citing the work of the EFSA Panel, in particular its caution based on anecdotal evidence that ventilation shutdown may in certain circumstances be less rapid, and hence more traumatic, with no guarantee of a rapid, complete kill. He suggested instead the use of an inert gas or a non-aversive gas mixture.
34. Dr Raj has specialised for some 20 years in research on animal welfare during stunning and slaughter. He is also a member of working groups of EFSA engaged in the same field. Like Dr Broom, he leant heavily on its caution as to the possible lack of efficiency of ventilation shutdown in certain circumstances. He argued that ventilation shutdown “would not be a very practical or effective killing method for the following reasons: 1) it is not a controlled or predictable method of killing; 2) it would require the raising and maintenance of a sufficiently high shed temperature for a period long enough for them to become rapidly unconscious and remain that way until death an exercise involving many variables for which there were no solid data;

3) in less industrialised conditions, such as conventional farms, supplemental, mobile heating would be required and operatives would have to enter the sheds to position the heaters; and 4) it could take days for surviving birds to die of starvation or dehydration. He also drew attention to the development since the 2006 Amendment of gas killing systems in various forms and means of vaccinating poultry against avian influenza, and the availability of anti-viral drugs to protect animal health workers. His final conclusion was

“There is no scientific research which demonstrates that ... [ventilation shutdown] could be operated in a manner which meets the terms of Annex E of the Directive. I am sceptical that it could be operated in such a way that it would cause (i) immediate death or a certain manner of death, (ii) rapid loss of consciousness; 3) birds to lose consciousness and remain unconscious until death supervenes.”

35. The Secretary of State relied on the written evidence of a number of witnesses, all of whom approached their evidence having regard to the limited context in which use of ventilation shutdown would fall to be considered, namely as a last resort to meet a threat of a potentially serious and deadly outbreak of avian influenza.
36. Fred Landeg, a veterinary surgeon and, until early 2008, the Deputy Chief Veterinary Officer for DEFRA, a specialist in health and livestock production, had been responsible for a number of years for contingency planning against outbreaks of serious animal disease, including Foot and Mouth Disease. In his evidence he stated that DEFRA’s role in relation to any outbreak of notifiable animal disease was to take appropriate measures as necessary to control or eradicate it as swiftly as possible, particularly where there was a potential threat to humans. He identified the hierarchy of priorities in such an exercise as: 1) the protection of human health and life (both of those involved in disease control and the public); and 2) swift and effective disease control; and 3) animal welfare - a hierarchy not challenged by the RSPCA.
37. Mr Landeg spoke with experience of the varied and serious logistical problems of eradicating or otherwise controlling the outbreak of serious diseases among poultry. His evidence was that these logistical problems took three main forms:
 - i) the large bird population in poultry holdings in England at any one time.– some 160 million;
 - ii) the number and uneven distribution of poultry units throughout the country – some 24,000;
 - iii) the variety of such units, ranging from small domestic holdings to large industrial units with up to hundreds of thousands of birds housed in sheds, each the size of half a football pitch and housing ten tiers of cages which, even in normal circumstances, would take at least four days to empty.
38. Mr Landeg also gave an account of the development of the global threat of avian influenza, including a potential flu pandemic. He also mentioned an outbreak of Foot and Mouth disease in the United Kingdom in 2001. All of this, he said, prompted the Government to review planning procedures for controlling potential outbreaks of

avian diseases leading in 2006 to the addition of ventilation shutdown to the Schedule 9 list of killing methods:

39. ... The threat that such an outbreak poses means that pandemic influenza is second in government contingency planning priorities only to terror attacks. Fears over the impact of avian influenza are also reflected in the ... “killer bird flue” headlines, in tandem with the deaths in the Far East, have heightened the perception of risk amongst the public.

40. Part of that contingency planning process has been to look at the killing options available and their suitability and effectiveness in a modern industry where poultry units frequently house tens of thousands of birds and often hundreds of thousands. Here the 2001 Foot and Mouth Disease outbreak demonstrated the need to ensure contingency plans cater for the worse [sic] scenario. That examination led to development and deployment in Great Britain of containerised gassing units, ... work on whole house gassing and consideration of other potential new options including ... [ventilation shutdown].

...

