Neutral Citation Number: [2024] EWHC 65 (Admin)

Case No: AC-2022-LON-003366

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/01/2024

Before :

MRS JUSTICE HILL

- -

Between :

The King **on the application of** **(1) LJ FAIRBURN & SON LTD** **(2) JW GATE AND SON OF LANGRIGG HALL** **(3) MORTON GRANGE FARM LTD** **(4) ROY SCAMAN FARMS** **(5) BJ TOMLINSON & SON** **(6) SUNRISE POULTRY FARMS LTD** **(7) YORKSHIRE FARMHOUSE EGGS LIMITED**	**Claimants**
- and -	
SECRETARY OF STATE FOR ENVIRONMENT FOOD AND RURAL AFFAIRS	**Defendant**
- and -	
NATIONAL FARMERS' UNION OF ENGLAND AND WALES	**Interested Party**

- -
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MALCOLM BIRDLING and JAGODA KLIMOWICZ (instructed by **JACKSONS LAW**) for the **Claimants**

MARK WESTMORELAND SMITH and JONATHAN WELCH (instructed by **Government Legal Department**) for the **Defendant**

MALCOLM BIRDLING and JAGODA KLIMOWICZ (instructed by **NATIONAL FARMERS' UNION**) for the **Interested Party**

Hearing dates: 12 and 13 December 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 19 January 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mrs Justice Hill:

<u>Introduction</u>

1. The Claimants are poultry farmers whose stock has been affected by Avian Influenza ("AI"). They are supported in this claim by the National Farmers' Union of England and Wales ("the NFU") as an Interested Party.

2. The Defendant, through the Animal and Plant Health Agency ("APHA"), has powers conferred under the Animal Health Act 1981 ("the 1981 Act") to condemn healthy birds to slaughter in order to curb the spread of AI, subject to a duty to pay compensation for those birds. This claim concerns a series of decisions and the policy relating to the payment of that compensation.

3. Prior to October 2022 the Defendant's policy was that compensation would be paid only for healthy birds actually culled, as calculated at the conclusion of the cull, as opposed to healthy birds condemned to be culled. The Claimants contend that although there is a statutory obligation to cull birds without delay, the Defendant only culled the birds days or even weeks after they had been condemned. Because the current strain of AI is highly virulent, many healthy birds which had been condemned to slaughter had become diseased and died during the period of the delay, significantly reducing the compensation paid to the Claimants. In October 2022, the Defendant introduced a new policy, to compensate birds which are healthy at the outset of planned culling, as opposed to at its conclusion.

4. The Claimants' central contention is that paragraph 5(2) of Schedule 3 to the 1981 Act, which sets out the Defendant's duty to pay the relevant compensation, must be construed to mean that the right to compensation for an individual bird arises at the time of condemnation, not the time of slaughter. The Defendant disputes that interpretation of the statute.

5. The Claimants advance the following grounds of judicial review:

   <u>Ground 1</u>: The Defendant's failure to compensate for healthy birds condemned to be slaughtered (rather than those actually slaughtered) under the

original policy is in breach of the 1981 Act, on conventional principles of statutory interpretation.

Ground 2: The failure also infringes the Claimants' rights under Article 1 of Protocol 1 ("A1P1") to the European Convention on Human Rights ("ECHR").

Ground 3: The new policy is unlawful for the same reasons as those under Grounds 1 and 2.

6. The Defendant contends that Grounds 1 and 2 were brought outside the time limit for commencing a claim for judicial review set out in CPR 54.5(1) and that there is no good reason to extend time. The Claimants argue that because these grounds relate to the Defendant's ongoing breach of statutory duty they were brought in time; alternatively, that an extension of time should be granted.

7. On 15 July 2023 Lang J granted the Claimants permission on Ground 3 and ordered a "rolled-up" hearing to consider whether permission should be granted in relation to Grounds 1 and 2 (and if so, the merits of those grounds) as well as the substance of Ground 3.

8. The Claimants relied on witness evidence from Daniel James Fairburn (the Managing Director of the First Claimant) and Simon Antony Catterall (solicitor at Jacksons Law). The NFU provided a witness statement from Aimee Jayne Mahony (their Chief Poultry Advisor).

9. The Defendant relied on witness evidence from Gordon Hickman (the exotic disease policy lead at the Department for the Environment, Food and Rural Affairs ("DEFRA"), Andrew Soldan (Veterinary Director at APHA) and Professor Ian Brown (Scientific Services Director at APHA).

10. I was greatly assisted by the oral and written submissions from all counsel.

The factual background

AI

11. AI is a highly infectious viral disease that affects both domestic and wild birds. The many strains of AI viruses can be classified into two categories according to the severity of the disease in birds: low pathogenicity avian influenza ("LPAI") that typically causes little or no clinical signs; and high pathogenicity avian influenza ("HPAI") that can cause severe clinical signs and high mortality rates for some strains. AI is predominantly spread by the movement of infected wild birds, contact with associated faeces or respiratory secretions and through objects such as clothing, footwear, vehicles, equipment, contaminated bedding and by rodents.

12. Since its identification in the People's Republic of China in 1996, there have been multiple waves of intercontinental transmission of the "H5Nx" lineage of the virus. HPAI has resulted in the death or culling of more than 316 million poultry worldwide between 2005 and 2021, with peaks in 2016, 2020 and 2021.

The 2021/2022 AI outbreak

13. There have been outbreaks of AI in seven out of the last 10 years. The largest number of annual outbreaks prior to the 2021/22 season was 26 in 2020/2021 and 13 in 2016/17. However, there were 152 outbreaks in the 2021/22 season. Moreover, the strain of HPAI responsible for the 2021/22 outbreak is particularly virulent. Once disease is present in a flock it spreads rapidly, particularly in Galliforme poultry species such as turkeys and chickens. In poultry, the progression of disease is fast, and deaths can occur within hours of noticing clinical signs.

14. The high virulence of this strain of HPAI means that the number of birds which are diseased but still alive at the time of culling may be very low or in some cases zero. The Claimants' individual cases illustrate how quickly the birds can become infected and die: in a 1-2 day delay between condemnation and culling, the Fourth Claimant lost 2,472 birds; and during a 14-15 day delay, the First Claimant lost 477,111 birds at its Barfen site.

15. APHA had undertaken a number of actions to enhance readiness for a potential outbreak of HPAI in 2021/2022. In October 2021 APHA assessed the risk of HPAI in poultry that winter to be of "low uncertainty for premises with stringent biosecurity" but "medium uncertainty for premises with inadequate biosecurity".

16. Nevertheless, Mr Hickman accepted that the level of intensity of the outbreak that began in autumn of 2021 was not fully anticipated. APHA had been prepared and resourced to respond to a "category 3" outbreak, but the one that occurred was at the upper end of "category 4". The last time there had been a "category 5" outbreak was in 2001. During the 2021/2022 outbreak there were Europe-wide shortages of the personnel (such as veterinarians, culling operatives/poultry-catchers and gas suppliers) and physical equipment (such as gassing units) required to deal with outbreaks.

