



Neutral Citation Number: [2024] EWCA Civ 1585

Case No: CA-2024-000266

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**KING’S BENCH DIVISION**  
**ADMINISTRATIVE COURT**  
**Mrs Justice Hill**  
**[2024] EWHC 65 (Admin)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 20 December 2024

**Before:**

**LORD JUSTICE MOYLAN**  
**LORD JUSTICE NUGEE**  
and  
**LADY JUSTICE ELISABETH LAING**

**Between:**

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

**- and -**

**R (LJ FAIRBURN & SON LTD AND ORS)** **Respondents**

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**James Eadie KC, Mark Westmoreland Smith KC and Jonathan Welch** (instructed by the  
**Treasury Solicitor**) for the **Appellant**  
**Malcolm Birdling and Jagoda Klimowicz** (instructed by **Jacksons Law Firm**) for the  
**Respondents**

Hearing dates: 7 November 2024

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**Approved Judgment**

This judgment was handed down remotely at 09.00am on 20 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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## **Lady Justice Elisabeth Laing:**

### *Introduction*

1. The context of this appeal is severe recent outbreaks of avian influenza. The Respondents to this appeal (the Claimants below) are several poultry farmers. The Secretary of State appeals, with the permission of Hill J ('the Judge'), against her order allowing the Respondents' application for judicial review on two grounds (but not on a third), and declaring that the Secretary of State's policies for paying compensation for the slaughter of poultry were unlawful.
2. There are two issues. The first is an issue of statutory construction. It concerns the compensation which the Secretary of State is obliged to pay to the owner of poultry slaughtered pursuant to paragraph 5(2) of Schedule 3 to the Animal Health Act 1981 ('the Act'). The second issue, which is the subject of the Respondents' cross-appeal, arises if the Judge was wrong on the first issue. She also decided that there had been no breach of the Respondents' rights under article 1 of Protocol 1 ('A1P1') to the European Convention on Human Rights ('the ECHR').
3. On the first issue, the Judge, consistently with the parties' analysis, asked when the right to compensation accrues. For the reasons given in this judgment, I consider that that was the wrong question. The question is in what circumstances, and in what amount, the Secretary of State is obliged to pay compensation. In my judgment, paragraph 5(2), read in its statutory context, could not be clearer on those questions. For the reasons given in this judgment I would allow the appeal. I would also dismiss the cross-appeal, for the reasons in paragraphs 120-122 below.
4. On this appeal the Respondents were represented by Mr Birdling and Ms Klimowicz. The Secretary of State was represented by Sir James Eadie KC, Mr Westmoreland Smith KC and Mr Welch. I thank counsel for their written and oral submissions. Paragraph references are to the Judge's judgment ('the Judgment') unless I say otherwise.

### *The facts*

5. I have taken the facts from the Judgment. The Respondents are poultry farmers whose stock has been affected by avian influenza (paragraph 1). There are two types of avian influenza: highly pathogenic avian influenza, which I will call 'HPAI' and low pathogenic avian influenza, which I will call 'LPAI'. The Act refers to the 'slaughter' of birds. When the Secretary of State decides that they should be slaughtered, he 'causes' them 'to be slaughtered'. The Judge preferred the words 'cull' and 'condemn'. The literal meanings of her words and of the words in the statute are not the same. It is nevertheless convenient, for the purposes of this judgment, for me to use them interchangeably.
6. Before October 2022, the Secretary of State's policy was only to pay compensation for healthy birds actually slaughtered, calculated at the end of the cull, and not to pay it for healthy birds which he caused to be slaughtered. The Respondents argued that although the Secretary of State has a statutory obligation to slaughter birds without delay, they were not slaughtered until days or weeks after they had been condemned. Because the current strain of avian influenza is very virulent, many healthy birds which had been

condemned were infected during the period between condemnation and slaughter, and died before they were slaughtered. This reduced the compensation which the Respondents were paid. In October 2022, the Secretary of State adopted a new policy, which was to compensate owners for birds which were healthy ‘at the outset of planned culling’ rather than healthy at the time of the slaughter (paragraph 3).

7. In paragraph 4, the Judge succinctly summarised the Respondents’ argument. It was that paragraph 5(2) of Schedule 3 to the Act 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’. Their ground 1 was that the policy of not compensating their owners for birds condemned to be slaughtered (rather than those actually slaughtered) under the former policy is a breach of the Act. Their ground 2 was that the failure to calculate compensation in that way was a breach of A1P1. Grounds 3 and 4 made similar criticisms of the latter policy.
8. The Judge described avian influenza and its recent development in paragraphs 11 and 12. Avian influenza is a highly infectious viral disease. It affects domestic and wild birds. It is mostly spread by the movement of wild birds. It can also be spread by contact of various kinds. It has led, between 2005 and 2021, to the slaughter of 316 million poultry in the world. There were peaks in 2016, 2020 and 2021.
9. She described the 2021 outbreak in paragraphs 11-17. The strain of avian influenza responsible for this outbreak was particularly virulent. Birds can die within hours of showing symptoms of this strain. Very few or no birds which were diseased when condemned were still alive when they were slaughtered. The Judge gave two examples in paragraph 14. The evidence showed that the Secretary of State was not prepared for the severity of the outbreak. There were widespread shortages of the necessary personnel and equipment (paragraph 16). The Respondents argued that those issues led to long delays in the initial assessment of avian influenza and in the slaughter of the birds once avian influenza was confirmed. The target in the policy was that slaughter should start within two days of condemnation. The delays in some of the Respondents’ cases were longer: 14-15 days in one case.
10. In paragraphs 18-25 she described the procedure once avian influenza was suspected. She noted that any person who suspects that a bird may have avian influenza is obliged by article 9 of the Avian Influenza and Influenza of Avian Origin in Mammals (England) (No.2) Order 2006 SI No 2702 (‘the 2006 (2) Order’) to report their suspicion immediately. They are also under a duty to take all reasonable steps to ensure that the steps set out in Schedule 1 to the 2006 (2) Order are complied with. Those include a duty to keep a daily record of birds, including those which have died, those which show clinical signs of avian influenza and those which are likely to be infected. Once such a notice has been served, restrictions are imposed on the keeper’s use of the stock by a notice served under article 10. Indeed an article 10 notice can be served if the presence of avian influenza is suspected, and without a notice under article 9. Once such restrictions have been imposed, ‘there is little the keeper can do with the stock’ (paragraph 19).
11. A veterinary inspector then goes to the premises to look at the stock and to take samples as soon as reasonably practicable. The inspector can impose further restrictions under articles 13-17 of the 2006 (2) Order. The samples are analysed. The initial results are

usually ready in 24-48 hours. If there is no disease, any restrictions are cancelled. If disease is confirmed, article 19 obliges the veterinary inspector to impose the further restrictions in Schedule 2 to the 2006 (2) Order. The Respondents' case was that that was when they were told that their birds would be slaughtered. The Judge considered that that was consistent with article 20 of the 2006 (2) Order, which provides, subject to article 21, that the Secretary of State must ensure that poultry and other captive birds to be killed on infected premises are killed 'without delay'. The decision of the Chief Veterinary Officer to slaughter birds after avian influenza has been confirmed is recorded in form EXD65.

12. A veterinary inspector visits the premises a second time to see how many birds are healthy. The Judge described the process in paragraph 22. The veterinary inspector then records, on form EXD188, the percentage of birds which is diseased and the percentage which is healthy at the time of that assessment. That assessment is made up to 24 hours before the slaughter is expected to begin. There is a further form, EXD64. It is completed after the slaughter but is not shown to the keeper. It records the number of birds slaughtered, how many died before slaughter, any welfare issues and how they were slaughtered. The amount of compensation to be paid is recorded in forms EXD33 and EXD34. The Respondents' evidence was that the process did not always work. Sometimes forms were served late, or were not served at all (paragraph 24). It is a criminal offence (contrary to section 73 of the Act) not to comply with provisions of the 2006 (2) Order.
13. Under the old policy, compensation was based on the number of healthy birds actually slaughtered, 'up to the maximum' on form EXD188. The Judge recorded that there was a dispute about whether the Secretary of State's policy changed during the outbreak in 2021-2022. That dispute, it was agreed, 'did not bear on the central issue of the correct construction' of paragraph 5(2). While the Secretary of State did not agree the figures on which the Respondents relied, it was agreed that 'there would be a material difference between the compensation calculated based on the date of condemnation and that calculated by reference to the culling' (paragraph 28).
14. The Judge described the 2022-2023 outbreak in paragraphs 29-32. It was also very significant. On 28 October 2022 the government announced a new policy which the Judge quoted in paragraph 30. Compensation would be paid 'from the outset of the planned culling rather than at the end'. Counsel for the Secretary of State explained that this meant that the calculation of compensation stopped with the figures collected during the health assessment and entered on form EXD188. The Respondents contended that this change did not go far enough.