47. ... the intention is to ensure that killing methods for disease control are proportionate, as humane as possible and in accordance with EU legislation. The killing methods set out in Schedule 9 of ... [the 1995 Regulations] ... cover a range of circumstances and would be the most appropriate methods for use in small free range poultry units. They are, however, unlikely to be a practical option for the large-scale culling of poultry where our preferred approach is the use of ... containerised gassing units. Where none of those methods is suitable, ... ventilation shutdown is intended to be an outright killing method, not a method that involves stunning before death (in the manner of captive bolt shooting which must be followed by another measure to kill the animal before it regains consciousness.”

39. As I have noted, it is difficult to strike a scientifically supported balance between the need to meet an outbreak of a virulent and potentially fatal disease to humans, on the one hand, and the welfare of possibly affected birds, on the other, because there is no way of determining by experimental testing, how well, in the interest of either, ventilation shut-down works in the many different circumstances in which it might fall for use. This is well illustrated in the following passage from the witness statement of Mr. Antony John Bourne, the Deputy Director of the Livestock and Livestock Products Hub of DEFRA and Head of its Animal Welfare Division, in the context of possible recovery of consciousness by birds following ventilation shutdown:

“... to conduct a field scale experiment would almost certainly have exposed the birds to suffering that, in the absence of a

public health and animal health threat that was not addressable by other means, was unnecessary. This would have been in breach of the law in the absence of a licence under the Animal Scientific Procedures Act. Given that we did not intend to use ... [ventilation shutdown] except in extremis we judged that it was preferable to wait until we had to do it and then monitor the procedure. We did not think it was appropriate to carry out an experiment purely for the purpose of acquiring information, and judged that the Home Office were unlikely to grant us a licence to do so.”

40. Geoffrey Webdale, a member of the Animal Welfare Team in DEFRA, like Mr Landeg, stressed the practical difficulties for quick mass killing of birds and the unchallenged priority “in a worst case scenario” to be given to the health and human safety of human operators and the general public in the event of an outbreak of a deadly disease. He also gave evidence of: 1) the development by DEFRA this year of draft operating instructions for the use of ventilation shutdown, including provision, if death is not achieved within three hours, for recourse to a Schedule 9 method of killing; 2) the account taken by DEFRA in doing so of the 2005 EFSA Report; and 3) research since the 2006 Amendment into the use of killing by various forms of gassing.
41. Mr Webdale’s comment on EFSA’s expression of caution in its 2008 Report against the use of ventilation shutdown was that it set out what was already understood about heat stress and associated bird mortality, an understanding, he said, that DEFRA had taken into account, post the 2006 Amendment, when preparing the draft operating instructions. Looking at the practicalities of disease control and of mass killing of birds, as against what he described as the academic opinions of Professor Broom and Dr Raj, he concluded:

“In the unlikely but contingent worse case scenario, the guiding principle must be the health and safety of human operators and the need to kill quickly for the greater good of preventing the virus replicating and further infecting other animals and human beings. Unfortunately the Department must plan for such a scenario.”
42. Finally, for the Secretary of State, there was the evidence of Professor Christopher Wathes, Professor of Animal Welfare at the Royal Veterinary College, University of London and Chairman of the Farm Animal Welfare Council. In his witness statement, he indicated that ventilation shutdown as a potential means of rapid culling first came to his attention in January 2006 when DEFRA was in the throes of considering how best to meet the contingency of a serious outbreak of avian influenza posing a significant risk to human health, should it occur. To that end, he introduced some modelling studies resulting in a report in August 2006 from the Centre for Animal Welfare at the Royal Veterinary College, the conditional conclusion of which was that, in a reasonably well sealed building ventilation shutdown would be most likely to kill birds by hyperthermia after about 45 minutes. However, the authors of the report qualified that conclusion by expressing need for experimental verification and field data and the desirability of some refinement of the method of calculation.

The Farm Animal Welfare Council did not have the financial resources to undertake that work.

43. On 12th September 2006, Professor Wathes wrote to DEFRA approving the use of ventilation shutdown as a method of killing birds as a last resort as part of the Government's contingency plan to deal with an outbreak of highly contagious notifiable disease such as avian influenza, subject to checks suggested by the Council being carried out prior to its use. He also gave an account of emerging research at or shortly after the introduction of the 2006 Amendment into other possible methods of rapid mass killing of birds, such as gassing, which, if successful, could obviate the need ever to use ventilation shutdown. All this, of course, was after the introduction of the 2006 Amendment, the legal validity of which is under challenge.