17. The Claimants contended that these resource issues led to long delays, both in the initial assessment of AI and in culling the birds once AI had been confirmed. The policy target is to start culling within 2 days of condemnation. Some of the relevant dates in the individual Claimants' cases were disputed. The Claimants contended that even adopting the Defendant's dates, culling was only completed at 2 of the 10 sites involved in this claim within the 2 day target, with culling completed after a week at 5 of the 10 sites. The First Claimant described a 14-15 day delay in his case. His impression was that the field operatives were "generally struggling to source enough staff and equipment to promptly cull the birds".

Procedure once AI is suspected

18. Any person who suspects that a bird may have AI is under a duty to report their suspicion to APHA immediately under the Avian Influenza and Influenza of Avian Origin in Mammals (England) (No. 2) Order 2006 (SI 2006/2702) ("the 2006 Order"), art.9. Once they have the requisite suspicion, they are also under a duty to take all reasonable steps to ensure that the measures set out in Schedule 1 to the 2006 Order are complied with. One such measure is a duty on the keeper to keep a daily record of

the birds, including the numbers of those which have been born or hatched, those which are alive and those which have died, those which show clinical signs of AI and those which are likely to be infected.

19. Once a notification is made under art.9, APHA imposes restrictions on the keeper's use of the stock by serving a notice under art.10 (and such restrictions can be imposed whether or not there has been a notification, if there is a suspicion of AI on the premises). The Claimants' case was that such restrictions are typically imposed by telephone in the first instance, and that once they are imposed, there is little the keeper of the poultry is legally permitted to do with the stock.

20. An APHA veterinary inspector attends the premises to assess the stock and take samples as soon as reasonably practicable and has the power to impose further written restrictions under arts.13-17. An EXD01 form records the restrictions on the keeper.

21. Samples are sent to the laboratory and initial results are received within 24-48 hours. If disease is ruled out, an EXD05 form revokes the restrictions previously imposed. If disease is present, an APHA veterinary inspector must, under art.19, impose the further restrictions set out in Schedule 2 to the 2006 Order. On the Claimants' case, this was the point at which they were informed that their birds would be culled. This is consistent with art.20 of the 2006 Order, which provides that, subject to art.21, the Defendant must ensure that poultry and other captive birds to be killed on infected premises under paragraph 5 of Schedule 3 to the 1981 Act are killed "without delay". An EXD65 form records the decision of the Chief Veterinary Officer to cull the birds following confirmation of AI; and an EXD16 form notifies the keeper of that decision.

22. An APHA veterinary inspector then conducts a second visit to the premises to conduct a health assessment of the birds. The process involves a 'W' shaped walk through the affected sheds or building, stopping at intervals to visually assess the number of birds affected with disease. The keeper is given the option to be present or to allow their private veterinary surgeon to be present during this walk through. At the conclusion of the walk through, the percentage of birds which are diseased and those which are healthy at the time of the assessment are recorded on an EXD188 form. The form is signed by the veterinary surgeon in the presence of the keeper (where present). This assessment is made up to 24 hours before the expected start of the cull.

23. The EXD64 is an internal form, not shared with the keeper, which records the number of birds culled, the birds that died before culling, any welfare issues and the culling method. The EXD33 and EXD34 forms record the compensation to be paid and are sent to the keeper sometime after the cull.

24. The Claimants' evidence was to the effect that the process set out above does not always work as it should with, for example, forms being served late or not at all.

25. It is a criminal offence contrary to s.73 of the 1981 Act not to comply with the provisions of the 2006 Order.

The calculation of compensation under the old policy

26. The compensation paid to the Claimants under the old policy (that in place prior to October 2022) was calculated based on the number of healthy birds actually culled, up to the maximum set out on the EXD188 form.

27. There was a dispute between the parties as to whether there had been a policy change during the 2021/22 outbreak. Ms Mahony's evidence was that compensation had historically been based on the numbers recorded on the EXD188 form. The Claimants had been expecting compensation calculated in this way. Mr Hickman's understanding was that the policy had been applied consistently since 1997, save for one exceptional ex gratia payment made to a particular keeper in 2005. Ms Mahony referred to a DEFRA policy statement with which the NFU had been provided on 1 December 2021. It was said that this policy statement did not align with the Defendant's submissions in this claim nor with the requirements of the legislation. However, it was agreed that this dispute, as with a small number of other factual issues between the parties, did not bear on the central issue of the proper construction of paragraph 5(2).

28. Ms Mahony described the significant financial impact on farmers of the delays in culling and of compensation being calculated by reference to the date of culling. The First Claimant's evidence was that he lost £1.5 million as a result of the delay. While the Defendant disputed this particular figure, it was agreed that there would be a material difference between compensation calculated based on the date of condemnation and that calculated by reference to the culling. There is also evidence that the mental health of farmers has been adversely affected by having to watch their birds suffer and die while AI spreads through the flock.

The 2022/23 outbreak and the new policy

29. The 2022/23 outbreak of AI was also on a very significant scale.

30. On 28 October 2022, the government announced a new policy as follows:

> "Under the new plans, the Government will alter the existing bird flu compensation scheme allowing compensation to be paid to farmers <u>from the outset of planned culling</u> rather than at the end. This will allow us to provide swifter payments to help stem any cash flow pressures and give earlier certainty about entitlement to compensation. The payments better reflect the impact of outbreaks on farmers" [emphasis added].

31. Mr Hickman's second witness statement explained the options that had been considered before this policy was settled upon. He summarised the effect of the policy, with effect from 1 October 2022, as being that compensation is now linked to decisions taken at the start of planned culling rather than at the end, such that APHA's assessment of the health of the birds to be culled will now be made shortly before the culling begins or within 48 hours of the decision to cull the birds being made, whichever is shorter. Counsel for the Defendant explained that in practice the new policy means that the calculation of compensation "stops" with the figures identified in the health assessment and recorded on the EX188 form.

32. The Claimants contended that while intended to assist poultry farmers, the new policy constitutes a relatively minor change to the calculation of compensation, it does little to mitigate the impacts described above and will inevitably lead to the Defendant continuing to fail to discharge the paragraph 5(2) statutory duty to pay compensation.

The key statutory provisions

33. Section 88 of the 1981 Act defines "disease" as follows:

> "(1) In this Act, unless the context otherwise requires, "disease" means cattle plague, pleuro-pneumonia, foot-and-mouth disease, sheep-pox, sheep scab, or swine fever, subject to subsection (2) below.
>
> (2) The Ministers may by order for all or any of the purposes of this Act extend the definition of "disease" in subsection (1) above so that it shall for those or any of those purposes comprise any other disease of animals.
>
> (3) In this Act, in so far as it applies to poultry, and unless the context otherwise requires, "disease" means—
>
> (a) fowl pest in any of its forms, including Newcastle disease and fowl plague; and
>
> (b) fowl cholera, infectious bronchitis, infectious laryngotracheitis, pullorum disease, fowl typhoid, fowl pox and fowl paralysis,
> subject to subsection (4) below.
>
> (4) The Ministers may by order for all or any of the purposes of this Act —
>
> (a) extend the definition of "disease" in subsection (3) above so that it shall for those or any of those purposes comprise any other disease of birds; or
>
> (b) restrict that definition so that it shall for those or any of those purposes exclude any of the diseases mentioned in paragraph (b) of subsection (3)".