*The law*

*The law which is relevant to the construction of paragraph 5(2)*

15. The first issue in this appeal depends on what the relevant provision of the Act means. The words must be construed in their statutory context. I will therefore start by summarising the statutory context. An important feature of the statutory context is that the Act confers many broad functions on the executive to do various things, as the relevant Minister or Ministers 'think fit', including, in several different situations, making orders under the Act. The statutory context is also relevant to the question whether the Secretary of State breached the Respondents' rights under A1P1. I will also

refer to the relevant delegated legislation, but I will only summarise it. I will then summarise two of the cases on which the Respondents relied to support the Judge’s construction of paragraph 5(2) (paragraphs 58-67, below).

### *The Animal Health Act 1981*

#### *General structure*

16. The Act, as its long title shows, is an Act which consolidates the Diseases of Animals Acts of 1935, 1950, and 1975, the Ponies Act 1969, the Rabies Act 1974 and ‘certain related enactments’. It was originally divided into six Parts: ‘I General’, ‘II Disease’, ‘III Welfare and Export’, ‘IV Local authorities’, ‘V Enforcement, Offences and Proceedings’, and ‘VI Supplemental’. Two further Parts have been added by amendment: ‘Part IIA Scrapie’, and ‘Part IIB TSE Scotland’. The Act therefore covers a wide range of topics which are linked with the health and welfare of, and control of diseases in, animals.

#### *Relevant definitions*

17. Section 86 is headed ‘Ministers and their functions’. Section 86(1) defines ‘the Minister’, ‘the appropriate Minister’ and ‘the Ministers’. Section 89 contains a long list of definitions which apply unless the context otherwise requires. ‘Suspected’ means ‘suspected of being diseased’. For convenience, I will refer to the relevant Minister as ‘the Secretary of State’.
18. Section 87 is headed ‘Meaning of “animals” and “poultry”’. Subject to section 87(2) and (3), section 87(1) defines ‘animals’. Subject to section 87(5), ‘and unless the context otherwise requires’ section 87(4) defines ‘poultry’ as meaning ‘birds of the following species – (a) domestic fowls, turkeys, geese, ducks, guinea-fowls and pigeons and (b) pheasants and partridges’. Section 87(4) adds that, subject to sections 15(5), 32(4) and 63(9), the Act ‘has effect in relation to poultry’ as it does in relation to animals. Section 87(5) gives the Ministers power by order for all or any of the purposes of the Act, ‘in so far as it applies to poultry’ to include other species of bird in the definition of ‘poultry’ and to restrict the definition so as to exclude any of the listed species from it. Article 2(1) of the Diseases of Poultry (England) Order 2003 (2003 SI No 1078) (‘the 2003 (1) Order’) extends the definition of ‘poultry’ to ‘include all birds’.
19. Section 88(1) defines ‘disease’, ‘unless the context otherwise requires’, and subject to section 88(2), as meaning six specific diseases (of animals). Section 88(2) gives the Ministers power by order, for all or any of the purposes of the Act, to extend that definition, so that it ‘shall for those or any of those purposes, comprise any other disease of animals’. By section 88(3), and subject to section 88(4), ‘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 pox and fowl paralysis’.
20. Section 88(4) gives the Ministers power by order for all or any of the purposes of the Act to extend the definition in section 88(3) so that ‘it shall for those or any of those purposes, comprise any other disease of birds’ and to restrict that definition for those or any of those purposes so as to exclude any of the listed diseases. Article 2(2) of the Diseases of Poultry (England) Order 2003 SI No 1078 (‘the 2003 (1) Order’) (made

under sections 16A, 32A and 62D2 of the Act), extends the definition of ‘disease’ to ‘include all diseases of birds’.

21. In this case, there was an issue whether avian influenza was a ‘disease’ for the purposes of the Act, or not. The Judge decided that issue in favour of the Secretary of State (paragraphs 50-70), and there is no cross-appeal against that part of the Judge’s decision.

*Part I*

22. Part I of the Act is divided into five groups of sections, headed ‘General powers of Ministers to make orders and to authorise regulations’, ‘Eradication and prevention of disease’, ‘Cleansing and movement’, ‘Transport by sea and air’ and ‘Control of dogs and preventive treatment of sheep’.
23. Section 1 is headed ‘General powers of Ministers to make orders’. It gives ‘the Ministers’ power to make ‘such orders as they think fit – (a) generally for the better execution of this Act, or for the purpose of in any manner preventing the spread of disease; and (b) in particular for the several purposes set out in this Act, and for prescribing and regulating the payment and recovery of expenses in respect of animals’. Section 2 gives the Ministers power to make ‘such orders as they think fit for authorising a local authority to make regulations for any of the purposes (a) of this Act or (b) of an order of the Ministers, subject to such conditions, if any, as the Ministers for the purposes of securing uniformity and the due execution of this Act, think fit to prescribe’.
24. The second group of sections is headed ‘Eradication and Prevention of Disease’. Section 3 is headed ‘Expenditure for eradication’. Section 3(1) gives the Minister power, with the approval of the Treasury, to ‘expend such sums as they think fit with the object of eradicating as far as practicable diseases of animals...in Great Britain’. The Ministers can authorise in writing any veterinary inspector or other officer of the Ministry to inspect animals (section 3(2)). Section 3(3) gives those authorised wide powers to enter land or premises and ‘apply such tests and take such samples as he considers necessary’. A person who makes a false statement ‘for the purposes of obtaining for himself or any other person any sum payable under section 3’ commits an offence (section 4(1)), as does anyone who interferes with the activities of a person who is authorised pursuant to section 3(2)). Section 6 is headed ‘Eradication areas and attested areas’. On its face, it is concerned with diseases of cattle. Section 6(1) and (2) give the Ministers power to make orders declaring ‘eradication’ and ‘attested’ areas. Section 6(3) gives them power to prohibit or control the movement of cattle in and out of and within such areas.
25. Section 6A obliges the Secretary of State to issue guidance ‘on the appropriate biosecurity measures’ for foot-and-mouth disease and for such other disease as the Secretary of State may by order specify, and makes connected procedural provisions. ‘Biosecurity measures’ are measures taken ‘to prevent the spread of causative agents of disease’. They include ‘any virus, bacterium and any other organism or infectious substance which may cause or transmit disease’. Section 6B(1) prohibits anyone with a function under the Act relating to foot-and-mouth disease or to any disease specified by order under section 6A(1) from exercising that function unless the guidance under

section 6A has been published and not withdrawn. An act contrary to section 6B(1) is ‘done without lawful authority’.

26. The third group of sections is headed ‘Cleansing and disinfection’. Section 7(1) gives the Ministers power to make such orders as they think fit for prescribing and regulating the cleansing and disinfection of places used for animals, and of things used for carrying animals for hire, and for the cleansing and disinfection of the clothes of people who come into contact with ‘diseased or suspected animals’. Section 7(2) gives the Ministers power by orders to prescribe and regulate ‘the cleansing and disinfection of receptacles or vehicles used for the conveyance or exposure to sale of poultry’. Section 8 is headed ‘Movement generally’. It gives the Ministers power to make such orders as they think fit for prescribing and regulating how animals are identified, and for prohibiting and regulating the movement of animals. Those provisions do not expressly apply to poultry, but Ministers may by order prescribe and regulate the separation of diseased poultry from poultry not affected by disease and the notification of disease in, or illness of, poultry (section 15(5)).

## *Part II*

27. Part II is also divided into five groups of sections: ‘Outbreak’, ‘Infection’, ‘Risk to Human Health’, ‘Slaughter’ and ‘Carcases etc. liable to spread disease’.
28. Section 15(1) obliges a person who has in his possession or charge an animal ‘affected with disease’ to keep that animal separate from animals which are not affected, and, as quickly as possible to notify a constable of that fact. Section 15(2) imposes a similar but qualified obligation on a person who has a similar suspicion. The constable must then notify such person or authority as the Ministers may direct (section 15(3)). A person is guilty of an offence if, without lawful authority or excuse (the existence of which he must prove), he fails where required by the Act or by an order of the Minister to give notice of a disease ‘with all practicable speed’. Section 15(5) provides that subsections 15(1)-(4) do not have effect in relation to poultry but that the Ministers may by order prescribe and regulate the notification of disease in, or illness of, poultry. The 2003 (1) Order (see paragraph 18, above) is in part made under section 15(5).
29. Section 16(1) gives the Ministers power to cause three groups of birds to be treated with serum or vaccine or both. If necessary, an inspector may enter any land or premises, using reasonable force for the purposes listed in section 16(2).
30. Section 16A is headed ‘Slaughter of vaccinated animals’. It applies to any animal which has been vaccinated against foot-and-mouth disease or such other disease as the Secretary of State may by order specify. The Secretary of State may ‘cause to be slaughtered’ any animal to which section 16A applies (section 16A(2)). That power extends to ‘taking any action (a) which is required to enable any such animal to be slaughtered and (b) which is otherwise required in connection with the slaughter’ (section 16A(3)). Section 16A(4) obliges the Secretary of State to pay compensation for any animal slaughtered under section 16A, in accordance with section 16A(5) and (6). Subsection (5) provides that where the target of the vaccination is foot-and-mouth disease, if the animal was ‘affected with foot-and-mouth disease the compensation is the value of the animal immediately before it became so affected’. In any other (foot-and-mouth disease) case, the compensation is the value of the animal immediately

before it was slaughtered. When the animal has been treated with a vaccine to stop the spread of a disease specified in an order made by the Secretary of State, the compensation is such amount as may be specified in an order made by the Secretary of State (section 16A(6)).

