Case Note: *R (Compassion in World Farming Limited) v Secretary of State for the Environment, Food and Rural Affairs*

The reality gap lives on

Lawyers who have had any contact with animal welfare law will be very familiar with the reality gap between the broad protective language used by much of the legislation and the paucity of the protection actually afforded to animals being put to use by humans in agriculture or other ways. Animal welfare legislation, most notably s 1(1) of the Animals Act 1911, purports to provide protection against 'unnecessary suffering'. The implication is that the moral basis of the legislation is that it can only be justifiable to cause animals to suffer where that is 'necessary'. The answer to the question whether the causing of an animal to suffer in any given situation is or is not *necessary* inevitably calls, however, for a value judgement to be made, balancing the suffering caused to the animal against the countervailing benefits, whether to the animal itself or to humankind.

Adherents of the philosophy of animal rights do not accept that it can ever be appropriate to balance animal suffering against potential benefits to humankind. Although the number of people in the United Kingdom who hold such purist views is not large enough to give them significant political clout, a very sizeable number of people (probably a majority) believe that it is wrong to cause animals to suffer to provide *cheap* meat, *new* ranges of cosmetics, or other 'unnecessary' benefits to humans. To such people, it is legitimate to use animals to provide meat and leather and other products, and to facilitate medical advances, but those benefits should be obtained in the most humane way – in other words, with the least possible suffering to the animals used – even if that entails higher financial costs.

Yet there is a gap between the aspirational welfarism of the UK population and their demands as consumers for cheap food. Modern intensive farming methods have been standard practice in British and European agriculture since the Second World War, and the public have come to rely on the plentiful supply of extraordinarily cheap meat that is made possible by such methods. The legislation passed by Parliament reflects that contradiction.

Under these circumstances, it is, perhaps, unsurprising that the English courts have been wary of making the legislative rhetoric match the reality. Although the courts have made a considerable contribution to social progress with regard to the social and economic rights of humans, social progress in the animal welfare field had been achieved almost entirely by legislation (both domestic and European). This has in part been a consequence of the strength of the political activism and organisation of the animal welfare lobby, and its comparatively paltry engagement with the legal system. What case-law there is, however, demonstrates the judiciary's assumption that animal welfare legislation was not intended to limit the use of common agricultural or other practices by which the moral imperative to avoid causing unnecessary suffering has been subjugated to the maximisation of economic profitability or other human benefits.[1]

[1] See, eg, *Roberts v Ruggiero* QBD, 3 April 1985 (Stephen Brown LJ, Stocker J) (unreported): Veal crate system not an offence of causing unnecessary suffering contrary to the Animals Act 1911, s 1(1)(a). Not sufficient for the prosecution to show that more humane systems of rearing were available.

Compassion in World Farming Limited v Secretary of State for the Environment, Food and Rural Affairs [2004] EWCA Civ 1009, *The Times* August 9, 2004, is the latest case in which the English courts have had to consider the yawning gap between the consensus that animals should not be caused to suffer unnecessarily, and the continued existence of systems of intensive farming that unavoidably have a detrimental impact on animal welfare when compared to alternative non-intensive methods. The case concerned the compatibility of the intensive farming of broiler chickens with the Welfare of Farmed Animals (England) Regulations 2000 (SI 2000/1870) ("the Regulations"), which implement Council Directive 98/58/EC[2] ("the Directive").

Approximately 44 billion broiler chickens are reared worldwide each year. Broiler chickens can be divided into two groups. The first group is ordinary broilers that are reared for their meat ("meat broilers"). The other group is the breeding flock ("breeder broilers"), whose role is to produce chicks. The case concerned the restricted feeding regime to which both male and female *breeder* broilers are subjected. The need for their feed consumption to be severely restricted arises from the reduction in the time it takes for a chicken to reach its 2 kg slaughter weight that has been achieved by selective breeding. That time has been halved over the last 30 years, with a broiler chicken now going from hatching to slaughter weight in just 6 weeks. Chickens of such fast-growing genotypes are vulnerable to a range of serious ailments because their legs, hearts and lungs do not develop quickly enough to support their massive muscle growth.