34. Sections 31-34 of the 1981 Act contain a series of provisions relating to the slaughter of animals. Of relevance to this claim is section 31(e), which gives effect to Schedule 3 on the slaughter of animals in relation to "diseases of poultry".

35. Paragraph 5 of Schedule 3 is headed "Diseases of poultry".

36. Insofar as it applies in England and Wales, paragraph 5(1) provides as follows:

> "(1) The Minister may, if he thinks fit, cause to be slaughtered—
>
> (a) any diseased or suspected poultry;

(b) any poultry which are or have been in the same field, pen, shed or other place as, or otherwise in contact with, diseased poultry or which appear to the Minister to have been in any way exposed to the infection of disease;

(c) any poultry the Secretary of State thinks should be slaughtered with a view to preventing the spread of avian influenza or Newcastle disease.

(1A) The Secretary of State may exercise the power under sub-paragraph (1)(c) whether or not poultry—

(a) are affected with avian influenza or Newcastle disease or suspected of being so affected;

(b) are or have been in contact with poultry so affected;

(c) have been exposed to the infection of avian influenza or Newcastle disease;

(d) have been treated with vaccine against avian influenza or Newcastle disease".

37. Paragraph 5(2) of Schedule 3 is the provision that is central to this claim. It reads as follows:

> "(2) The Minister shall for poultry, other than diseased poultry, slaughtered under this paragraph pay compensation, which shall be the value of the bird immediately before it was slaughtered".

38. Paragraph 5(2) therefore sets out a duty to pay compensation for poultry, other than diseased poultry. It therefore embraces the other three categories of bird that the Secretary of State may "cause to be slaughtered" set out in paragraph 5(1), namely those suspected of being affected with AI; those exposed to the infection; or any other poultry the Secretary of State thinks should be slaughtered with a view to preventing the spread of AI, referred to for ease of reference during this claim as "healthy birds".

39. Value under paragraph 5(2) is determined by reference to the Poultry Valuation Tables published quarterly by the Defendant's department, or a valuer where the type is not included in those tables. The Explanatory Note to the current version states that the "Government uses valuation tables to assess the market value of birds at the time of culling".

40. Paragraph 5(3) provides as follows:

> "(3) The Minister may by order prescribe the payment of compensation in accordance with a scale approved by the Treasury for diseased poultry slaughtered under this paragraph, being poultry affected with any disease other than fowl pest in any of its forms, including Newcastle disease and fowl plague".

41. Paragraph 5(3) therefore sets out a power, not a duty, to pay compensation in relation to diseased poultry. The Defendant has not prescribed a rate for such compensation.

Relevant principles of statutory interpretation

42. The parties agreed the following principles:

(i) In construing a statute, the task of the court is to ascertain the intention of Parliament as expressed in the words it has chosen. The Parliamentary intention is to be derived from the terms of the Act as a whole, read in its context. Once it has been ascertained, the court must give effect to it so far as the legislative text permits: *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687 at [38], per Lord Millett;

(ii) The intention of Parliament is "an objective concept" and "a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used": *R v Secretary of State for the Environment, Transport and the Regions, ex parte Spath Holme Ltd* [2001] 2 AC 349 at pp.396G, per Lord Nicholls;

(iii) The "starting-point" – and usually the end-point - is to find the "natural and ordinary" meaning of the words…used, viewed in their particular context (statutory or otherwise) and in the light of common sense": *London Borough of Lambeth v Secretary of State for Housing, Communities and Local Government* [2019] UKSC 33 at [19], per Lord Carnwath (with whom Lord Reed, Lady Black, Lord Lloyd-Jones and Lord Briggs agreed);

(iv) When determining the objective meaning of the words used, regard should be had to the purpose of a particular provision and the language should be interpreted, as far as possible, in a way which best gives effect to that purpose: *Barclays Mercantile Finance Ltd v Mawson* [2004] UKHL 51 at [28] (citing *Inland Revenue Commissioners v McGuckian* [1997] 1 WLR 991 at 999, per Lord Steyn); and

(v) The consequences of the rival interpretations are relevant when assessing Parliament's intention: a choice which produces a result which cannot have been intended is to be rejected if there is a less unsatisfactory alternative: *Project Blue Ltd v Commissions for Her Majesty's Revenue and Customs* [2018] 1 WLR 3169 at [110], per Lord Briggs (in a dissenting judgment).

43. The Claimants also relied on the following principle set out by Brett MR in *Attorney-General v Horner* (1884) 14 QBD 245 at 257:

> "…it is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights without compensation, unless one is obliged so to construe it. If it is clear and obvious that Parliament has so ordered, and there is no other way of construing the words of the Act, then one is bound to so

construe them, but if one can give a reasonable construction to the words without producing such an effect…one ought to do so".

44. Similarly, in *Colonial Sugar Refining Co Ltd v Melbourne Harbour Trust Commissioners* [1927] AC 343 at 359, Lord Warrington referred to the "well known principle" that "a statute should not be held to take away private rights of property without compensation unless the intention to do so is expressed in clear and unambiguous terms."

45. In *Westminster Bank Ltd v Minister of Housing and Local Government* [1971] AC 508 (HL) at 529C-D, Lord Reid described the principle as flowing from the fact that Parliament "seldom intends" to take away private rights of property without compensation, such that "before attributing such an intention to Parliament we should be sure that that was really intended" and that "if there is reasonable doubt, the subject should be given the benefit of the doubt."

46. Bennion, Bailey and Norbury, Statutory Interpretation (8th edition) explains in section 27.6 that (i) this principle is an illustration of the wider legal policy that by the exercise of state power the property or other economic interests of a person should not be taken away, impaired or endangered, except under clear authority of law; and (ii) it applies where rights, even though not taken away, are restricted.

47. The Claimants contended that this principle created a very strong presumption that a statute should be interpreted to deny an individual compensation only if that was the only way to construe it. Any ambiguity had to be resolved in favour of the individual and not the state. The Defendant agreed the existence of this principle, but disputed the Claimants' suggestion that it was for the Defendant to show the absence of "reasonable doubt" regarding Parliamentary intention, contending that this was for the Claimants to prove. Absent clear authority on the point, I have worked on the basis that it is for the Claimants to provide the existence of the reasonable doubt in question.

48. The Claimants also relied on the Human Rights Act 1998 ("the HRA"), s.3 which provides that "[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights". Convention rights for these purposes includes the rights under A1P1: see the HRA, s.1(1)(b).

The issues

49. The list of issues that require determination, and the logical order for considering them, is as follows:

(1): Is AI included in the definition of "disease" in section 88(3) of the 1981 Act (**"the disease issue"**)?

(2): On conventional principles of statutory interpretation, does the right to compensation under paragraph 5(2) of Schedule 3 to the 1981 Act accrue at the point of condemnation or the point of slaughter (**"the accrual issue"**)?