31. Sections 31-34 are headed 'Slaughter'. Section 31 introduces Schedule 3 to the Act, which 'has effect as to the slaughter of animals in relation to...(e) diseases of poultry'. Section 32A(1), as explained by section 32A(2), gives the Secretary of State power to amend Schedule 3 for the purposes of 'authorising or requiring the slaughter of animals to be caused with a view to preventing the spread of disease other than foot-and-mouth disease' and 'requiring the payment of compensation in respect of animals slaughtered by virtue of' the order.
32. Section 32(1) gives the Minister, if he sees fit, power to 'cause to be slaughtered any animal which – (a) is affected or suspected of being affected with any disease to which this section applies; or (b) has been exposed to the infection of any such disease' . Section 32 applies to 'such diseases of animals as may from time to time be directed by order of the Ministers'. The Minister shall pay for animals 'slaughtered under this section compensation of such amount as may be determined in accordance with scales prescribed by order of the Minister made with the Treasury's approval' (section 32(3)). Section 32 does not apply to poultry (section 32(4)). 'Disease' is not restricted by its definition in the Act (section 32(4)(a)).
33. The Secretary of State is prevented by section 32D(2) from exercising any power to which section 32D applies unless, before he first exercises it, he had published his reasons for exercising the power and for not exercising the power, conferred by section 16, to cause the animals to be treated with serum or vaccine (section 32D(2)). Section 32D applies to a power exercisable by the Secretary of State under any provision of Schedule 3 to the Act as amended by an order under section 32A(1)(a). If the Secretary of State does not comply with section 32D(2) 'anything done in connection with the exercise of the power in such circumstances must be taken to have been done without lawful authority' (section 32D(3)).
34. Section 34 is headed 'Slaughter and compensation generally'. Section 34(1) gives the Minister power 'notwithstanding anything in this Act' to keep for observation and treatment an animal which is liable to be slaughtered under the Act 'at his direction but subject to payment of compensation by him as in case of actual slaughter'. Where an animal has been 'slaughtered under this Act at the Minister's direction, the carcase of the animal shall belong to the Minister'. The carcase may be buried, sold, or otherwise disposed of by him, or as he directs, depending on the condition of the animal or carcase (section 34(2)). If the Minister gets more for the sale of the carcase than the compensation he has paid, he must pay the difference to the owner, after deducting reasonable expenses (section 34(3)). 'Where an animal has been slaughtered under [the Act] at the Minister's direction' he may bury it on the owner's land or elsewhere (section 34(4)). If the owner has insured the animal, the amount of the compensation awarded to him under the Act may be deducted by the insurers from the amount payable under the insurance (section 34(5)). Section 34(6) gives the Minister power, in some circumstances, if he thinks fit, to withhold the compensation which would otherwise be due, wholly, or in part (section 34(6)). Section 34(7)(a) gives the Ministers a wide power to make orders prescribing how the value of 'an animal slaughtered, or liable to



be slaughtered, at their direction' should be calculated. Section 34(7)(c) also refers to 'animals slaughtered at their direction'. 'Disease' in section 34 is not restricted by its definition in the Act (section 34(8)).

35. The Ministers have power by order to provide for the seizure of anything by or by means of which it appears to them any disease to which section 35(1) applies might be carried or transmitted. Section 35(1) does not apply to animals but it does apply to their carcasses. Section 35(1) applies to 'the diseases in the case of which powers of slaughter are exercisable under this Act' (section 35(2)). They are listed in section 35(2) and include '(b) any disease as defined in relation to poultry by or under section 88 below' (see paragraphs 19 and 20, above). Section 36 makes provision for the payment of compensation when powers of seizure are exercised. The value of compensation payable under section 36(1) of (2) for any seized item 'shall be its value at the time of seizure'. See also section 36(4).

#### *Part IV*

36. Section 50(1) defines 'local authorities' for the purposes of the Act. Section 50(5) requires local authorities to 'execute and enforce [the Act] and every order of the Minister so far as they are to be executed and enforced by local authorities'. Every local authority is obliged, by section 52(1), to appoint as many inspectors and other officers as the local authority 'think necessary for the execution and enforcement of' the Act. Section 58 makes provision about regulations of local authorities.

#### *Part V*

37. Part V is headed 'Enforcement, Offences and Proceedings'. Section 60 gives constables wide powers to enforce the Act. A constable has power to stop and detain a person who is seen or found committing, or is reasonably suspected of being engaged in committing, an offence against the Act (section 60(1)). If a person obstructs or impedes or assists in obstructing or impeding a constable or inspector in the execution of the Act, or of a regulation by a local authority, the constable or inspector may without warrant apprehend the offender (section 60(5)).
38. Section 62A(1) gives an inspector a power to enter premises at any time in order to see whether a power conferred by or under the Act 'to cause an animal to be slaughtered' should be exercised, and in order to do anything 'in pursuance of the exercise of that power'. A justice of the peace may, if satisfied that three conditions are met, issue a warrant authorising an inspector to enter any premises, if necessary using reasonable force, for the purposes mentioned in section 62A (section 62B(1)). Section 62D gives an inspector power to enter premises to find out whether disease antibodies are present in animals on the premises, whether any animal there or which was there at any time is or was at that time infected with disease and whether any 'causative agent of disease is present on the premises'. 'Causative agent' is defined in section 62D(4). For that purpose, '[D]isease' is 'foot-and-mouth disease and any other such disease as the Secretary of State may by order specify' (section 62D(2)). The exercise of this power may also be supported by the issue of a warrant (section 62E).
39. Section 63(1) confers on inspectors, for the purposes of the Act, but with two exceptions, all the powers of a constable. Section 63(2) confers wide powers to enter premises if the inspector has reasonable grounds for supposing that disease exists, or

has existed within 56 days, or that there is to be found any thing ‘in respect of which any person has on any occasion failed to comply with the provisions of’ the Act or ‘of a regulation of the local authority’, or that the Act or a regulation of a local authority has not been or is not being complied with. A certificate of a veterinary inspector to the effect that a bird is or was affected with a disease specified in the certificate shall ‘for the purposes of’ the Act ‘be conclusive evidence in all courts of justice of the matter certified’ (section 63(7)). ‘Disease’ in section 63(7) is not restricted by its definition in the Act (section 63(7A)). An inspector of the Minister has all the powers of an inspector (section 63(8)).

40. By section 66, a person is guilty of an offence if, without lawful authority or excuse (which are for him to prove), he refuses to ‘an inspector or other officer, or other officer, acting in execution’ of the Act, or of a regulation of a local authority, admission to any land or other place which the inspector or officer is entitled to enter or examine, or obstructs or impedes him. A person is guilty of an offence against the Act if, without lawful authority or excuse (which are for him to prove), he ‘does anything in contravention of’ the Act, ‘or of an order of the Minister...or of a regulation of a local authority’ (section 73(1)).
41. Section 79 is headed ‘Evidence and procedure’. Where the owner or person in charge of an animal is charged with an offence against the Act, ‘relative to disease to or illness of the animal’, section 79(2) creates a rebuttable presumption that he knew of the illness or disease. It is for him to satisfy the court that he did not know of the disease or illness, and that he ‘could not with reasonable diligence have obtained that knowledge’. ‘Disease’ is not restricted by the definition in the Act (section 79(2A)).