In the case of breeder broilers their rapid growth presents a serious 'welfare dilemma'. Since broilers do not reach sexual maturity until between 18 and 24 weeks after hatching, breeder broilers must be kept alive for at least three times as long as the time it takes a meat broiler to reach slaughter weight. If female breeder broilers were permitted to feed "*ad libitum*", their welfare would be seriously undermined by heart problems and lameness. In addition, their commercial utility would be undermined by high mortality rates, and because egg production and hatchability would be poor. In an attempt to reduce such problems, breeder broilers, for the first 20 weeks of their lives, are fed one half or less of what meat broilers are given to eat (sometimes as little as 20%). While this is effective in reducing the incidence of health and welfare problems arising from their growing too quickly, the restrictive feeding regime itself presents a serious welfare concern because (as the Government accepted by the time of the Court of Appeal hearing) scientific studies have demonstrated that the feed restrictions result in the birds experiencing "chronic hunger"[3] that resulted in a welfare detriment (though the true meaning of the phrase "chronic hunger" in terms of the causation of suffering was disputed).

The offence of cruelty should not be used to attack a common system of intensive farming that Parliament had not (at that time) chosen to ban.

[2] Council Directive 98/58/EC of 20 July 1988, *Official Journal* L 221, 08/08/1998, pp.23-27.

[3] J A Mench, Department of Animal Science, University of California, "Broiler Breeders: Feed Restriction and Welfare", *World Poultry Science Journal*, March 2002: "Broiler breeders are truly caught in a welfare dilemma, because the management practices that are necessary to ensure health and reproductive competence may also result in the reduction of other aspects of welfare. … Broiler breeders show evidence of physiological stress as well as increased incidents of abnormal behaviours, and are also chronically hungry."

The only way to avoid this 'welfare dilemma' is to avoid rearing birds of certain fast-growing genotypes, and to instead use birds of genotypes which would not require that the breeding flock be subjected to a restrictive feeding regime that resulted in birds being chronically hungry. Essentially, the contention of the claimant animal welfare organisation was that the law required the adoption of that course.

The Directive

The Directive laid down minimum standards for the protection of animals kept for farming purposes. Article 10 requires Member States to bring into force national measures to implement the Directive by 31 December 1999, though they are free to maintain or apply stricter standards.

Article 4 of the Directive provides:

'Member States shall ensure that the conditions under which animals (other than fish, reptiles or amphibians) are bred or kept, having regard to their species and to their degree of development, adaptation and domestication, and to their physiological and ethological needs in accordance with established experience and scientific knowledge, comply with the provisions set out in the Annex.'

The Annex referred to is organised under a number of headings, such as staffing, inspection, freedom of movement, accommodation, and breeding procedures. One such heading is 'Feed, water and other substances', under which paragraphs 14 and 15 provide as follows:

'14. Animals must be fed a wholesome diet which is *appropriate* to their age and species and which is *fed to them in sufficient quantity to maintain them in good health and satisfy their nutritional needs*. …

15. All animals must have access to feed *at intervals appropriate to their physiological needs*.'

In addition, paragraph 21 (the final paragraph of the Annex) provided that:

'No animal shall be kept for farming purposes unless it can reasonably be expected, on the basis of its genotype or phenotype, that it can be kept without detrimental effect on its health or welfare.'

The domestic implementing Regulations reproduce in Schedule 1 the scheme and layout of the Annex to the Directive, albeit with certain amendments designed to maintain a higher domestic standard. Regulation 3(2) places a burden on owners and keepers of animals to '*take all reasonable steps* to ensure that the conditions under which the animals are bred or kept comply with the requirements set out in Schedule 1.'