(3): If not, or in any event, do the Claimants' rights under A1P1 generate such an interpretation (**"the A1P1 issue"**)?

(4): In light of the findings on Issues (1)-(3), does Ground 3 succeed (**"the Ground 3 issue"**)?

(5): In respect of Grounds 1 and 2, (i) were they brought in time?; (ii) if not, should time be extended for the Claimants to bring them?; (iii) should the Claimants be granted permission to bring them?; and (iv) if so, do they succeed? (**"the Grounds 1 and 2 issues"**).

(1): The disease issue

The parties' submissions in outline

50. As set out at [37]-[38] and [40]-[41] above, the duty to pay compensation under paragraph 5(2) of Schedule 3 to the 1981 Act does not apply to "diseased poultry" and the power to pay compensation for such poultry under paragraph 5(3) has not been exercised. However, the Claimants argued that birds with AI were not "diseased poultry" for this purpose. On that analysis, they would be entitled to compensation under paragraph 5(2) for all birds caused to be slaughtered under paragraph 5, not simply the healthy birds.

51. "Disease" is defined for these purposes by s.88 of the 1981 Act: see [33] above.

52. Certain diseases are defined as constituting disease in poultry, unless the context otherwise requires, in s.88(3). This list does not refer in terms to AI.

53. Further, s.88(4) provides a Ministerial power to expand or restrict the s.88(3) definition. That power was used to expand the s.88(3) definition to include "all diseases of birds", with effect from 30 April 2003: see the Diseases of Poultry (England) Order 2003 (SI 2003/1078) ("the 2003 Order"), art.2(2). However, with effect from 27 April 2006, the 2003 order "does not apply in relation to avian influenza": see the Avian Influenza and Influenza of Avian Origin in Mammals (England) Order 2006 (SI 2006/1197), art.88(1).[1]

54. It was for these two reasons that the Claimants contended that AI was outwith the s.88(3) definition of disease.

55. The Claimants' argument to this effect was advanced for the first time in their Skeleton Argument, because the version of the 2003 order published on the legislation.gov.uk website, on which the claim form was based, excluded the amendment effected by SI 2006/1197. The Defendant did not object to the point being determined and conceded that the relief sought by the Claimants embraced a claim for compensation advanced on this wider basis. However the Defendant did serve further evidence on the issue, shortly before the hearing, in the form of Professor Brown's witness statement.

[1] This order was later revoked and replaced by the 2006 Order cited at [18] above, in part to rectify errors identified by the Joint Committee on Statutory Instruments in their 31st Report for 2005-2006.

56. Professor Brown's unchallenged evidence was to the effect that "fowl plague" is the historical terminology used to describe the disease currently referred to as AI; and "there is no substantive difference between the two terms". The Professor's witness statement and the guidance from the Centre for Disease Control exhibited to it explained that the First International Symposium on AI in 1981 recommended a change of nomenclature from "fowl plague" to AI; and that this was accepted by what is now the World Organisation on Animal Health.

57. On this basis, the Defendant's case was that AI does fall within s.88(3), s.88(3)(a) of which refers to "(a) fowl pest in any of its forms, including Newcastle disease and fowl plague" as constituting disease in poultry for these purposes.

Analysis

58. The Claimants argued that Professor Brown's evidence was not determinative as his evidence was merely factual: what mattered was the legal construction of the statute. I respectfully disagree. The Professor's evidence makes clear that AI is, in substance, fowl plague.

59. The Claimants relied on the fact that paragraphs 5(1)(c) and 5(1A) of Schedule 3 specifically refer to "avian influenza", whereas paragraph 5(3) continues refers to "fowl plague" (see [36] and [40] above), arguing that where Parliament intends to refer to AI, it does so in terms. However, as the Defendant highlighted, AI only appears in parts of the 1981 Act which were amended after the Act was passed: paragraphs 5(1)(c) and 5(1A) were only added to Schedule 3 with effect from 11 July 2003 (by the Avian Influenza and Newcastle Disease (England and Wales) Order 2003 (SI 2003/1734), art.4).

60. The Symposium where the use of the name AI was agreed took place in the same year as the 1981 Act was passed. It is perhaps unfortunate that the language of "fowl plague", which was already becoming out of date was used in s.88(3)(a), and elsewhere in the 1981 Act; and especially so that the provisions have not been updated since, even when other amendments have been made to the legislation which do specifically refer to AI. However, based on Professor Brown's evidence, the factual position remains that fowl plague and AI are one and the same.

61. The 1981 Act refers to "Newcastle disease and fowl plague" together, in both s.88(3)(a) and paragraph 5(3) of Schedule 3. The fact that the newer paragraphs 5(1)(c) and 1(1A) of Schedule 3 similarly refer to "avian influenza or Newcastle disease" further illustrates that while the description of Newcastle disease remains consistent, fowl plague and AI are interchangeable phrases for this purpose.

62. The specific reference to AI in paragraphs 5(1)(c) and 5(1A) of Schedule 3 also emphasises the Parliamentary intention that AI be treated as a disease.

63. The coming into force of the 2003 and 2006 Orders does not change this analysis.

64. The 2003 Order had set out a series of measures to control the spread of poultry diseases. In 2006, bespoke separate provision was needed for AI, pursuant to Council Directive 2005/94/EC. As a result, SI 2006/1197, art.88(1) amended the 2003 Order,

so that the general regime set out therein did not apply to AI, by the insertion of a new art.1(3) to the 2003 Order to the effect that it does not apply in relation to AI.

65. The 2006 Order, art.3(1)(c) extended the definition of "disease" in s.88(1) to include AI in mammals. This was because s.88(1) applies to non-poultry animals and did not previously include reference to fowl pest or fowl plague, unlike s.88(3) which refers specifically to poultry. However, art.3(1)(c) effected no change to s.88(3). The Claimants contended that this was a conscious drafting decision, indicating that Parliament did not intend to expand the s.88(3) definition to include AI in poultry. I disagree: in line with my findings above in relation to Professor Brown's evidence, the reason the 2006 Order did not address AI in poultry was that it did not need to, as it was already covered by the words "fowl plague" in s.88(3)(a).

66. Various statutory powers were used to make the two 2006 Orders. The preamble to each order lists the powers identically, save that SI 2006/1197 was stated to have been made pursuant to s.88(4) and the second 2006 Order referred to s.88(2).

67. The use of s.88(2) as an enabling power for the second 2006 Order is plainly correct: this is the power to amend the s.88(1) definition of disease in animals; and the effect of art.3(1)(c) was to extend the s.88(1) definition to include AI in mammals.

68. It is not entirely clear why no mention was made of s.88(2) as an enabling power for SI 2006/1197, given that the wording of art.3(1)(c) therein is identical to the wording of art.3(1) in the second 2006 Order; and why the s.88(4) power to amend the s.88(3) definition of poultry was relied on instead. It appears likely that this was a drafting error that was corrected when other issues were addressed in the second 2006 Order.