The Issues

44. It is trite law that, while the form and methods by which European Union obligations, including Directives, are implemented are for Member States, they must take all appropriate measures, whether general or particular, to ensure their fulfilment. Mr Thompson submitted that the 2006 Amendment fails to do that in three respects.

Issue 1) Compatibility with Article 10(1) of and Annex E to the 1993 Directive

45. First, Mr Thompson submitted that it is incompatible with Article 10(1) of, and Annex E to, the 1993 Directive. He contended that, properly read, the Annex made it a condition of the validity of the amendment that DEFRA could show that its use in any given circumstances would cause rapid death and, given its mechanism, rapid, if not immediate, loss of consciousness enduring until death (see paragraph 14 above). He sought to support that contention by reference to the qualification in Annex E to the incorporation by reference of Annex C methods of killing, in the words "certain death" and, in relation to "other" methods not causing "immediate" death, in the requirements in the indents. The first indent requires that "appropriate methods are taken to kill the animals as soon as possible and, in any event, before they regain consciousness", and, the second indent, that nothing more is done to them before ascertainment of their death. Those qualifications, he submitted, made plain that Annex E, in the case of ventilation shutdown, was aiming at rapid and enduring unconsciousness leading to death in any circumstance in which it might fall to be used. He put it as high as requiring DEFRA to show that it could *guarantee* or *ensure* such outcome in any circumstances – something which, on the evidence before the Court, it plainly could not do.
46. Mr Thompson sought support for those submissions from the evidence of the RSPCA's witnesses, in particular Professor Broom and Dr Raj as to the uncertainty of speed of death achievable by the method, as against DEFRA's avowed aim in introducing it, "to ensure that the birds become unconscious rapidly and remain so until they are dead" (see paragraph 22 above). He prayed in aid the acknowledgement of DEFRA in correspondence (see paragraph 24 above) and in its case before the Court that the method, if and when it needs to be used, may cause some distress or suffering, albeit that it is the most humane in the circumstances. He, like Dr Raj and Professor Broom, had recourse to EFSA's expression of caution expressed in its 2008 Report (see paragraph 27 above) as to the use of ventilation shutdown as an emergency method for killing birds infected with avian influenza. He maintained that

it constituted a clear indication that it should not be used because DEFRA cannot guarantee rapid unconsciousness or death. He also relied on the WOA 2005 guideline (see paragraph 28 above) as an international standard and/or authoritative guidance on standards applicable to the killing of poultry for disease control, though, as I have said, it is expressed in terms that simply reflect the general thrust of Articles 3 and 10(1) of and Annex E to the 1993 Directive.

47. As a further attack on the issue of compatibility, Mr Thompson laid stress on the word “avoidable” in Article 3/Regulation 4 (see paragraphs 12 and 15 above), submitting that it is only if pain and suffering to animals are *unavoidable* that it is permissible to subject them to it in a permitted slaughter or killing process. He maintained that it was for DEFRA to show potential unavoidability of pain and suffering in use of ventilation shutdown as a killing process by establishing that: 1) there was or would be no available alternative and more humane method of killing poultry; and/or 2) all possible steps had been or would be taken to facilitate the use of such alternative, and/or 3) all possible steps had been or would be taken to ameliorate the effects of the use of ventilation shutdown by speeding the onset of enduring unconsciousness to death of birds subjected to it.
48. As to 1) Mr Thompson maintained that it is not met by the new paragraph 6(1) of Schedule 9 to the 1995 Regulations (see paragraph 21 above), requiring the Secretary of State to be satisfied in individual circumstances that “any other method of killing listed in this Schedule is impracticable”, since that provision did not require DEFRA to look outside the scheduled methods for more humane alternatives or to consider variation of some of the conditions of their use. As to 2), he submitted that that ventilation shutdown cannot logically be accepted as suitable method of last resort unless it is reliably practicable and appropriate in all cases both as to the welfare of the birds and as an efficient method of disease control, and that unavoidability of pain and suffering could not be guaranteed in the absence of DEFRA showing that it has taken all possible steps to promote the use of other more humane methods. As to 3), he complained of the absence of any prescribed conditions governing the use of ventilation shutdown, for example, the structure or condition, including feasibility of heating and sealing, of sheds in which it could be used, the external temperature at the time of use and the condition of birds to be subjected to it.
49. Mr Mercer prefaced his submissions on this and the two other issues as described by Mr Thompson with the observation that considerations of animal welfare need to be considered in their context, not as abstract propositions of general application regardless of it. The context here, he submitted is critical – one of a conflict of interests. On the one hand, there is a need to protect poultry workers and the public from a highly contagious and potentially fatal disease requiring speedy and large scale culling where the options are limited and resources finite, as indicated in the evidence of Mr Landeg and Mr Bourne. On the other, there is the need to have regard, in Article 3 terms, to the welfare of animals subjected to the culling process, to spare them from avoidable pain and suffering. In the circumstances, he submitted, that the important principle to be considered against the extremity of circumstances giving rise to its consideration - serious and urgent threat to human life for which no other available method may be available as adequate protection. In so submitting, he placed particular emphasis on the unchallenged evidence of Mr Landeg that the Government, as matter of policy, regards a potential pandemic as second only in its