The claim brought by CIWF

CIWF sought judicial review of both the Secretary of State's implementing Regulations and her refusal to adopt a policy of prosecuting farmers under those

Regulations for subjecting breeding broilers to the restricted feeding regime. The judicial review application was first heard by Newman J in the High Court ([2003] EWHC Admin 2850), where CIWF argued two grounds:

(1) *The 'reasonable steps' derogation:* The Directive should be read as imposing an obligation on Member States to achieve the *end result* of ensuring that the prescribed minimum standards were met, and not merely as requiring Member States to regulate the *conduct* of keepers by requiring them to take '*all reasonable steps*' to achieve that result, as the Regulations had done.

(2) *The 'chronic hunger' violation:* The restricted feeding regime applied to breeder broilers did not comply with paragraphs 14 and 15 of the Annex to the Directive (which had been transposed into the domestic Regulations as paragraphs 22 and 24 of Schedule 1). Alternatively, the regime breached paragraph 22 of Schedule 1 which went further than the Directive, providing that animals had to be fed in sufficient quantity "*to promote a positive state of wellbeing*". Accordingly, DEFRA, by refusing to adopt a policy of prosecuting keepers of breeder broilers who subjected those chickens to feeding practices that led to the birds experiencing "chronic hunger", was failing to enforce the Regulations.

The judgment of Newman J

Newman J rejected both of CIWF's grounds of challenge. In relation to the first ground ("*reasonable steps*"), the judge noted that Article 249 of the EC allowed Member States a 'choice of form and method' when implementing Directives. The Annex to the Directive incorporated concepts the application of which depended on scientific value judgements, e.g. "appropriate care" (para 4), "suitable accommodation" (para 4), "appropriate steps to safeguard health and wellbeing" (para 13) and, of particular relevance to the instant case, a "wholesome diet" and feeding at "appropriate" intervals. The lack of certainty intrinsic within those concepts would give rise to particular difficulty if they were treated as obligations imposing strict liability.[4] By subjecting keepers to a "reasonable steps", rather than an absolute, obligation, the UK had taken sufficient action that was apt and likely to give rise to substantial compliance with the standards set out in the Annex to the Directive. Accordingly, the UK had acted within its margin of discretion to properly transpose the Directive.

Newman J also rejected the second ground of challenge ("*chronic hunger*"). All animals kept by humans were subjected to a feeding regime of one form or another and, at certain times, those animals may be described as 'hungry'. Hunger was a natural physiological state that motivated eating. As with humans, an ad libitum feeding regime [which was not what was being advocated by the claimant] was not necessarily the best way to promote the health and welfare of birds. Although the literature provided some support for the proposition that the feed restrictions resulted in the birds being "chronically stressed", the assessment of stress in birds was scientifically problematic and it could not be shown that the birds were "starving".

[4] Reference was made to the common law's reluctance to impose strict liability in respect of criminal offences: see *Sweet v Parsley* [1970] AC 132, 148-150, *per* Lord Reid.

It was not enough for the claimant to argue that the feed restrictions resulted in breeder broilers being left "chronically hungry", "very hungry" or that, from time to time, they exhibited distress. *Intensive farming in connection with chickens was not of itself unlawful, and the need to achieve a balance in connection with the health of broiler breeders was an attendant aspect of intensive farming systems.* The period of feed restrictions was limited and directed to a particular need, and the fact that chickens on restricted feeding regimes were able to gain weight and that their essential bodily functions were not compromised was a significant factor in counteracting the suggestion that broiler breeders were being kept sufficiently hungry to compromise their wellbeing.

The Court of Appeal

CIWF appealed to the Court of Appeal, though before that Court only the second ground for review ("*chronic hunger*") was pursued. In so doing, CIWF focused on the final words of paragraph 22 (which were not derived from the Directive), requiring that animals be fed sufficient food "to promote a positive state of wellbeing". That constituted a distinct requirement that was not met by the restrictive feeding regime.