69. The Claimants contended that the reliance on s.88(4) was correct, because SI 2006/1197, art.88(1) limited the scope of the 2003 Order, and that Order had made amendments to the s.88(3) definition. However, even if this meant that the expanded definition of disease effected by art.2(2) of the 2003 Order (to include "all diseases of birds") did not apply to AI, this was irrelevant, as AI was already within the original s.88(3)(a) definition, for the reasons given at [58]-[62] above. Further, any attempt to use the s.88(4)(b) power to restrict the s.88(3) definition by excluding AI would have been ultra vires, because the s.88(4)(b) power to restrict the s.88(3) definition by SI is limited to a power to exclude any of the diseases mentioned in s.88(3)(b), whereas fowl plague/AI is included in s.88(3)(a): see [33] above.

Conclusion on the disease issue

70. I therefore conclude that, albeit by virtue of some outdated statutory language, AI is a "disease" within s.88(3) of the 1981 Act. In my judgment the *Horner* principle considered at [43]-[47] above does not assist the Claimants on this issue: it is debatable whether it properly applies to the definition of "disease", which is not squarely an issue relating to compensation; and in any event the interpretation of these provisions is sufficiently clear. This means that AI infected poultry are "diseased poultry" for the purposes of paragraphs 5(2) and (3) of Schedule 3 to the 1981 Act, such that no compensation is payable in respect of them.

(2): The accrual issue

71. As noted at [37] above, paragraph 5(2) of Schedule 3 to the 1981 Act provides that the Minister "shall for poultry, other than diseased poultry, slaughtered under this paragraph pay compensation, which shall be the value of the bird immediately before it was slaughtered".

72. The central dispute between the parties was whether, applying the conventional principles of statutory interpretation summarised at [42] above, the right to compensation under paragraph 5(2) accrues at the point of condemnation (the Claimants' case) or slaughter (the Defendant's case). The Claimants submitted that, at the very least, there is reasonable doubt about the interpretation of paragraph 5(2), such that they should have the benefit of the doubt in accordance with the *Horner* principle.

(i) The ordinary meaning of paragraph 5(2)

73. The Claimants contended that the ordinary meaning of paragraph 5(2) is that (i) the Defendant is obliged to pay compensation for poultry (other than diseased poultry) "slaughtered under this paragraph"; (ii) the basis on which poultry is "slaughtered under this paragraph" is that the Defendant has "caused [them] to be slaughtered" under paragraph 5(1), and it is when this occurs (i.e. at the point of condemnation) that the right to compensation accrues; and (iii) the remaining words of the paragraph separately specify the time ("immediately before [the bird] was slaughtered") for determining the level of compensation payable.

74. The Defendant submitted that (i) paragraph 5(2) is the sole provision addressing the right to compensation; (ii) the language used paragraph 5(2) is in no way ambiguous; and (iii) it does not link the value of compensation to the point in time at which the decision to order the slaughter took place, but instead links it to the value of the bird immediately before slaughter.

75. The Defendant rightly observed that (i) if Parliament intended that the obligation to pay compensation accrued when a bird was "caused to be slaughtered", that language could have been used in paragraph 5(2), as it was in paragraph 5(1), but it was not; and (ii) paragraph 5(2) does not refer to the value of "a" bird (namely the generic unit value of a healthy bird) but to "the" bird (namely the particular bird that has been slaughtered). However I do not consider that either of these points are so persuasive that the Claimants' construction is rendered unreasonable.

76. In my judgment, looking solely at the ordinary meaning of the words in paragraph 5(2) does not determine its meaning: on this approach, both parties' constructions are reasonable.

77. The Defendant's construction results in the keepers' rights to their poultry being restricted without compensation. This is because the keeper's rights over their birds are restricted once AI is suspected, and even more so at the time of condemnation; and on the Defendant's construction, no compensation is paid for birds healthy at the time of condemnation, but diseased by the time of slaughter. On that basis, the *Horner* principle applies. In light of my conclusion that each of the constructions of paragraph 5(2), based on the ordinary meaning alone, is reasonable, I cannot say that I

am "obliged" to interpret paragraph 5(2) in the manner contended for by the Defendant; or that there is "no other way" of construing the paragraph (respectfully adopting Brett MR's wording from *Horner*).

78. However, the statutory construction principles make clear that it is appropriate to look at the words used in paragraph 5(2) in their wider statutory context, to consider the purpose of the statute and the consequences of the competing constructions of the paragraph. As I explain in the following paragraphs, the result of these exercises gives me greater confidence that the Claimants' construction is the correct one. Alternatively, they have proved that there is reasonable doubt as to the ordinary meaning of paragraph 5(2), such that the *Horner* principle as considered in *Westminster Bank Ltd* applies, and the Claimants should be given the benefit of the doubt on this issue.

(ii) The wider statutory context

79. The Claimants relied on the wider statutory context in which paragraph 5(2) sits. I consider that they were right to do so, and that the provisions referred to below support their construction of paragraph 5(2).

80. Section 34(1) of the 1981 Act affords the Minister a power to reserve for observation and treatment an animal "liable to be slaughtered", but this is "subject to payment of compensation by him as in case of actual slaughter". This wording indicates that there is a right to compensation for animals reserved under this power as liable to slaughter, in the same way as if they were slaughtered. It illustrates that the right to compensation accrues at the point of the Minister's action that is adverse to the keeper's rights, namely the reservation of the animal for observation and treatment. This supports the Claimants' contention that the right to compensation under paragraph 5(2) accrues at the point of the similar adverse action by the Defendant, namely condemnation under paragraph 5(1).

81. Section 34(7)(a) of the 1981 Act provides a power to make orders for the mode of ascertainment of the value of an animal slaughtered or "liable to be slaughtered"; and the Diseases of Animals (Ascertainment of Compensation) Order 1959 ("the 1959 Order"), art.3 prescribes a process for determining compensation where the value of an animal or bird slaughtered or "liable to be slaughtered" is necessary. These provisions support the argument that compensation is payable at the point the birds are condemned, that being when they are "liable" to be slaughtered. Under art.3(i) the Minister must cause a written statement of the valuation of the animal to be given to the owner "as soon as practicable", which, given the reference to the value of animals "liable to slaughtered", contemplates the valuation of an animal before it has been slaughtered.

82. Paragraph 1 of Schedule 3 of the 1981 Act applies to cattle plague. Paragraphs 1(1)-(3) give the Minister power to "cause to be slaughtered" animals affected with cattle plague or exposed to other animals so affected. Paragraph 1(4) provides that compensation for an animal affected with cattle plague is "half of its value immediately before it became so affected", capped at £20. Similar provisions exist in relation to pleuro-pneumonia (paragraph 2(3)), foot-and-mouth disease (paragraph 2A(10)) and swine fever (paragraph 4(2)). These provisions fix a point in time for

valuation purposes before the animal was diseased and before any order was made causing the animal to be slaughtered. They illustrate that the right to compensation accrues at a different time to calculation of the level of that compensation.

83. Sections 34(2) and (3) of the 1981 Act give the Minister ownership of the animal once it has been slaughtered and require the Minister to pay over any profit from the sale of the carcass that exceeds the compensation to the keeper. These provisions suggest that the Parliamentary intention is that the keeper be "made whole" in terms of compensation. That principle would most naturally support the Claimants' construction of paragraph 5(2).