contingency planning priorities to terrorist attacks, and that, given such level of priority, human life and safety and swift and effective disease control should, where they are in conflict, take precedence over animal welfare.

50. As a matter of interpretation, therefore, Mr Mercer submitted that Annex E (see paragraph 14 above) subjects all permitted methods of animal killing to the principle in Article 3/Regulation 4 to spare animals avoidable suffering, not just methods listed in Annex C (see paragraph 13 above) causing certain death, whether immediate or otherwise. It thus applies to all “other” methods, including ventilation shutdown, that may be permitted by “the competent authority”. However, as he pointed out, the two indents in Annex E are confined in their application to permitted methods that do not cause immediate death, and the indents do not together or individually call for a “guarantee” of rapid induction of unconsciousness enduring until death. As to the EFSA advice and WOAH guidance, he submitted that they take the matter no further towards any such purposive interpretation of the requirements of the Directive. He noted that the Government, in its explanatory statements at or about the time of introducing the 2006 Amendment (see paragraphs 22 and 23 above), had clearly had regard to the views of EFSA, so far as they go, and that the WOAH guidelines do little more than reflect in general terms the Directive’s requirements.
51. As to Mr Thompson’s arguments on the implications of the word “avoidable” in Article 3/Regulation 4, Mr Mercer submitted that the evidence before the Court of inconclusive and incomplete research and emerging development of other methods of mass killing of animals for the purpose of prevention of disease, including “whole house gassing”, does not undermine, as a matter of fact or law, the Government’s decision some two years ago to provide for ventilation shutdown as a last resort should circumstances of a serious outbreak of a highly contagious and dangerous disease call for it. Put another way, he submitted that there is no basis for challenging the Secretary of State’s provision in 2006 for him or his successor, as a “competent authority”, should that contingency arise, to conclude on appropriate advice that any other method of killing in such a circumstance would be impracticable, as required by new paragraph 6 of Schedule 9 to 1995 Regulations (see paragraph 21 above).
52. As to the argument of the RSPCA that “whole house gassing”, in particular, would have been a more acceptable alternative for such last resort contingency planning, Mr Mercer pointed to the evidence before the Court showing its limitations as a means of speedy and effective response to sudden large outbreaks of avian influenza, dependent as it is on tanker delivery to such outbreaks, large or small, anywhere in the country. Moreover, as he pointed out, the evidence shows that, following investigation extending well after the introduction of the 2006 Amendment, it is only this year that DEFRA has been able to conclude an agreement for the provision over the next three years for two culling teams, bulk gas tanker and gas supplies for the purpose.
53. Mr Mercer, accordingly, submitted that DEFRA’s introduction of ventilation shutdown as a contingency provision in the terms set out by the 2006 Amendment conformed with Article 3 of, and Annex E to, the 1993 Directive, noting that the indents in Annex E are applicable only to methods that do not cause “immediate” death.
54. The critical question, as Mr Thompson acknowledged in argument, is whether Annex E is to be construed as imposing a requirement achievable in every circumstance of a