CIWF criticised the judge for approaching the case on the basis that it was a given that intensive farming of chickens of the selectively bred genotypes now being used had to be accepted. Paragraph 29 of Schedule 1 to the Regulations (which materially replicated paragraph 21 of the Annex to the Directive) provided that "*[n]o animal shall be kept for farming purposes unless it can reasonably be expected, on the basis of its genotype or phenotype, that it can be kept without detrimental effect on its health or welfare*". In any event, the claimants contended that the judge had been wrong to balance the commercial interests of intensive farming against the minimum standards specified by the Regulations and the Directive.

The Court of Appeal dismissed the appeal. Giving a judgment with which the other members of the Court agreed, May LJ held[5] that, provided that breeder broilers were fed so that their diet was wholesome and appropriate to their age and species and sufficient to maintain them in good health and satisfy their nutritional needs (as had been found by Newman J to be the case[6]), there would be no contravention of the last eight words of paragraph 22 if the chickens were for part of their lives persistently hungry.

Like Newman J, May LJ effectively took it as a given that the legislation allowed the intensive farming of chickens of fast-growing genotypes. Paragraph 22, he held, was concerned with the feeding of animals which owners or keepers happened to be rearing, irrespective of their genotype. CIWF's objection based on paragraph 29 of Schedule 1 (paragraph 21 of the Annex to the Directive) was brushed aside without detailed consideration, May LJ asserting that CIWF had abandoned reliance on that paragraph before the High Court, and should not be permitted to resurrect it before the Court of Appeal.

[5] CA judgment, para 49.
[6] See judgment of Newman J, para 60.

May LJ, having thus refused to consider the possibility that the rearing of fast-growing genotypes was not permitted by the legislation, then inevitably went on to find that the restricted feeding regime was not incompatible with paragraph 22 since a balance had to be arrived at between mutually incompatible welfare concerns. The promotion of an animal's "wellbeing" required a balancing of factors which may conflict, and the last eight words of paragraph 22 of Schedule 1 imposed no discrete strict obligation. The obligation was "to take all reasonable steps" and "to promote". Performing the balance in itself met the requirements imposed by those words.

In a seemingly reluctant concurrence, Sedley LJ accepted that "the behavioural evidence show[ed] that breeders [were] distressed by the low level of feeding to which they [were] confined for their first 20 weeks, and that this on its face [was] inimical to their wellbeing". However, the selection of genotypes was "beyond the reach of the measures at issue" in the appeal. Accordingly, while agreeing with May LJ "[f]or the present", Sedley LJ concluded that it might "nevertheless be for consideration whether, if the ingredients of an offence [were] otherwise present, the use of a genotype which ma[de] suffering unavoidable [would] afford a defence".

Commentary

What will be of most interest in this case to those with an interest in animal welfare law generally is the way that the High Court and Court of Appeal approached the issues. Rather than look at the strict minimum welfare requirements set out in the Directive and the domestic Regulations, before then determine whether or not the feeding regime was compatible with those requirements, the two Courts regarded the potential reach of the legislation function as going no wider than requiring a balance to be struck between the welfare consequences of adopting different alternative feedings regimes *within the existing intensive farming system*. Newman J put it this way:

"I accept that but for intensive farming there would be no need to restrict the feeding of chickens in the manner currently practised, but, since the legislation is directed towards intensive farming techniques, the focus of attention must be to examine the extent to which restricted feeding strikes the best balance between the health problems that would otherwise be suffered by broiler breeders if they were eating *ad libitum* and the "hunger" associated with a restricted feeding regime."[7]

The judgment of May LJ in the Court of Appeal was particularly unsatisfactory in that he completely failed to engage with paragraph 29 of the Regulations, which is plainly directed at preventing the keeping of animals of genotypes which mean that they cannot be farmed without detriment to their welfare.