(iii) The statutory purpose

84. The Defendant highlighted that the overarching purpose of paragraph 5(2) is that where the Defendant requires healthy birds to be destroyed for the wider public good, the keeper should be compensated. The Defendant's evidence was to the effect that biosecurity measures can prevent the spread of AI once it is on a premises. Although the Claimants' submissions suggested that they did not accept this evidence, they served no evidence to challenge it and indeed there was support for it in some of their own evidence. For these reasons, and by analogy with *Anand v Royal Borough of Kensington and Chelsea* [2019] EWHC 2964 (Admin) at [85], I accept the Defendant's evidence on this issue.

85. However, the fact that biosecurity measures can prevent the spread of AI does not, in my judgment, necessarily prove – as the Defendant contended – that it is proper to compensate keepers only for those healthy birds actually slaughtered rather than those condemned. The fact that the Defendant does not currently pay compensation for diseased birds already reflects some shifting of the financial risk to the keepers. It is, in my judgment, not clear that the statute must be interpreted as shifting the risk to the keepers even further, by adopting the Defendant's construction of paragraph 5(2).

86. The Claimants cited a further purpose of the statutory scheme, namely the encouragement of early reporting of AI. On 21 November 2022, in the context of the new policy, the Defendant specifically acknowledged that the compensation scheme was intended to encourage early reporting, in support of the public interest in controlling the spread of AI.

87. In my judgment the Claimants' construction of paragraph 5(2) is more consistent with this purpose. This is because the earlier keepers report an outbreak, the more healthy birds for which compensation is payable will be present. The Defendant rightly observed that under the 2006 Order, art.9 keepers are under a legal obligation to report suspected cases immediately upon suspicion in any event. However that obligation is consistent with, and does not undermine, the Claimants' construction of paragraph 5(2), as the reporting and compensation provisions are all part of a consistent statutory scheme.

(iv) The consequences of the competing constructions of paragraph 5(2)

88. The Claimants submitted that the Defendant's construction of paragraph 5(2) has the potential, perversely, to incentivise the Defendant to delay culling so as to pay less

compensation. In my judgment this submission is sound, as is the argument that the risk of such a consequence undermines the obligation in the 2006 Order, art.20 to cull birds "without delay". That obligation is part of the package of measures intended to meet the public interest in controlling the spread of AI.

89. The Defendant contended that it is the Claimants' construction of paragraph 5(2) which leads to absurd or perverse consequences. This is because condemnation is usually communicated by an APHA official to the keeper by telephone, without any assessment of the number of healthy birds having been undertaken. At that point, only the keeper can ascertain the number of healthy birds due to be culled; they can only do so by a swift count, without official supervision, in circumstances of considerable "bio-risk"; and allowing a keeper to "mark their own homework" in such a fashion would be inconsistent with the statutory purpose, as it would incentivise an underestimation of diseased birds.

90. I accept the Claimants' submission to the effect that these concerns are overstated. The statutory scheme already requires keepers to maintain daily records, including of the numbers of healthy and diseased birds (see [18] above). If the Defendant conducts the EXD188 assessment promptly after condemnation, consistent with the art.20 duty, that may well provide the best evidence of the numbers of healthy and diseased birds. If agreement cannot be reached between the Defendant and the keeper as to the number of healthy birds, the arbitration process provided for in the 1959 Order can be used.

91. In my judgment these consequences of the Claimants' construction are less problematic than the potential incentive to the Defendant to delay culling caused by the Defendant's construction. However, if in fact it is fairer to conclude that both constructions lead to equally challenging consequences, then the *Horner* principle would again apply to assist the Claimants.

Conclusion on the accrual issue

92. For all these reasons I conclude that on conventional principles of statutory interpretation, the right to compensation under paragraph 5(2) accrues at the point of condemnation rather than the point of slaughter.

(3): The A1P1 issue

93. A1P1 provides as follows:

> "*Protection of property*
>
> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control

the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties".

94. The Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights: Protection of Property (31 August 2022) prepared by the Registry of the European Court of Human Rights ("the ECtHR") ("the Guide") at [4] and [78]-[80] makes clear that:

(i) The term "possessions" encompasses immovable and movable property and other proprietary interests;

(ii) A1P1 consists of three distinct but connected rules: the first, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second, contained in the second sentence of the first paragraph, covers only deprivation of possession and subjects it to certain conditions; and the third, in the second paragraph, recognises that the Contracting States are entitled, inter alia, to control the use of property in accordance with the general interest; and

(iii) To be deemed compatible with A1P1 an interference with the right to the peaceful enjoyment of one's property must fulfil certain criteria: it must comply with the principle of lawfulness and pursue a legitimate aim, by means reasonably proportionate to the aim sought to be realised.

The A1P1 issues in this case

95. The parties agreed that (i) poultry are possessions or property for these purposes; (ii) the slaughter of poultry under paragraph 5(1) is a deprivation under the first paragraph of A1P1 and thus an interference with A1P1 rights; and (iii) condemnation and slaughter are lawful and pursue a legitimate aim, namely the public interest in reducing the spread of AI.

96. However, the following were in issue: (i) whether condemnation (as opposed to slaughter) is a deprivation or a control of use (**"the deprivation/control of use issue"**); and (ii) whether the failure to pay compensation for birds which are healthy at the point of condemnation but diseased at the time of slaughter is not reasonably proportionate to the stated aim, and thus incompatible with A1P1 rights (**"the compatibility issue"**).

97. The Claimants contended that condemnation under paragraph 5(2) is a deprivation; but that even if it is a control of use, the failure to pay the compensation described above is incompatible with A1P1. Further, the HRA, s.3 (see [48] above) requires paragraph 5(2) to be "read and given effect to" in a way that is compatible with A1P1 rights "[s]o far as it is possible to do so". This, on the Claimants' case, provided an additional basis for adopting the construction of paragraph 5(2) which they advanced by reference to domestic law principles, as addressed under Issue **(2)** above, to the effect that the right to compensation accrues at the point of condemnation not slaughter.

98. The Defendant submitted that condemnation is a control of use (together with the other measures imposed on the premises upon notification, and then confirmation of disease status); but that however it is characterised under A1P1, the statutory scheme is compatible with A1P1 rights, such that the Defendant's interpretation of paragraph 5(2) is consistent with the HRA, s.3 obligation.

(i) The deprivation/control of use issue

99. The Claimants submitted that condemnation under paragraph 5(2) amounts to a deprivation under A1P1 because it involves severe restrictions on keepers' rights: for example, they are permanently restricted from selling, slaughtering or even moving the birds; they cannot generate any monetary value from them, such as by selling eggs, without specific approval; and post-slaughter, ownership of the birds passes to the Minister under section 34(2).

100. Deprivations under A1P1 involve a range of situations "where the very substance of an individual right has been extinguished"; and can occur where there has been no formal expropriation by the state extinguishing the owner's rights. In the absence of a formal transfer of ownership, in order to ensure that A1P1 rights are "practical and effective", the court must investigate the "realities of the situation complained of" to ascertain whether there has been a "de facto expropriation": see the Guide at [84]-[85] and [96].

