



Neutral Citation Number: [2007] EWCA Civ 893
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
(HIS HONOUR JUDGE HICKINBOTTOM)

Case No: C1/2007/1589

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Monday, 23rd July 2007

Before:

LORD JUSTICE PILL
LORD JUSTICE THOMAS
and
LORD JUSTICE LLOYD

Between:

SURAYANDA

Respondent

- and -

THE WELSH MINISTERS

Appellants

(DAR Transcript of
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Official Shorthand Writers to the Court)

Mr Crow QC and Joanne Clements (instructed by Treasury Solicitors) appeared on behalf of the **Appellants**.

Mr M Hoskins and Ms Lester (instructed by Messrs Bindman & Partners) appeared on behalf of the **Respondent**.

Judgment

(As Approved by the Court)

1. This is an appeal against the decision of HHJ Higginbottom sitting as a Deputy High Court Judge on 16 July 2007 at the Cardiff Civil Justice Centre. The judge quashed a decision of the Welsh Assembly Government, Llywodraeth Cynulliad Cymru, sued as the Welsh Ministers ("the appellants") and made by the Minister of Sustainability and Rural Development ("the Minister") to order the slaughter of the bullock, Shambo, owned by the Community of the Many Names of God ("the Community"). The order was confirmed on 3 July 2004 under discretionary powers contained in section 32 of the Animal Health Act 1981 ("the 1981 Act") as applied by Article 4 of the Tuberculosis (Wales) Order 2006. The application to quash was made by Swami Surayanda, known as Brother Michael, as Director of Finance and one of the trustees of the Community.

The background

2. As described by the judge, the Community are a registered charity whose objects include promoting the teachings of Krishna. In 1973 the founder of the Community purchased a farm at Skanda Vale, Llanpumsaint, where a monastic centre was established. Llanpumsaint is located in an agricultural area in the heart of rural west Wales, north of the town of Carmarthen (Caerfyddin). The farm was transferred to the Community in 1976 and an adjoining farm purchased in 1978. Two former farmhouses have been converted into temples, where public worship is held, and a third temple was built in 1999. There are about 30 permanent residents, 25 of whom are monks or nuns. They received over 90,000 pilgrims and visitors last year. 92 acres are owned. Much of the land is in agricultural use but that use is wholly ancillary to the religious use of Skanda Vale. Agriculture is not conducted on a commercial basis.
3. It is stated by the Community and accepted by the appellants that the preservation of life is a fundamental tenet of the Community's beliefs. Slaughter of any animal in the Community's care would be a direct violation of its spiritual values. Shambo is the temple bullock and slaughter would be a particularly sacrilegious act, a serious desecration of the temple, and comparable, in the Community's view, to the killing of a human being. The Community's beliefs in relation to the religious significance of Shambo are, as the judge held, "patently sincere and most deeply held".
4. Bovine tuberculosis ("bTB") has been described in the Government Veterinary Journal for September 2006 as:

"The most difficult animal health programme we face in Great Britain today."

It is described by Dr Christianne Glossop the Chief Veterinary Officer for Wales at paragraph 9 of her statement:

"TB in cattle is a serious, chronic, debilitating disease arising from infection by *Mycobacterium bovis* (*M. bovis*). The periods between infection and

developing clinical disease vary from one individual to another but the development of clinical signs may take years. Some infected individuals do not develop clinical signs of TB. However, infected cattle can shed *M. bovis* at an early stage. This means that the infected animal may release *M. bovis* through aerosol, respiratory secretions (e.g. mucus), faeces, urine, milk and semen. Clinically normal but infected animals may shed *M. bovis*.”

5. The incidence in Great Britain of the disease is one of the highest in the European Union, and there has been an upward trend. In February 2003 the United Kingdom Government announced its intention to review its strategy to deal with the disease, and as a result a “Government strategic framework for the sustainable control of bovine tuberculosis (bTB) in GB” was published in 2005. A map published as figure 5 in the document shows a high concentration of new bTB breakdowns in south west Wales, by comparison not only with other parts of Wales but with Great Britain as a whole. In the September 2006 Veterinary Journal, which was a special bTB edition, it was stated that the problem is severe in those areas where the disease is concentrated, such as south west Wales. That is confirmed by figures given to the court showing the proportion of slaughters performed in Wales and of those the high proportion in south west Wales.

6. The strategy document opens with this introduction:

“Bovine TB is one of the most difficult animal health problems that the farming industry faces in GB today. The scale of the challenge facing both Government and industry in seeking to reverse the long-term upward disease trend is significant. The Government recognises it has a role in leading and facilitating the changes required to make this happen.”

7. The government’s objective is that of controlling with a view to eliminating bTB. The policy by which that objective is to be achieved is, as stated by the judge at paragraph 10 of his judgment, one of surveillance and slaughter. Cattle are routinely tested using the single intradermal comparative cervical tuberculin test (“tuberculin skin test”) approved by the World Organisation of Animal Health and the European Commission as a primary effective tool for the diagnosis of tuberculosis in cattle. The administrations for England, Wales and Scotland have jointly issued a document entitled “Dealing with Bovine TB in your Herd”, last updated in April 2007. That describes, amongst other things, the procedure by which bTB is detected in cattle. Under the heading “How is bTB detected in live cattle?”, it is stated at section 3:

“The cornerstone of TB control in cattle is the accurate detection and removal of animals infected with

M. bovis before they become infectious to other animals. Importantly, infected cattle can become infectious long before they exhibit any obvious clinical signs or lesions typical of TB detectable even with the most careful veterinary examination. Even if present, the clinical signs of TB in cattle are seldom typical. As a result, effective *ante mortem* diagnosis of bovine TB must rely on detecting **infection** with *M. bovis* rather than **disease**. [The words “infection” and “disease” being emphasised].