rapid loss of consciousness enduring until death. I agree that, where the permitted method of killing does not cause immediate death, the provisions of Annex E to the 1993 Directive are aimed at rapid transition to death during which animals subjected to it are spared avoidable excitement, pain and suffering. However, in my view, they do not require, as condition of their use, a *guarantee* of absence of all such discomfort where the method, by its very nature and the exigency calling for its use as a last resort may, despite due professional care, not always be able to achieve that. The specified requirements of the Article E indents are to take appropriate measures to kill animals as soon as possible and, in any event, before they regain consciousness and not to interfere with them until after death. They are requirements directed to means. They are not requirements as to the success of such means or of a guarantee that death will in every case ensue without more from unconsciousness. In the case, for example, of stunning, or, as here, of ventilation shutdown, rapid unconsciousness enduring until death should be the aim. However, I cannot read out of those provisions the gloss of a *condition* or *guarantee* of such an outcome. For the same reason, there is nothing in the acknowledgements by DEFRA that absence of pain or suffering may not always be achievable or in the general guidance from EFSA or WOAH to suggest or logically justify, a more rigorous interpretation.

55. As with all or most exercises of legislative construction nowadays, context is important. The practical difficulties of providing an all-purpose method of or variety of methods of ventilation shutdown so as to provide a guarantee of no distress, pain or suffering when meeting an emergency in all circumstances and country-wide are so obvious as to demonstrate the unreality and imbalance of the RSPCA's case. There may be other methods suitable for certain types of poultry unit. But what if there are not, or none readily available for the particular type of unit and/or location of the outbreak of disease? The Government has been entrusted with the task of providing a response as a last resort for the protection of the public against the contingency of a serious outbreak of a highly contagious and dangerous disease. It is not for this Court faced, on a claim for judicial review with different expert views on each side to what more might have been done, to attempt, whether as a matter of law or otherwise, to substitute its own view.
56. Accordingly, I reject the RSPCA's case on the first issue of compatibility with Article 10(1) of, and Annex E to, the 1993 Directive.
57. In doing so, I should add that, if I had reached a contrary decision, I would not have relied on Article 11 of the Directive or its implementation in Regulation 13(2) of the 1995 Regulations (see paragraphs 14 and 18 above) disapplying, *inter alia*, Article 10(1) and Annex E where an animal "has to be killed immediately for emergency reasons". In my view, Mr Thompson was correct in his submission that Article 11 does not operate as a general derogation from the controls of Articles 3 and 10(1) and Annex E applicable to killing animals for purposes of disease control. Its focus is much narrower and different - as the draftsman of the 1995 Regulations clearly understood in expressly confining "emergency reasons" to those "relating to the welfare of that animal". It is clearly not intended to provide for mass culling in the interest of disease control by means that may not necessarily cause immediate death capable of permission under Annex E. Its focus is on the welfare, in the main, of individual animals by enabling them to be put out of their misery immediately.

2) Proportionality

58. Mr Thompson’s second and alternative submission, which overlaps with his submission on the first, was whether the 2006 Amendment conforms with the principle of proportionality inherent in Article 3 of the 1993 Directive and EU law. He contended that the introduction of ventilation shutdown breached the principle of proportionality as laid down in the Community legal order. He acknowledged the relevance - indeed the overriding importance - of the objective of the new provision as a means of protecting the public from highly contagious and potentially fatal disease. However, he argued that neither the proportionality requirement of “appropriateness” nor that of “necessity” is met, because of the availability, or potential availability, of alternative methods of killing less damaging to animal welfare.
59. Mr Thompson acknowledged the broad margin of discretion conceded to Member States in the field of animal health, as, for example, laid down by the European Court in Joined Cases C-96/03 *Templeman*, at para 10, and Case C-504/04 *Agrarproduktion*, at para 9. However, he maintained, in reliance on *R(Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, HL, that it is for the Secretary of State to provide a systematic justification for a measure such as this – one that has an adverse impact on animal welfare.
60. Mr Mercer, in his turn, acknowledged that the discretion inherent in the use of the word “appropriate” in the first indent of Annex E, requiring the taking of “appropriate measures ... to kill the animals as soon as possible and, in any event before they regain consciousness”, imports issues of proportionality. However, he maintained that it is for the RSPCA to show that ventilation shutdown is “manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue”, citing from paragraph 36 of the judgment in *Agrarproduktion*, on the question of the proportionality of a Community regulation, a judgment in which the Court went to state, at paragraph 39:

39... where there is uncertainty as to the existence or extent of risks to human health, the institutions, applying the principle of precaution and preventive action, may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent.”