*Schedule 3 to the Act*

42. Schedule 3 to the Act is headed ‘Power to slaughter in relation to certain diseases’. There are six paragraphs in Schedule 3.
43. Paragraph 1 is headed ‘Cattle plague’. Paragraph 1(1) imposes a duty on the Minister to ‘cause to be slaughtered’ all animals affected with cattle plague. Paragraph 1(2) gives the Minister power ‘if he thinks fit’ to ‘cause an animal to be slaughtered’ if it is ‘suspected’ of being so affected, or (in short), if it is in a place which is infected with cattle plague. Paragraph 1(4) imposes a duty on the Minister to pay compensation ‘for animals slaughtered under this paragraph’. Where the animal slaughtered was ‘affected with cattle plague’ the compensation is to be one half of its value ‘immediately before it became so affected’, but the compensation must not exceed £20. In ‘every other case’ the compensation shall be ‘the value of the animal immediately before it was slaughtered’ (but not more than £40).
44. Paragraph 2 is headed ‘Pleuro-pneumonia’. Its structure and content, with immaterial differences, are similar to those of paragraph 1. Paragraph 2(3) is the equivalent of paragraph 1(4). Paragraph 3 gives the Minister a power to ‘cause to be slaughtered’ animals affected, or suspected of being affected, with foot-and-mouth disease, and any animals which (in short) might have been in contact with such animals. Paragraph 3(2) is relevantly similar to paragraphs 1(4) and 2(3). Paragraph 4 is headed ‘Swine-fever’. It is relevantly similar to the paragraph 2. Paragraph 4(2) is the equivalent of paragraphs 1(4), 2(3) and 3(2).

45. Paragraph 5 is headed ‘Diseases of poultry’. Paragraph 5(1) gives the Minister power, ‘if he thinks fit to cause to be slaughtered’ three classes of poultry. Those are ‘any diseased or suspected poultry’, any poultry which have been near diseased poultry or have been exposed to infection, and any poultry the Secretary of State thinks should be slaughtered ‘with a view to preventing the spread of avian influenza ...’ The Secretary of State may exercise the third power in relation to poultry whether or not they satisfy the criteria in sub-paragraphs (a) to (d) of paragraph 5(1A). Paragraph 5(2) obliges the Minister to pay compensation ‘for poultry, other than diseased poultry slaughtered under this paragraph...which shall be the value of the bird immediately before it was slaughtered’. Paragraph 5(3) gives the Minister power by order to 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...’ The Judge recorded (paragraph 41) that the Secretary of State has not prescribed such a rate.
46. Paragraph 2A has no heading. It appears that it may no longer be in force. When in force, it gave effect to Directive 2003/85/EC on Community measures for the control of foot-and-mouth disease, and applied to any premises which were declared to be infected premises. Paragraph 2A(1) required the relevant authority to ‘cause to be slaughtered all susceptible animals kept on the premises’, subject to sub-paragraphs (3) and (5). Paragraph 2A(10) impose[d] a duty on the relevant authority to pay compensation for ‘animals slaughtered under this paragraph’. Where the animal slaughtered was affected with foot-and-mouth disease, the compensation was ‘the value of the animal immediately before it became so affected’. In every other case, the compensation was ‘the value of the animal immediately before it was slaughtered’.

*The relevant orders made under the Act*

47. There were four orders in the bundle of authorities. I have already referred to some of their provisions. The oldest is the Diseases of Animals (Ascertainment of Compensation) Order 1959 SI No 1335 (‘the 1959 Order’). It was made under various powers conferred by the Diseases of Animals Act 1950, and seems still to be in force. Two orders were made under the Act in 2003. The first is the 2003 (1) Order (see paragraph 18, above), made under sections 1, 7, 8(1), 15(5), 17(1), 23, 25, 28, 35(1), 83(2), 87(5)(a) and 88(4) of the Act. The second is the 2003 (2) Order (see paragraph 20, above), made under sections 16A, 32A and 62D(2) of the Act. The third is the Avian Influenza and Influenza of Avian Origin in Mammals (England) Order 2006 SI No 1197 (‘the 2006 (1) Order’), made under sections 1, 7(1), 8(1), 11, 13, 15(5), 17(1), 23, 25, 28, 32(2), 35(1), 35(3), 38(1), 65A(3), 83(2), 87(2) and (5)(a), and 88(4) of the Act. The 2006(1) Order was revoked by article 86(2) of the 2006 (2) Order (see paragraph 10, above). The 2006 (1) Order is not relevant to this case.

*The 1959 Order*

48. Article 3 of the 1959 Order prescribes the process which applies when ‘it is necessary, in England and Wales, that the value of an animal or bird slaughtered or liable to be slaughtered should be ascertained for the purpose of settling compensation’. As soon as practicable, the Secretary of State must give the owner a statement of the amount of the valuation of the bird. The owner then has 14 days within which to serve a counter-notice challenging that valuation. If he does not do so, the compensation payable will be based

on that valuation. If he does so, the dispute is referred to arbitration. The details of that process do not matter.

*The 2003 (1) Order*

49. The 2003 (1) Order confers extensive powers to impose restrictions if a ‘designated disease’ (originally defined in article 3(1) as including ‘avian influenza’) is suspected or confirmed. The 2003 (1) order was amended by article 88(1) of the 2006 (1) Order. By that amendment, it does not apply to avian influenza (article 1(3)). Article 2(1) of the 2003 (1) Order extends the definition of ‘poultry’ in section 87(4) of the Act to include all birds. Article 2(2) extends the definition of disease in section 88(3) of the Act to include all diseases of birds.

*The 2003(2) Order*

50. Article 2 of the 2003 (2) Order specifies avian influenza and Newcastle Disease as diseases to which section 16A of the Act applies. Article 3 includes avian influenza and Newcastle Disease in the definition of ‘disease’ in section 62D(2) of the Act. Article 4 amends various provisions of the Act.

*The 2006 (2) Order*

51. The Explanatory Note to the 2006 (2) Order (‘the Note’) says that the 2006 (2) Order replaces the 2006 (1) Order, and that it continues to transpose the relevant European Directive and other EU legislation. It corrects various mistakes in the 2006 (1) Order. The main substantive changes are identified in paragraph 4 of the Note. The 2006 (2) Order distinguishes between what I have called ‘HPAI’ and ‘LPAI’ (see paragraph 5, above).
52. Part 1 of the 2006 (2) Order, the Note explains, provides for preventive measures to reduce the risk of the transmission of avian influenza and provides for surveillance of the disease. Part 3 and Schedule 1 describe measures to deal with any suspected outbreak of avian influenza at premises other than slaughterhouses and border inspection posts. Part 4 and Schedule 2 provide for measures when avian influenza A is confirmed in such premises. Part 4 also provides for the declaration of protection zones, surveillance zones and restricted zones around infected premises. Measures to be taken in protection and surveillance zones are in Schedules 4 and 5.
53. Part 5 provides for measures when avian influenza A is confirmed at slaughterhouses, border inspection posts and in vehicles. Part 6 and Schedule 6 provide for measures when LPAI is confirmed at premises other than slaughterhouses and border inspection posts. They include the declaration of LPAI zones. The measures for such zones are in Schedule 7. Part 7 contains measures to reduce the risk of the spread of avian influenza to mammals. Part 8 provides for general measures which apply when avian influenza is suspected or confirmed. Measures for inspection and enforcement are in Part 9. Failure to comply with the 2006 (2) Order is an offence under section 73 of the Act.
54. The 2006 (2) Order consists of 86 articles and ten Schedules. It is over 100 pages long. It makes very detailed provision for a range of circumstances and premises. There are at least three significant themes: the reduction of the risk of the spread of avian influenza (see Part 2) and the containment of avian influenza once it is suspected, and

once it has been detected. As soon as avian influenza is suspected, article 9 obliges anyone who has or has charge of a bird or carcass which has, or which he suspects, has avian influenza, immediately to notify the Secretary of State and to take all reasonable steps to ensure that the measures in Schedule 1 are complied with. Those measures also apply if an inspector suspects that avian influenza exists or has recently existed on premises (see article 10 and subject to article 11). Samples may then be taken (article 12). Article 13, which is headed ‘Measures to minimise the risk of the spread of avian influenza from suspect premises’ provides that the Secretary of State must, if he considers such measures necessary to minimise the spread of avian influenza from suspect premises declare a temporary movement restriction zone, serve a notice on the owner or occupier of premises requiring him to comply with the measures in Schedule 2 and/or declare a temporary control zone. There are seven gradations of control zone (see article 5).

55. If the Chief Veterinary Officer confirms that HPAI or LPAI virus exists on any premises, he must, by notice, impose on the occupier of the premises the restrictions in Schedule 2 as well as the restrictions in Schedule 1 (article 19). Article 20 obliges the Secretary of State to ensure that ‘poultry and other captive birds to be killed on infected premises under paragraph 5 of Schedule 3 to the Act are killed there without delay’. The birds may be moved and killed off the premises in some circumstances (article 21). Meat and eggs from infected premises must be traced (article 23) and when traced, disposed of (article 24).
56. The measures in Schedule 1 include a duty to keep detailed daily records of poultry, the housing or isolation of birds, a prohibition on the movement of poultry without a licence, a prohibition on the movement of other things which might transmit avian influenza, a prohibition on the movement of people, animals and vehicles to and from the premises unless licensed, restrictions on the movement of eggs without a licence, and measures for disinfection.
57. The measures in Schedule 2 include a duty imposed on the occupier to give all reasonable assistance to any person exercising a duty in relation to the killing of birds pursuant to paragraph 5 of Schedule 3 to the Act, taking steps to minimise the spread of avian influenza to wild birds, a duty to ensure that all carcasses and eggs not disposed of by a veterinary inspector are disposed of under his instructions, a duty to help a veterinary inspector to trace any thing liable to spread avian influenza to or from the premises, duties to cleanse and disinfect premises in accordance with Schedule 3 and a restriction on re-stocking premises.