Thus, the Courts missed an opportunity to inject a degree of principle and intellectual rigour into animal welfare legislation by holding up the commonly practised methods of food production to the so-called minimum standards laid down in the legislation. Whether it was Parliament in passing the 1911 Act or the EU organs making the 1998

[7] *CIWF*, paras 59-61, *per* Newman J.

Directive, legislation has set down certain minimum animal welfare standards in aspirational, but concrete and enforceable, terms. Those standards are an expression of the minimum animal welfare standards that are regarded as acceptable in the United Kingdom and other Member States of the European Union at the beginning of the twenty-first century. The question arises, then, what the response of the courts should be when confronted with an infringement of those *minimum* standards that cannot be appropriately rectified within an existing, commonly-practised system of intensive farming, the abolition of which does not appear to have been within the contemplation of the legislature when the legislation was passed.

It is wholly understandable that the courts are reluctant to take a decision that effectively outlaws an existing agricultural practice, with the immediate and, possibly pronounced, impact on the meat and livestock industry that such a decision may bring with it. Is this not a situation, however, where it is incumbent on the courts to "let justice be done, though the skies may fall"[8]?

A principled approach would require a simple two stage test. First, what are the minimum standards imposed by the legislation? Secondly, is the system of husbandry, practice or technique that is at issue in the case consistent with *all* of those minimum standards? Where the legislation has set out minimum standards that cannot be achieved within an existing system of intensive animal husbandry, it is the system, and not the standards, that should give way. The result would be that legislatures would have to face up to the fact that that the existing systems and practices violate the very minimum standards that the legislation lays down.

Such an approach would also be more consistent with European Community law, the objective of which is to ensure consistency in standards across the Member States so that one Member State cannot compete unfairly with another by adopting or continuing to employ systems of husbandry that fail to meet the minimum Community standards. By permitting a "balancing" of different welfare requirements, the Court of Appeal has provided a loophole through which national interests may be able to seep into the equation and undermine the uniform application of Community law. This is particularly so because, in some countries, certain intensive systems may be more common than in others. To take one example, should the French courts be entitled to take the view that a directive that set down a number of minimum standards, including that animals should not be overfed, did not prohibit the force-feeding of geese because that is a commonly-practised method of producing foie gras in France and a degree of excessive feeding is a necessary part of that system? The same could be said of minimum standards of movement that are inconsistent with the veal crate system.

For similar reasons, the High Court can fairly be criticised for allowing the minimum standards in the Directive, which envisaged the achievement of a state of affairs, to be qualified in the Regulations by a "reasonable steps" requirement. Such a qualification is all too apt to allow commercial considerations to dilute the protections that the Directive conferred, with pro-welfarist measures being regarded as 'unreasonably'

[8] "We must not regard political consequences, however formidable they may be. If rebellion was the certain consequence, we are bound to say, 'Justicia fiat, ruat coelum'" — William Murray, Lord Mansfield (1705-1793).

uneconomic. Such a qualification is also liable to undermine the consistent application of the Directive across the EU.

Despite the glaring inadequacy of the Court of Appeal's treatment of paragraph 29, the House of Lords rejected CIWF's petition for leave to appeal. This was probably inevitable, given the factual finding at first instance that the scientific evidence was insufficient to demonstrate conclusively that the feeding regime was resulting in actual suffering (the phrase "chronic hunger" being open to a range of interpretations in that regard). However, the Court of Appeal's refusal to engage with paragraph 29 (which mirrors paragraph 21 of the Annex to the Directive) remains of great concern given the inevitability that genetic engineering will speed up the rate at which genotypes are developed which maximise profits but are severely detrimental to animal welfare. It is to be hoped that in some future case a preliminary reference to the European Court of Justice may enable life to be given to Annex paragraph 21. Developments in selective breeding and genetic engineering should not be allowed to erode the minimum animal welfare standards that Community law has laid down.

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