And, as Mr Mercer added, a Member State is entitled to a significant margin of appreciation where, as here, there is a significant risk to public health; see *R Secretary of State for Health, ex p Eastside Cheese* [1999] EuLR 968, at 987 per Bingham MR, as he then was:

“... on public health issues which require the evaluation of complex scientific evidence, the national court may and should be slow to interfere with a decision which a responsible decision-maker has reached after consultation with its expert advisers.”

61. Thus, just as in the case of the “guarantee” argument of the RSPCA on the first issue, it is not for the Court to attempt to evaluate the weight of conflicting expert evidence as to availability of competing alternative measures. There is no rationality argument in this case, as Mr Thompson acknowledged in his submissions. Given the clear objective of the 2006 Amendment of protection of public health and safety, and given all the balancing considerations of fact and fear canvassed in this judgment on the first

issue, I can see no basis for striking down by way of judicial review this provision for a last resort method of protection of the public where it is judged by those advising the Secretary of State that a serious outbreak of dangerous disease demands it.

62. Accordingly, I also reject the RSPCA's claim on the issue of proportionality.

Issue 3) - Certainty

63. Mr Thompson submitted that the 2006 Amendment is, in any event, too uncertain in its application effectively to implement the requirements of Article 10(1) of, and Annex E to, the 1993 Directive and of EU law generally. He again acknowledged the broad measure of appreciation left to Member States as to the form and method of implementation of obligations binding under EU law. However, he maintained that it stops short of sanctioning uncertainty as to the precise extent of rights granted and obligations sought to be imposed, citing the following as an example of the general approach of the Court, in Case 363/85 *Commission v Italy* [1987] ECR 1733, at para 7, p 1742:

“... the transposition of a directive into domestic law does not necessarily require that its provisions be incorporated formally and verbatim in express, specific legislation; a general legal context may, depending on the content of the directive, be adequate for the purpose provided that it does indeed guarantee the full application of the directive in a sufficiently clear and precise manner so that, where the directive is intended to create rights for individuals, the persons concerned can ascertain the full extent of their rights and, where appropriate, rely on them before the national courts.”

64. Mr Thompson maintained that the reference in that passage to “the content of the directive” is of importance here, where the 1993 Directive identified detailed requirements for a number of the methods of killing permitted under Annex C to meet the over-arching requirement in Article 3 for the welfare of animals subjected to them (see paragraph 13 above). He submitted that such content does not permit the adoption by a Member State of a measure of killing that: 1) is not prescribed in the Directive; 2) is not circumscribed in a similarly detailed way as for other methods permitted by the Directive; and 3) prompts serious welfare concerns identified by a relevant Community scientific committee, EFSA, with which the 2006 Amendment does not deal.
65. The seed of those complaints of Mr Thompson is, again, to be found in the *guarantee* argument underlying his submissions on the first issue. In repetition of his central argument on that issue, he maintained that Article 3 imposes a strict requirement of necessity for killing measures that may have adverse effects on animal welfare. He submitted that the new provisions in paragraph 6 of Schedule 9 to the 1995 Regulations for the authorisation by, and involvement on behalf of, the Secretary of State in any individual recourse to the method (see paragraph 21 above) do not fill the gap because they do not specify detailed criteria for authorisation and oversight. He argued that the nature and scale of the feared outbreak of disease are not relevant considerations for the Secretary of State, or, that, if they are, the 2006 Amendment is faulty in failing to identify the criteria by reference to which he should assess the

relative weight to be given to them and to animal welfare. He suggested, for example, a need for identification and specification of a number of variables as to numbers, types and ages of birds and the number, nature and sizes of sheds in which they may be accommodated.

66. Mr Thompson referred to the evidence of Dr Raj that, in the absence of research and trials in this field, it is impossible to predict with certainty the speed with which unconsciousness could be induced in any given case. He contrasted it with the greater certainty of timing that could be achieved by those experienced in the use of application of lethal gas to any size of shed and with the detailed provisions in the 1993 Directive and 1995 Regulations for other permitted killing techniques. In short, he submitted that, to permit use of a method where the time to unconsciousness is unknown and untested, does not adequately implement Article 3 of the 1993 Directive, as read with Annex E.