*The Respondents’ approach to the interpretation of paragraph 5(2)*  
*Attorney General v Horner*

58. The Respondents and the Judge relied greatly on the decision of this court in *Attorney General v Horner* (1884) 14 QBD 245. There was a dispute in that case between those who claimed a right to hold a market three times a week in or near Spital Square and the local authority, which wished to restrain the scope of the market, relying on ‘certain Paving Acts’. This court held that the market was ‘without metes or bounds’ and could therefore extend, from time to time, over any of the surrounding streets which were to be presumed to have been dedicated to the public subject to the exercise of the market franchise, despite the Paving Acts, which were not to be construed as interfering with

the market franchise. Stephen J had found for the local authority and granted a permanent injunction restraining the use of the surrounding streets for purposes related to the market. The appellants appealed to this court.

59. Brett MR, Cotton LJ and Lindley LJ each gave a judgment. They agreed in the result, but did not reach it by the same route. All three relied, in different ways, on the decision of this court and of the House of Lords in *Goldsmid v Great Eastern Ry Co* 25 Ch D 511; 9 App Case 927, a case which raised similar issues about the relationship between the Paving Acts and a market franchise.
60. Brett MR identified the main issue as whether the appellant had the franchise of the market which authorised what he had done. Brett MR decided that issue in the appellant's favour. He then considered the impact of the Paving Acts. The local authority argued that their inevitable effect was to appoint commissioners, and to vest the freehold of the streets in them, and to give them power to prevent obstructions, including those caused by the market. He was nearly certain, as regards what the parties referred to as 'the inner streets', that when their owners (who were not the holder of the franchise) dedicated them to the public, they took into account 'the fact of the market and dedicated the streets subject to the market rights over them'.
61. If the streets, in particular, the inner streets, were dedicated subject to the franchise, 'unless Parliament has interfered with and taken away from a man what was granted him by the Crown, these streets would remain subject to the franchise'. The local authority argued that that was the effect of the Paving Acts. If that was their effect, they had done so without compensation. Brett MR considered that '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 Act of Parliament, then one is bound so to construe them, but if one can give a reasonable construction to the words without producing such an effect, to my mind one ought to do so.' He then considered whether such a construction was available. There was plenty on which the Paving Acts could bite without 'doing anything injurious to anybody and consequently it seems to me that the true way of construing them is to say that they do not interfere with the rights granted by this franchise'. The same point had been decided in *Goldsmid*. The courts had found that the Paving Acts had no effect on the franchise in that case.
62. Cotton LJ based his decision largely on the true construction of the grant of the market rights. He dealt briefly with the question whether the Paving Acts interfered with those rights. His view was that they were not intended to make illegal anything which was legal when they were passed. They were passed to enable the local authority to deal with some acts which, but for the market franchise, would be a nuisance, and therefore only enabled the local authority to interfere with such nuisances on non-market days (p 262).
63. Lindley LJ agreed with the outcome. There was little for him to add. There were two issues: the extent of the franchise, and the effect of the Paving Acts on those rights. The words of the Paving Acts were 'certainly very startling, for if only [they] are looked at, the whole of the market-place, including the open spaces and streets, would be vested in the commissioners, with a right to put down this market. I need hardly say that that

is a conclusion that nobody would arrive at unless driven to it'. In *Goldsmid* this court had decided 'and was not dissented from by the House of Lords, but rather the contrary, that the true construction of these Paving Acts is that they must be interpreted so as to be consistent with the existence of the market rights, whatever those market rights are'. There was no difficulty in that because the markets were only on two days, leaving the commissioners to keep the streets free of obstructions on the other days (and on market days outside market hours). The commissioners could only exercise their rights 'in subordination to the market rights' (whatever their true extent).

*Westminster Bank Limited v Beverley Borough Council*

64. The Judge also referred to *Westminster Bank Limited v Beverley Borough Council* [1971] AC 508. Lord Reid, with whose speech two other members of the Appellate Committee agreed, dismissed an appeal from this court, which had allowed an appeal from an order of Donaldson J (as he then was), quashing a decision of the Minister to dismiss the Bank's appeal from a refusal by a local authority in its capacity as local planning authority ('the LPA') of the Bank's application for planning permission to develop its land. The LPA refused the application on the grounds that the proposed development might interfere with the possible widening of a road next to the Bank's land. The local authority in its capacity as highways authority had not prescribed an improvement line or a building line under section 72 or 73 of the Highways Act 1959. Had it done so, the Bank would have been entitled to compensation for injurious affection of its land. The county development plan did not define the area which might be needed to widen the road, nor designate the land for compulsory purchase.
65. Lord Reid thought that the Minister had gone beyond the findings of the inspector. It could not be said that there was 'no doubt' that the appeal site would eventually be needed for widening the road. But the relevant rules apparently allowed him to make such a finding. The Bank argued that the only way in which a frontager can be prevented from building on his land is if the highway authority acts under section 72, which would give him a right to compensation, and it was ultra vires of the LPA to refuse planning permission on the ground that land was or might be needed to widen a street. Other than in exceptional circumstances, the planning legislation did not provide for the payment of compensation when planning permission is refused.
66. The planning legislation did not refer to section 72. The LPA ought to indicate in the local plan if it proposed that land should be used for widening a road. But the LPA might be a different authority from the highway authority and might consider that the road needed to be widened even if the highway authority refused to prescribe an improvement line. Lord Reid could find no ground for holding that the LPA must defer to the highway authority. There were many indications that the LPA must have 'a free hand'.
67. The Bank's argument was based on the 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' (p359 of *Colonial Sugar Refining Co Limited v Melbourn Harbour Trust Commissioners* [1927] AC 343, per Lord Warrington). Lord Reid accepted that. 'It flows from the fact that Parliament seldom intends to do that and therefore before attributing such an intention to Parliament we should be sure that that was really intended. I would only query the last words of the

quotation. When we are seeking the intention of Parliament that may appear from the express words but it may also appear by irresistible inference from the statute read as a whole. But I would agree that if there is reasonable doubt, the subject should be given the benefit of the doubt'. It was quite clear from the planning legislation that no-one has a right to compensation for the refusal of planning permission. So 'the absence of any right to compensation is no ground for arguing that it is not within the power of [an LPA] to refuse planning permission for this reason' (p529B-G).

*The law which is relevant to A1P1*

*The Human Rights Act 1998*

68. Section 1 of the Human Rights Act 1998 ('the HRA') defines the 'Convention rights' as 'the rights and fundamental freedoms set out' among other things, in articles 1 to 3 of the First Protocol. They are also set out in Schedule 1 to the HRA (section 1(3)). Section 2(1) of the HRA requires a court 'determining a question which has arisen in connection with a Convention right to take into account any...judgment of the European Court of Human Rights' ('the ECtHR'). Section 3(1) provides that 'In so 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'. If a court decides that a provision of primary legislation is incompatible with a Convention right, it may make a declaration of incompatibility (section 4(1) and (2)). Section 6(1) makes it unlawful for a public authority to act incompatibly with a Convention right, but it does not apply to an act if 'as a result of one or more provisions of primary legislation, the authority could not have acted differently' (section 6(2)). An act does not include a failure to introduce or propose primary legislation or to make any primary legislation (section 6(6)).

69. A1P1 is in Part II of Schedule 1 to the HRA. It provides:

'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.'

*Chagnon et Fournier v France*

70. *Chagnon et Fournier v France* (414174/06 and 44190/06) (15/10/2010) is a decision of the fifth section of the ECtHR. The judgment is not available in English. The parties provided us with a somewhat erratic machine translation of the French version of the judgment.

71. The applicants' sheep had been slaughtered as part of a plan to control foot-and-mouth disease. They complained that the slaughter was unlawful and that that illegality and the lack of sufficient compensation amounted to a breach of their A1P1 rights. They brought proceedings against the French authorities. The authorities paid the applicants



some compensation before and during the proceedings. The applicants' domestic challenge succeeded at first instance, but was dismissed on appeal.