101. Although forfeitures or confiscations by the state obviously entail a deprivation of property, they are "generally" regarded by the ECHR as a control of use under A1P1; and the court has a "constant" approach in this regard: see the Guide at [103]. Examples of this principle are (i) *Air Canada v the United Kingdom* (Series A no. 316, 5 May 1995) at [33]-[34] (temporary seizure of an aircraft without depriving Air Canada of ownership, where the aircraft could be returned for a fee); (ii) *AGOSI v United Kingdom* (1987) 9 EHRR 1 at [51] (confiscation of illegally imported gold coins); and (iii) *Silickienė v Lithuania* (App no. 20496/02, 10 April 2012) at [62] (confiscation of company shares and an apartment pursuant to a judicial decision).

102. However, in some cases, where the confiscation involves a permanent transfer of ownership and the applicant had no realistic possibility of recovering their possessions, the ECtHR has considered that the measures in question amounted to a deprivation of property: *Aktiva DOO v Serbia* (App No 23079/11, 19 April 2021) at [78]. Examples of this approach are *Andonoski v the former Yugoslav Republic of Macedonia* (App no. 16225/08, 17 September 2015) and *BKM Lojistik Tasimacilik Ticaret Limited Sirketi v Slovenia* (App no. 42079/12, 17 January 2017) at [48], relating, respectively, to the permanent confiscation of vehicles used by third parties to smuggle migrants and for drug trafficking, with no possibility of restoration of the vehicles to the owner.

103. The Claimants relied on *Vasilescu v Romania* (App No 53/1997/837/1043, 22 May 1998). The Applicant's 327 gold coins had been seized by the police during a criminal investigation and unlawfully retained for many years. The ECtHR concluded that the loss of all ability to dispose of the property, together with the failure to remedy the situation, entailed sufficiently serious consequences for the applicant that there had been a "de facto confiscation": [51]-[54]. It is not entirely clear whether by this phrase

the Court was referring to a de facto expropriation and thus a deprivation. The Court did not need to definitively determine this issue, as it had already concluded that the admitted illegality of the retention made out a breach of A1P1, whichever category of interference applied: [50]. I do not therefore consider that *Vasilescu* assists the Claimants.

104. More specifically to the facts of this case, in *Chagnon and Fournier v France* (App Nos 44174/06 and 44190/06, 15 July 2020) at [36], the preventive slaughter of animals to combat foot-and-mouth disease was held to be a control of use. *Chagnon* was applied in *S.A. Bio d'Ardennes v Belgium* (App No 44457/11, 2 December 2020), in the context of similar measures relating to brucellosis. At [48], the ECtHR concluded that there was no basis for departing from *Chagnon* since the slaughtered cattle remained the applicant's property and could be sold for butchery value.

105. The Claimants contended that these two cases did not create a "hard and fast" rule that condemnation to slaughter would always be categorised as a control of use. This is a fair observation, to the extent that the Guide recognises at [86] that "similar measures may be qualified differently" by the ECtHR.

106. The Claimants argued that if the slaughtered cattle had not remained the applicant's property with the potential to generate value in *S.A. Bio d'Ardennes*, the Court might have departed from *Chagnon*, and should do so here, because these features did not apply.

107. I respectfully disagree. There is no suggestion in *Chagnon* that the applicants retained rights in the animals post-slaughter. Further, even if they did, under the relevant French provisions the carcasses of the animals were destroyed (see [26]) so their meat could not have been sold on for any value to the applicant. Accordingly, the features present in *S.A. Bio d'Ardennes* were not the basis on which a control of use was found in *Chagnon*. In any event the general principles set out at [100] above indicate that the issue of formal ownership is not determinative of the categorisation for A1P1 purposes: the court needs to look beyond that issue.

108. In my judgment *Chagnon* and *S.A. Bio d'Ardennes* are consistent with each other in categorising measures leading to slaughter as a control of use; and are consistent with the "general" or "constant" approach of the court to forfeiture and confiscation cases in general. The regimes as described in both cases are broadly comparable to the regime for condemnation and slaughter applicable here. On that basis I consider that *Chagnon* and *S.A. Bio d'Ardennes* are applicable and binding.

109. Accordingly, I conclude that condemnation is a control of use for A1P1 purposes.

(ii) The compatibility issue

110. To satisfy the proportionality requirement in A1P1, an interference must strike a "fair balance" between the general interest of the community and the protection of the individual's fundamental rights, such that the individual does not "bear a disproportionate and excessive burden": see the Guide at [142]-[143].

111. In determining whether a fair balance exists, the state enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question: *AGOSI* at [52]. The court will respect the legislature's judgment as to the compensation due for expropriation unless it is manifestly without a reasonable foundation: *Lithgow and Others v the United Kingdom* (1986) 8 EHRR 329 at [122].

112. In deprivation cases, proportionality is generally achieved where the compensation paid to the person whose property has been taken is reasonably related to its "market" value, as determined at the time of the expropriation; and a total lack of compensation can be considered justifiable only in "exceptional circumstances": see, for example, *James and Others v United Kingdom* (Series A no. 98, 21 February 1986) at [54]. In *R (SRM Global Master Finance Ltd) v Commissioners of Her Majesty's Treasury* [2009] EWCA Civ 788, the Court of Appeal noted that there had been only one occasion when the ECtHR had approved a deprivation of property without any compensation: *Jahn v Germany* (2006) 42 EHRR 49, where this result was only justified because of "the unique context of German reunification": see *SRM* at [48].

113. If I had concluded that condemnation is a deprivation for A1P1 purposes, I would have found that the failure to pay compensation for birds which are healthy at the point of condemnation but diseased at the time of slaughter is disproportionate. The Defendant rightly highlighted that there are some cases when proportionality does not require market value compensation (see *SRM Global Master Finance Ltd* at [48] and [56]); but advanced no persuasive evidence or submissions in support of the requisite "exceptional" circumstances for a complete lack of compensation, nor could I discern any.

114. In control of use cases, the proportionality test is applied differently: the lack of compensation is a factor to be taken into consideration in determining whether a fair balance has been achieved but is not determinative: see the Guide at [176].

115. Uncertainty - be it "legislative, administrative or arising from practices applied by the authorities" - is a factor to be taken into account in assessing the state's conduct: *Broniowski v Poland* (App No 31443/96, ECHR 2004-V, 22 June 2004) at [151], cited in the Guide at [143]. At the point of condemnation, there is some uncertainty as to the level of compensation received, as the progress of the disease and the logistics of the culling will be unclear. There is also an element to which uncertainty can be caused by factors outside the keepers' control such as the delays described by the First Claimant, where the culling professionals went abroad and did not return for several days. However, as the Defendant contended, the original scheme did provide some certainty in the form of the maximum number of birds recorded on the EXD188 form; and the new scheme gives greater certainty.

116. Delays by the authorities can also be relevant to the proportionality assessment: see the cases cited in the Guide at [150] and [163]. While the Claimants did provide some evidence of delays, these were not litigated as actionable breaches of statutory duty; and the overall statutory scheme does provide keepers with protection in the form of the art.20 obligation on APHA to carry out any cull without delay. The progress of the

disease is also linked to biosecurity measures adopted by keepers and is not entirely attributable to the state.