67. Mr Thompson also relied on the statement of principle by the ECJ in Case 102/79 *Commission v Belgium* [1980] ECR 1473, para 11 at 1486, that:

“[m]ere administrative practices, which by their nature can be changed as and when the authorities please and which are not publicized widely enough cannot in these circumstances be regarded as a proper fulfilment of the obligation ...”

68. He also referred to Case 354/99 *Commission v Ireland* [2001] ECR I- 7657, as of importance in its application of that principle in the field of animal welfare. The case concerned the adequacy of Ireland’s implementation of provisions in Council Directive 86/609/EEC on the approximation of the laws, regulations and administrative provisions of Member States for the protection of animals used for experiment and other scientific purposes. The Directive contained a definition of “experiment”, which Ireland had not incorporated into Irish law, leaving legislative uncertainty as to what types of experiment it purported to subject to the requirements of the Directive. Ireland sought to rely on a licensing system for which the Minister of Health was responsible, which allowed him, not only to refuse a licence if he considered that the health and welfare of the animals concerned were not taken into account, but also to withdraw a licence for failure to comply with conditions attached to it, and to refuse to issue any further licences. The Court, citing *Commission v Italy* and *Commission v Belgium*, found against Ireland, holding at paragraph 29, that, “even if in practice ... [its] criteria relating to distress and lasting harm inflicted on animals ... “ were covered by the definition of the term “experiment” in the Directive, persons concerned were “in a position of uncertainty as regards their legal situation”.

69. Mr Thompson submitted that such reasoning is equally applicable here to the absence of any identified criteria for authorisation by the Secretary of State of ventilation shutdown, for example as to a time limit for securing unconsciousness and/or as to how it is to be achieved in different circumstances. As such, he maintained that the 2006 Amendment is equivalent to purported implementation by unpublicized “administrative practices” changeable at the Secretary of State’s whim. He added that it could not be cured by the issue of operating instructions of the sort presently in draft, in the light of EU case law that Member States cannot rely on their internal administrative practices to remedy defects in the implementation of EU legislation.

70. Mr Mercer’s response was that the 2006 Amendment is sufficiently certain, given the varied exigencies as to scale of outbreak of avian viral diseases, and location, size and nature of poultry housing to which ventilation shutdown might in an emergency have to be applied. He pointed out that, under the 1995 Regulations, as amended, the Secretary of State’s written authority for its use is required, which he can only give if satisfied, in the circumstances, that any other method is impracticable, and it must be conducted under the direct supervision of one of his officials. He added that, as a matter of common sense, it was neither necessary nor appropriate to spell out criteria of impracticability, which would, in any event, be subject to change according to the individual circumstances of each outbreak and as new methods of killing for disease control emerge.
71. In my view, and for the reasons given by Mr Mercer, this ground of claim must also fail. Provision of an effective method of killing for control of potentially widespread and deadly disease in the event of an outbreak so serious that no other known or developed method is, in the informed judgment of the Secretary of State, practicable cannot sensibly be the subject of detailed prescription for all possible circumstances. It is, in my view, inherent in the general principle articulated in Article 3 that animals must be spared any “avoidable” pain or suffering and in the general provision in Annex E for the taking of “appropriate measures ... to kill as soon as possible” by “other” unspecified killing methods permitted by competent authority, that circumstances may be so extreme and unexpected that only a tailor-made response to a particular outbreak will do. That is necessarily a matter for the informed judgement of the Secretary of State at the time. Any *legislative* attempt at greater prescription for such a contingency could, in my view, be counter-productive to achievement of the objective of the measure - disease control. It would also, in my view, be disproportionate as a means of implementing the principle in Article 3 of sparing animals any *avoidable* excitement, pain or suffering in the cause of disease control. Accordingly, I also reject this ground of claim.

Reference to the ECJ

72. Mr Thompson invited me to consider a reference to the ECJ pursuant to Article 234 of the EC Treaty on each of the three issues that I have been asked to consider in this claim, and by reference to the various facts and circumstances to which he has drawn my attention in support of his arguments on each. In my view, there is no need for such reference on any of the issues; the Directive is sufficiently clear, in *Else* terms, as to its application to each of the three issues to the facts and circumstances of this claim.

Accordingly, I dismiss the claim.