72. The ECtHR dismissed the French Government's objection that the applicants had not exhausted their domestic remedies. It noted that the parties agreed that the impugned measures were an interference with the applicants' property. They did not agree, however, whether that interference amounted to a deprivation of property or to a control of its use. In paragraph 36 of its judgment, having referred to four earlier decisions, the ECtHR announced that, in the present case, the preventive slaughter of sheep, the aim of which was to prevent the spread of a disease on a national territory was a control of use. The rule in the second part of A1P1 had nevertheless to be read in the light of the general principle, expressed in the first part of A1P1, that rights of property should be respected.
73. The parties did not agree whether the measures were lawful or whether their effect on the applicants was disproportionate. The ECtHR considered, first (paragraphs 44-49) whether the measures were 'provided for by law' within the meaning of A1P1, and concluded that they were. Any interference had to pursue a legitimate aim in the general interest. It was not in dispute that there was such an aim in this case (paragraph 50).
74. In paragraphs 56-59 the ECtHR considered whether or not the measures had struck a fair balance between the general interest and the applicants' rights to their property. The French Government argued that although the measures did not provide for a full indemnity, they were proportionate in the circumstances. In the case of an epidemic like foot-and-mouth disease, the slaughter of animals which were suspected of being infected should not be analysed as a deprivation of property for which the farmers should be indemnified. The measures were a response to an interest which was greater than the farmers' property rights, which could, following the case law of the court, reduce or even negate rights to property. The Government cited an Austrian case, *Poiss v Austria* 23 April 1987, which concerned the consolidation of land holdings.
75. The ECtHR held that the measures were not disproportionate. They were only aimed at one kind of animal, were only taken for the time which was necessary to fight against the outbreak of disease. Their purpose was to protect public health and domestic food security, fields in which the state has a certain margin of appreciation. The compensation regime which was applied to them was far from arbitrary because it guaranteed equal compensation to all farmers who had suffered losses as a result of the measures for slaughtering their animals. The compensation in one case was 84.5%, and in the other, 72%, of the total losses estimated by the experts appointed by the authorities to assess the applicants' losses. Taking into account those factors and the margin of appreciation, the ECtHR concluded that, in the context of a control of use, the measures were not disproportionate.

*SA Bio d' Ardennes v Belgium*

76. The applicant in *SA Bio d' Ardennes v Belgium* (44457/11) (21 November 2019) was a beef producer. In breach of a Royal Decree, the applicant did not notify the relevant authorities that it had bought from a merchant cattle which came from Portugal and which had had miscarriages. There was a later inspection which uncovered an outbreak of brucellosis. Two orders to slaughter the cattle were issued. New cattle were brought

onto the applicant's farm before the applicant had complied with an order requiring it to take measures to control disease before any further cattle were accommodated on the farm. The new cattle were seized and made the subject of a further order for slaughter. They too were slaughtered, making a total of 253 cattle. The authorities refused to pay any compensation to the applicant because of its breaches of the relevant requirements. The applicant, in turn, blamed the authorities for not telling it about the risks of buying cattle from Portugal and claimed that the regime for slaughtering cattle was an infringement of its property rights.

77. The applicant took proceedings in the domestic courts. The Mons Court of Appeal ordered the authorities to compensate it for the value of 27 of the slaughtered cattle. There was a further appeal. The Court of Cassation remitted one issue (about the slaughter of a further 62 cattle) to the Court of Appeal. The parties then settled the proceedings. The authorities agreed to compensate the applicant for the 62 cattle.
78. The applicant argued that the refusal of the authorities to compensate it for the slaughter of the cattle was an infringement of its A1P1 rights. The ECtHR held that the applicant had exhausted its domestic remedies and held that the application was admissible.
79. The applicant argued that the slaughter of the cattle was a total deprivation of its property. There were no exceptional circumstances which justified this without compensation. The refusal to compensate it because of its breaches of the relevant rules was disproportionate.
80. The Belgian Government, by contrast, argued that the interference was a control of use. The cattle were still the applicant's property and the applicant could realise their (not insignificant) 'slaughter value', as meat from animals with brucellosis is fit for human consumption. The general context was a longstanding fight against brucellosis. The applicant must have known the relevant rules. The refusal of compensation was based on breaches of the rules and was foreseeable. That fight explained the drastic measures taken by the Government. The disease had a long incubation period, which meant that it was vital for producers to co-operate, and to inform the authorities of the slightest suspicion. That context and the applicant's breaches amounted to exceptional circumstances which justified the award of no compensation. If the applicant had behaved properly, it could have been given significant compensation.
81. The cattle were not a 'working tool' within the meaning of the ECtHR's case law. The fact that cattle had been slaughtered did not make it impossible for the applicant to take in new animals once the health measures were lifted.
82. The ECtHR referred, in paragraph 48, to *Chagnon*. The ECtHR had decided in that case that a measure of preventive slaughter of sheep in order to prevent an outbreak of foot-and-mouth disease in a national territory amounted to a control of use. There was no reason to reach a different decision on these facts, since the applicant retained property in the cattle and could sell them for their butchery value. The court must nevertheless bear in mind the general principle of respect for property expressed in A1P1.
83. The absence of compensation was one factor in a decision about whether a fair balance has been struck, but was not enough on its own to violate A1P1. The issues, including

the applicant's attempts to blame its losses on the authorities, had been examined by the domestic courts in accordance with domestic law. Their reasoning was not arbitrary. The ECtHR also took into account the partial compensation received by the applicant. The fact that other legislation reduced but did not extinguish compensation when the applicant had broken the rules did not, in this case, show that a fair balance had not been struck. National authorities have a margin of appreciation in measures to protect public health and food safety when they decide on the sanctions for failing to comply with the rules, in accordance with the risks which the rules guard against and with the characteristics of the disease which the rules were designed to eradicate. Whether or not the cattle were a 'work tool' made no difference on the facts. The applicant could not continue its activities with new cattle when the measures were lifted.

84. Those elements were enough for the ECtHR to conclude, bearing in mind the importance for States of fighting animal diseases, and the relevant margin of appreciation, that the refusal of compensation for the slaughtered cattle was not a special or exorbitant burden for the applicant.

### *The Judgment*

#### *The Judge's analysis*

##### *The construction of paragraph 5(2)*

85. The Judge described the relevant principles of statutory interpretation in paragraphs 42-48. The parties had agreed a list of five principles (paragraph 42). She also recorded their contentions about other relevant principles. She noted that the Respondents also relied on section 3 of the HRA. The issues she listed which are relevant to this appeal were whether, on 'conventional principles of statutory interpretation' the right to compensation accrued at the point of condemnation or at the point of slaughter, and, 'if not, or in any event' whether the Respondents' rights under A1P1 gave rise to that interpretation (paragraph 49).
86. The issue about paragraph 5(2) was whether the right to compensation accrued 'at the point of condemnation', as the Respondents argued, or, as the Secretary of State contended, when they were slaughtered (paragraph 72). The Judge summarised the arguments in paragraphs 73-75.
87. The Respondents argued that paragraph 5(2) means that the Secretary of State had (i) 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 Secretary of State] has "caused [them] to be slaughtered" under paragraph 5(1), and it is when this occurs (ie at the point of condemnation) that the right to compensation accrues; and (iii) the remaining words of the paragraph separately specify the time...for determining the level of compensation payable' (paragraph 73).
88. The Judge described the Respondents' argument in paragraphs 74 and 75. She accepted that two points made by the Secretary of State were right, but commented that neither point was 'so persuasive that the [Respondents'] construction is rendered unreasonable' (paragraph 75).