117. It is also relevant that the overall legislative scheme does provide some compensation to be paid for slaughtered healthy birds, at market value.

118. For these reasons, I do not consider that if condemnation is a control of use, the approach to compensation is manifestly without a reasonable foundation, such that it is outside the margin of appreciation afforded to the state in this context.

Conclusion on the A1P1 issue

119. Accordingly, I conclude that it is not necessary to interpret paragraph 5(2) in the manner contended for by the Claimants in order to ensure compatibility with A1P1 rights. However, if I am wrong in my finding in relation to the deprivation issue, then my conclusion on the overall A1P1 issue would have been in the Claimants' favour for the reasons given at [112]-[113] above.

(4): The Ground 3 issue

120. While the new policy increases the compensation paid to keepers under paragraph 5(2), it does not operate on the basis that the right to compensation accrues at the stage of condemnation. Such an interpretation of paragraph 5(2) is required on conventional principles for the reasons given under Issue **(2)** above. The policy is therefore unlawful.

121. In addition, the new policy (i) includes a positive statement as to the purported effect of the 1981 Act which is incorrect and which would induce someone who followed the policy to breach their legal duty to provide compensation in accordance with paragraph 5(2); and (ii) authorises unlawful conduct, namely the payment of compensation at a lower level than that required by paragraph 5(2). I therefore accept the Claimants' submissions that it is unlawful in the sense of the first and third categories described in *R (A) v SSHD* [2021] 1 WLR 3931 at [46].

122. Ground 3 therefore succeeds, on conventional principles of statutory interpretation; and to the extent that AI is included in the definition of "disease" in section 88(3) of the 1981 Act for these purposes.

(5): The Grounds 1 and 2 issues

The relevant chronology

123. Each of the Claimants lodged appeals against the level of compensation they received. The letters to each Claimant explaining the outcome of their appeal were dated between 9 February 2022 (the Third Claimant) and 29 July 2022 (the First Claimant).

124. On 8 July 2022, in response to correspondence in relation to the First Claimant, the Defendant wrote to the Claimants' solicitors citing paragraph 5(2) as the basis on which the compensation had been paid. The Claimants took legal advice including from counsel over the summer.

125. On 16 September 2022, the Claimants sent a pre-action protocol letter to the Defendant.

126. On 22 September 2022, the Defendant requested an extension by email to respond to the pre-action protocol letter until 14 October 2022. On 26 September 2022 the Claimants solicitors replied stating that they "would be willing to consent to the proposed extension on the basis that your client confirms that it will not take a point on timing". On 4 October 2022, the Defendant replied, confirming that they "will not be taking any delay point and as such agree with the condition". The Claimants' solicitors responded on the same day that: "On the basis that your clients will not take issue with limitation our clients consent to your request for an extension for their response until 14 October".

127. Further extensions of time were agreed until 21 October 2022, when the Defendant provided a substantive response to the pre-action letter. This coincided with the announcement of the new policy.

128. On 2 November 2022 the Claimants' solicitors wrote to the Defendant seeking clarification of whether the policy would be backdated to include the Claimants, to which the Defendant responded in the negative on 4 November 2022. The claim form was issued on 25 November 2022.

(i) Were Grounds 1 and 2 brought in time?

129. Looking solely at the dates of the decisions in each of the Claimants' cases, and characterising this case as solely about such "one off" decisions, the claims under Grounds 1 and 2 were brought out of time.

130. However, I accept the Claimants' argument that Grounds 1 and 2 were brought in time because they relate to the Defendant's ongoing failure to comply with the legislative obligation to pay compensation to the Claimants generated by paragraph 5(2). Paragraph 5(2) creates an obligation of result ("The Minister shall…pay compensation"); and the Defendant remains in breach of that duty. The position is therefore comparable to an ongoing failure to provide appropriate housing in breach of the Housing Act 1996, s.193(2) (as in *R (M) v Newham LBC* [2020] EWHC 327 (Admin) at [118(i)]); or to recognise a legislative entitlement to citizenship status (as in *R v Secretary of State for Foreign and Commonwealth Affairs, ex p. Ross-Clunis* [1991] 2 AC 439, where several decisions in 1980 and 1988 were challenged).

131. I therefore consider that Grounds 1 and 2 were brought in time.

(ii) If not, should time be extended for the Claimants to bring Grounds 1 and 2?

132. The Claimants sought an extension of time if needed. In considering whether to grant an extension of time the court should consider all the circumstances, including whether an adequate explanation has been given for the delay, the importance of the issues, whether an extension will cause substantial hardship or prejudice to the Defendant or any other party or be detrimental to good administration and the prospects of success: see the Administrative Court Guide 2023 at paragraph 6.4.4.2

and *R. (Dean Dobson) v Secretary of State for Justice* [2023] EWHC 50 (Admin) at [31]. In *R (QR Pakistan) v SSHD* [2018] EWCA Civ 1413 at [45], Hickinbottom LJ held that "the proper approach to an extension of time…is that set out in *Mitchell*… and *Denton*".

133. I accept that there would be some prejudice to good administration as a result of re-visiting the particular decisions in the Claimants' cases. I also accept that there are some parts of the chronology where the Claimants' conduct of the litigation lacked the necessary urgency, noting that the time taken to obtain legal advice is not generally a good reason to extend time: *Nata Lee Ltd v Abid & Anor* [2014] EWCA Civ 1652 at [53].

134. However, if I am wrong in concluding that Grounds 1 and 2 were brought within time, on balance, I would have considered it appropriate to extend time.

135. Grounds 1 and 2 raise important issues, the determination of which is in the public interest. Ground 3, on which permission was granted, involves the same issue of statutory interpretation as Grounds 1 and 2. This means the overall prejudice to the Defendant in resolving them is reduced. Against that are the very significant difficulties the poultry sector has faced due to AI and the prejudice the Claimants have suffered.

136. Although counsel sought to persuade me otherwise, I am satisfied that a fair reading of the correspondence summarised above is that the Defendant agreed not to take a point both in relation to promptness and the 3-month point. The Defendant's statement that a point would not be taken on "delay" was in agreement with the Claimants' condition that no point be taken on "timing". An agreement "not to take a time point" is generally understood to encompass both promptness and the 3 month period; and is a persuasive factor in favour of extending time.

(iii) Should the Claimants be granted permission to bring Grounds 1 and 2?

137. In light of my decision to extend time, and my view that both Grounds 1 and 2 are arguable, permission should be granted.

(iv) If so, do Grounds 1 and 2 succeed?

138. Ground 1 succeeds to the same extent as Ground 3: see [122] above.

139. Ground 2 is dismissed for the reasons given under Issue **(3**) above.

<u>Conclusion</u>

140. Accordingly for the reasons set out above the Claimants' claim succeeds in relation to Grounds 1 and 3 only. It is appropriate to grant a declaration that the old and new policies are unlawful. The Defendant is required to reconsider the compensation payable to the Claimants in light of this judgment.