89. She added (paragraph 76) that ‘looking solely at the ordinary meaning of the words in paragraph 5(2) does not determine its meaning: on this approach, both the parties’ constructions are reasonable (paragraph 76).
90. The Secretary of State’s construction meant that the Respondents’ rights to their poultry were ‘restricted without compensation’. Their rights were restricted as soon as avian influenza was suspected, ‘and even more so at the time of condemnation’. No compensation was paid for birds which were healthy ‘at the time of condemnation, but diseased by the time of slaughter’. That meant that ‘the *Horner* principle’ applied. As, on her analysis, each construction was ‘reasonable’, she could not say that she was ‘obliged’ to interpret paragraph 5(2) as the Secretary of State argued she should, nor could she say that there was ‘no other way’ of construing paragraph 5(2) (paragraph 77).
91. The principles of statutory construction showed that it was ‘appropriate to look at the words’ of paragraph 5(2) ‘in their wider statutory context, to consider the purpose of the statute and the consequences of the competing constructions’. As she would explain in the following paragraphs, ‘the result of these exercises gives me greater confidence that [the Respondents’] construction is the correct one. Alternatively, they have proved that there is reasonable doubt as to ordinary meaning of paragraph 5(2), such that the *Horner* principle as considered in *Westminster Bank Limited* applies, and [the Respondents] should be given the benefit of the doubt on this issue’.
92. In paragraphs 70-83, she accepted the Respondents’ argument that sections 34(1), 34(7), article 3 of the 1959 Order, paragraphs 1(4), 2(3), 2A(10) and 4(2) of Schedule 3, section 34(2) and (3) supported the Respondents’ construction. They showed, in order, that compensation was payable at the point of condemnation, that the right to compensation accrues at a different time to calculation of the level of compensation, and that Parliament intended that ‘the keeper “be made whole” in terms of compensation’.
93. The Judge considered the statutory purpose in paragraphs 84-87. The Secretary of State submitted that the purpose of paragraph 5(2) was to compensate farmers when healthy birds were slaughtered for the public good. She accepted the Secretary of State’s evidence that once avian influenza is in premises, its spread can be limited by biosecurity measures (paragraph 84). That did not prove that ‘it is proper to compensate keepers only for those healthy birds slaughtered rather than those condemned’. By not paying compensation for diseased birds, the Secretary of State to some extent shifted the risk to their keepers, but it was not ‘clear that the statute must be interpreted as shifting the risk to the keepers even further’ which was the consequence of accepting the Secretary of State’s construction (paragraph 85).
94. She referred in paragraph 86 to a further purpose of the compensation scheme, encouraging the early reporting of avian influenza to support the public interest in controlling its spread. The Respondents’ construction was more consistent with that purpose. The earlier keepers reported an outbreak, the more healthy birds would be present for which compensation would be payable. The legal obligation, imposed by article 9 of the 2006 (2) Order, to report suspected cases immediately was consistent with, and did not undermine, the Respondents’ argument. The reporting and compensation obligations ‘are all part of a consistent statutory scheme’ (paragraph 87).

95. In paragraphs 88-91, she considered the consequences of the rival constructions. The Respondents submitted that the Secretary of State's construction provided a perverse incentive to delay slaughtering of birds. That argument was 'sound' as was the argument that such a consequence undermined the obligation imposed by article 20 of the 2006 (2) Order to slaughter birds 'without delay' (paragraph 88).
96. She recorded in paragraph 89 the Secretary of State's argument that it was the Respondents' construction which had absurd or perverse consequences. The decision to slaughter was normally communicated to an owner by telephone, without any assessment of the number of healthy birds. Only the owner, at that stage, could tell how many of the relevant birds were healthy. Allowing the owner to 'mark his own homework' in that way would provide an incentive to underestimate the number of diseased birds, which would be contrary to the statutory purpose. The Judge accepted the Respondents' submissions that such concerns were overstated. She explained why in paragraph 90.
97. The consequences of the Respondents' construction were 'less problematic' than 'the potential incentive to [the Secretary of State] to delay culling. If, on the other hand, both constructions had difficult consequences, then 'the *Horner* principle would again apply to assist' the Respondents (paragraph 91). On 'conventional principles of statutory interpretation, the right to compensation under paragraph 5(2) accrues at the point of condemnation rather than at the point of slaughter' (paragraph 92).

*A1P1*

98. The text of A1P1 is in paragraph 93. The Judge also referred to paragraphs 4, and 78-80 of 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 ECtHR.
99. The parties agreed that the poultry were 'possessions' for the purposes of A1P1, that their slaughter was a 'deprivation' for the purposes of the first paragraph of A1P1 (and thus an interference with the Respondents' rights under A1P1), and that 'condemnation' and slaughter were lawful, and pursued a legitimate aim, that is to say the public interest in reducing the spread of avian influenza. The issues were whether condemnation, as opposed to slaughter, was a deprivation or a control of use, and whether the failure to pay compensation for birds which were healthy when they were condemned was reasonably proportionate to that aim.
100. The Respondents' primary submission was that condemnation was a deprivation, but even if it was a control of use, their secondary submission was that the failure to pay compensation was incompatible with A1P1. Section 3 of the HRA required paragraph 5(2) 'to be read and given effect to compatibly with Convention rights so far as it is possible to do so'. That was another reason to adopt their construction of paragraph 5(2) 'to the effect that the right to compensation accrues at the point of condemnation not slaughter' (paragraph 97). The Secretary of State submitted that condemnation was a control of use (together with other measures). Whether it was a deprivation or a control of use, the Secretary of State's construction of paragraph 5(2) was compatible with the Respondents' Convention rights.

101. The Judge considered the arguments and the authorities in paragraphs 101-108. She concluded that *SA Bio d’Ardennes* and *Chagnon* (see paragraphs 70-84 above) were consistent with each other in classing measures leading to the slaughter of animals as a control of use.
102. She acknowledged the Respondents’ submission that these cases did not create an invariable rule that condemnation to slaughter always amounted to a control of use, ‘to the extent that the Guide recognises at [86] that “similar measures may be qualified differently” by the ECtHR’ (paragraph 105). They also argued that if the cattle in *Bio d’Ardennes* had not still been the applicant’s property, with some value, the ECtHR might not have followed *Chagnon* (paragraph 106).
103. She rejected the submission that she should not follow *Chagnon*. There was no suggestion that the applicants in that case retained their rights in the sheep after their slaughter. Even if they had done, the carcasses would, in any event, have had to be destroyed, so they would have had no value to the applicants. The reasons why the ECtHR found a control of use in *Bio d’Ardennes* were absent in *Chagnon*. In any event, the formal ownership of the animal was not decisive; ‘the court needs to look beyond that issue’ (paragraph 107). The two cases were consistent with each other in classifying measures leading to slaughter as a control of use. They were also consistent with the ECtHR’s general approach to forfeiture and confiscation cases. The regimes in both cases were ‘broadly comparable’ with the scheme in this case. She therefore considered that they applied, and were ‘binding’ (paragraph 108).
104. She considered whether the scheme struck a fair balance in paragraphs 110-118. The Secretary of State has a wide margin of appreciation in its choice of measures and when the court considers whether the consequences of the regime are justified in the general interest to achieve their aim. The court will respect the state’s judgment about the compensation which is due, unless it is manifestly without reasonable foundation (‘MWRP’): *Lithgow v United Kingdom* (1986) 8 EHRR 329 at paragraph 122.
105. She considered some of the decisions of the ECtHR in paragraph 112. Her conclusion (paragraph 113) was that if she had decided that ‘condemnation’ was ‘deprivation’ of property, she would have found that the failure to pay compensation for birds which were healthy ‘at the point of condemnation’ but diseased when they were slaughtered was disproportionate (paragraph 13).
106. The approach to the fair balance is different when there is a control of use. The absence of compensation was a relevant factor but not decisive (paragraph 114). She considered uncertainty in paragraph 115, and delays by the Secretary of State in paragraph 116. The Respondents did provide some evidence of delays; but ‘these were not litigated as actionable breaches of statutory duty’. The scheme provided some protection from delay (the duty imposed by article 20 of the 2006 (2) Order) to slaughter poultry without delay). ‘The progress of the disease is also linked to biosecurity measures adopted by keepers and is not entirely attributable to the state’ (paragraph 116). The availability of compensation for birds which are healthy when slaughtered (at market value) was also relevant (paragraph 117).
107. If, therefore, ‘condemnation’ was a control of use, the approach to compensation was not MWRP, and was not outside the margin of appreciation (paragraph 118).

*The submissions*

108. The Respondents argued (skeleton argument paragraph 23) that paragraph 5(2) of Schedule 3 means that ‘the Secretary of State must pay compensation for birds condemned to be culled, not just healthy birds actually culled’. They added (paragraph 28) that ‘that compensation is paid for healthy birds condemned to be slaughtered (ie caused to be slaughtered) is clear from’ the ordinary meaning of the words, the statutory context, the statutory purpose (to incentivise early reporting) and the perverse result of the contrary interpretation (that the Secretary of State benefits financially from his own delay).
109. The Respondents also argued that the words ‘cause to be slaughtered’ do not have to appear in paragraph 5(2) as they are ‘embedded’ in the phrase ‘under this paragraph’. The phrase ‘immediately before’ means what it says, but only refers to the value of the bird, and not to the time at which the right to compensation accrues. Other provisions have a similar structure.
110. The right to compensation is the corollary of the exercise of the power conferred by paragraph 5(1). The Judge was right to take into account other provisions which refer to a liability to be slaughtered (section 34(1), 34(7)(a)), and article 3 of the 1959 Order. All the provisions ‘speak with one voice’ and show that an animal becomes ‘liable to be slaughtered’ when it is ‘caused to be slaughtered’ (see paragraph 5(1)).
111. The Respondents cited many cases in support of the Judge’s application of what they call ‘the *Horner* principle’. They submit that she only applied it ‘in the alternative’ and, in any event, it ‘carries great weight’. She was therefore right to hold ‘if both interpretations are reasonable, the *Horner* principle applies in favour of the Respondents’.
112. AIP1 requires the Respondents to be compensated for birds which were healthy when they were caused to be slaughtered. The Judge was wrong to hold that the two decisions of the ECtHR state a general rule. She should, instead, have looked carefully at this scheme, and have classified the measures as a deprivation of property. The two decisions are not ‘binding’: see *Manchester City Council v Pinnock* [2011] 2 AC 104 at paragraph 48 per Lord Neuberger. The two decisions are not ‘a clear and constant line of authority’. The facts in *Chagnon* are not clear. The premise of *Bio d’Ardennes* was that the applicant still owned the carcasses. The Respondents accept that as soon as avian influenza is suspected ‘severe restrictions’ are imposed. Those are not a deprivation because they are temporary and will be lifted if avian influenza is not found. Once avian influenza is confirmed, the restrictions become permanent and the owner has no prospect of getting any value from healthy birds which have been condemned. If the restrictions are a control of use, the absence of any compensation for birds which were healthy when they were caused to be slaughtered imposes ‘an individual and excessive burden’ on their owners. The Judge was wrong to hold that the question was whether the measures were MWRF, as this case is not about ‘a controversial measure of social or economic policy, such as the system of social security benefits’.

*Discussion*

*What does paragraph 5(2) of Schedule 3 mean?*

113. The Act is undoubtedly a measure in the general public interest. It represents Parliament's view of the appropriate mechanisms for reducing the risks of diseases in animals and for containing outbreaks of disease. The overall purpose of the Act which is most relevant in this case is to prevent the spread of disease and if possible to eradicate it. The powers to slaughter animals are part of a much bigger picture.
114. The public as a whole, and not just farmers, has an interest in that overall purpose, not least because of the risk of transmission of some diseases between animals and people. The Act is designed to be comprehensive and flexible, because of the wide powers which Ministers have to amend different provisions of the Act in order to respond to new developments and new diseases. A significant feature of the Act is the detailed control of the wide powers to make orders which Parliament has conferred on the Ministers to respond to suspected and confirmed outbreaks of disease. The Act confers powers to make significant and intrusive interferences with the property rights of the owners of animals. For example, birds can be vaccinated compulsorily. The movement of animals can be restricted. The Act also confers significant powers of arrest, entry into property, and seizure. It creates relevant criminal offences.
115. The financial interests of individual farmers are but one factor in a complex network of interests which are not always aligned. Indeed, the interests of farmers are sometimes in conflict, depending on whether their animals are disease-free, are suspected of being diseased, or are diseased, and in the case of those whose animals are free of disease, their proximity to an outbreak. Depending on the nature of the disease, the market value of animals in those three categories may vary, and may, in some cases, be nil. Farmers whose animals are not diseased have a significant financial interest in the rapid and effective containment of any outbreak. In the case of animals which are diseased, the Act does not make a simple binary distinction between compensation and no compensation (which may well reflect those potential variations in value).
116. I accept Sir James Eadie's submission that the primary task of the court in this case is to understand the natural and ordinary meaning of the words in paragraph 5(2) in their context. I also consider that he was right to accept, in argument, that paragraph 5(2) does not provide for the point at which any right to compensation accrues, but rather, stipulates when the Secretary of State must pay compensation, and how its amount is to be calculated. It is unfortunate that the parties appear to have agreed, in front of the Judge, that paragraph 5(2) identifies the point at which the right to compensation accrues. I consider that the Judge erred, although understandably, in approaching the case on that basis.
117. If the correct approach is taken, then, in my view, paragraph 5(2) is not even arguably ambiguous. It could not be clearer in stipulating 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*" (my emphasis). The other provisions of the Act on which the Respondents and the Judge relied, far from supporting their construction of paragraph 5(2), show that it is wrong. That material shows that when Parliament thought it appropriate, Parliament was able to make provision of the type which, the Respondents contend, Parliament made in paragraph 5(2); that it chose to do so in different cases; and also that it chose not to do so in cases like these. Paragraph 5 and other relevant provisions, such as paragraphs 1, 2, 3, 4 and 2A of Schedule 3, and section 16A (see paragraph 30, above) expressly distinguish



between two stages: when an animal (or bird) is ‘caused to be slaughtered’ and when it is actually slaughtered. Elsewhere the Act expressly distinguishes between liability to slaughter and actual slaughter (for example in section 34(1)); but the concept of ‘liability to slaughter’ is not used in paragraph 5(2). The Act also provides, elsewhere, for compensation for the value of an animal before it becomes diseased; but it clearly does not do so in paragraph 5(2). It is impossible, in that situation, to read in ‘cause to be slaughtered’ in paragraph 5(2), as the Respondents’ contend (whether that implication has to be made once, or twice). The Respondents’ argument that their construction creates an incentive to the early reporting of disease is not, therefore, even a straw in the wind. In any event, it might be thought that an immediate statutory duty to report, backed by criminal sanctions, is itself incentive enough.

118. I accept Sir James’s submissions about the wording of paragraph 5(2).
1. The Secretary of State is only obliged to pay compensation for birds which are healthy when they are slaughtered.
  2. The duty to pay compensation only applies to birds which are actually slaughtered, and not to birds which are ‘caused to be slaughtered’. There is no obligation to compensate the owner for a bird which is diseased when it is slaughtered.
  3. When the duty applies, the Secretary of State must pay the value of the bird ‘immediately before it was slaughtered’. The duty to pay compensation and the amount of that compensation are coherent.
  4. The amount of the compensation is the value of ‘*the* bird’; that is, of the bird which has actually been slaughtered. That bird is a bird which was healthy when it was slaughtered, not a notional bird which was healthy when it was ‘caused to be slaughtered’.
119. As paragraph 5(2) is clear, the Respondents’ construction is not reasonably available, and it follows that there is no question of giving the benefit of any doubt about its construction to them. There is, therefore, no issue about the ‘*Horner* principle’ or about any related canon of interpretation. I doubt, in any event, whether that ‘principle’, which has been developed (at least in the cases to which we referred in argument) in relation to rights over land, can necessarily be generalised to this very different context, which (1) concerns property which has a finite lifespan, and is susceptible to fatal and fast-acting diseases and (2) engages a wider and urgent public interest in the general containment and eradication of an outbreak of disease. Only one case we were referred to, *Newcastle Breweries v the King* [1920] 1 KB 854 was about personal property, rather than rights over land. The Admiralty requisitioned 239 puncheons of rum in wartime and claimed that it was not required to pay the owner more than about a third of the market value of the rum. This case did not, however, concern the construction of primary legislation. Salter J simply decided that the secondary legislation on which the Admiralty relied was ultra vires the relevant primary legislation.

#### *A1P1*

120. As I have indicated, the statutory context is relevant to A1P1. The property to which A1P1 applies has a range of different characteristics. A1P1 covers both land and ephemera, tangible and intangible property, and everything in between. *Chagnon* and *Bio d’Ardennes* are the only cases to which we were referred in which the relevant

property was animals. Animals can catch diseases. They can die for a variety of reasons and when they do, their owner may not necessarily be able to realise their market value. As soon as there is an outbreak of a virulent disease, their lives and their value become even more precarious. *Chagnon* and *Bio d’Ardennes* are also the only cases to which we were referred which deal with compensation for the slaughter of animals in the context of measures to contain an outbreak of disease. At the risk of stating the obvious, these features mean that it is unlikely that decisions about the confiscation of land or personal property are of much persuasive value, if any. For that reason, while the Judge might have gone somewhat too far in saying that she was bound by the analysis in these two cases, it is of very significant persuasive value, and she was right to give it great weight. Contrary to the submissions of the Respondents, they are not simply decisions on their own facts, but illustrate a wider principle.

121. The focus of the argument before the Judge was whether ‘condemnation’ was a control of use, or a deprivation of property. I doubt whether the analysis should be limited to the measures described in paragraph 5 of Schedule 3. The necessary context for paragraph 5 is the whole suite of measures which is available to the authorities when there is an outbreak of avian influenza is suspected, and then confirmed. The measures in paragraph 5 of Schedule 3 are the culmination of controls on the use of the birds which start with the moment when an outbreak is suspected and increase once it is confirmed. But even if it is correct to focus on ‘condemnation’ alone, I agree with the Judge that, in this factual and statutory context, that is correctly classified as a control of use, and not a deprivation of property.
122. I also agree with the Judge that the legislative scheme strikes a fair balance between the interests of the owners and the general interest. For the reasons given in paragraphs 113-115, above, the Judge was right to hold that the relevant test is whether the measure is MWRF. I agree with her that the measures are not MWRF. The Judge was therefore right to hold that the Respondents’ rights under AIP1 were not breached in this case. I would therefore dismiss the cross-appeal.

*Conclusion*

123. For those reasons I would allow the appeal of the Secretary of State and dismiss the Respondents’ cross-appeal.

**Lord Justice Nugee**

124. I agree.

**Lord Justice Moylan**

125. I also agree.