The two types of test currently approved in the European Union for the diagnosis of TB in live cattle are based on this principle. The intradermal tuberculin (**skin**) tests are the **primary** screening tests, whilst the **gamma-interferon assay** is only approved as an **ancillary** diagnostic tool.

What is a reactor?

A reactor is an animal that has failed a) the comparative intradermal tuberculin skin test (the variant of the tuberculin test used in the British Isles) or b) any other relevant test, including the gamma-interferon blood test ... In other words, these are cattle that give a test result consistent with their being affected with bTB.

[...]

When one or more reactors are found in a herd, this is known as a TB ‘incident’ or a herd ‘breakdown’. Animal Health will aim to remove your reactor animals as quickly as possible to help control the disease and help your herd regain its TB free status.

[...]

What happens when a reactor is found?

Your herd will be placed under movement restrictions and we will value and slaughter the reactors.

[...]

What happens to reactor animals?

You must isolate them immediately from the rest of the herd until they are slaughtered.

[...]

Why complete a post-mortem examination?

By examining the carcass we may be able to quickly confirm whether your animal had bTB and, if so, whether it was in the early or advanced stages of the disease. If we confirm bTB in one or more of your reactors, we will review the tuberculin test results again, lowering the cut-off point for an animal to be declared a reactor. (This is known as 'severe interpretation') and may result in further animals being classed as reactors. The post-mortem findings also help us decide how much more testing is needed in your herd and in neighbouring herds, and whether we should trace any animals you may have bought or sold before the TB restrictions came into force."

8. The policy and the reasons for it were more fully explained in veterinary evidence which was placed before the judge. Dr Glossop stated at paragraph 23 of her statement:

"One of the key principles of infectious disease control is rapid, early identification of infection. This is supported by a policy for eliminating infection from the population (i.e. herd, area, country). In the absence of accepted and efficacious treatment for bovine TB ... elimination of infection is achieved by the slaughter of animals exposed to infection."

Paragraph 99:

"The current 'surveillance and slaughter' policy is in place to eliminate the risk of an infected animal spreading infection to others. In the current state of veterinary knowledge, treatment cannot achieve this objective. Further, as there is no effective treatment, there is a strong likelihood that the reactor would gradually start to exhibit clinical signs of TB, for which there would be no treatment. This is unacceptable practice and totally against the Animal Welfare Act (England and Wales) 2006."

These were Dr Glossop's conclusions:

"102. The Government's 'Surveillance and Slaughter' policy for the control of bovine TB aims to eliminate the risk of spread of infection to other susceptible animals and to humans. Examination of reactor cattle post-mortem provides information vital to decision making on subsequent testing of the remaining cattle in

the herd, as well as the surveillance of neighbouring (contiguous) herds."

103. Any departure from the Surveillance and Slaughter policy increases the risk of disease spread within the TB reactor herd, to other cattle herds, to the local wildlife population as well as to humans. I advised the Minister that the Community's proposals to avoid the slaughter of the affected bullock do not meet the public health objectives set out above, i.e. they would not eliminate (as opposed to minimise) the risk of transmission of TB from this animal, nor would they provide the information necessary for the disease management of this herd or contiguous herds."

"104. It is my professional view that the only way to eliminate the risk of transmission of TB from this animal and to provide the necessary information is that the affected bullock should be removed and slaughtered in accordance with the current disease control policy."

9. There was also evidence before the judge from Dr John Anthony Jewell, the Chief Medical Officer of the Welsh Assembly Government. He was dealing with the risk to human beings:

"21. *M. bovis* in man has been controlled in the UK as a result of pasteurisation of milk and animal health measures such as the slaughter of infected animals, such that new primary infection is now rarely seen. In England and Wales between 1994-2004 there were 371 documented cases of *M. bovis* with 22 isolates in Wales.

22. The 'Surveillance and Slaughter' policy for animal populations has led to the low number of human cases of human TB caused by the bovine strain. The policy is part of the current public health response to *M. bovis* that has allowed the disease to be controlled in man. Primary cases of *human M. bovis* infection are now rare in the UK, despite the increase in number of animals found infected with the disease.

23. Despite these public health preventive measures cases do occur and there was a cluster of bovine TB in humans in the West Midlands [of England] in 2006 which affected 6 people and caused the death of one of the group due to TB meningitis. The investigators found that following transmission from animals there was human to human spread of bovine TB."

10. The Community's veterinary advisor, Mr Taylor, also attributes the decline in human TB from this source to the screening policy followed. Dr Jewell also gave evidence that a generation ago, in the 1930's and 1940's, a significant proportion of human deaths from tuberculosis were from this source.

11. I summarise further parts of Dr Glossop's evidence. Infection is possible from cattle to cattle, from cattle to wildlife and back to cattle, and though, as Dr Jewell says, now happily rare, from cattle to human beings. Airborne transmission is possible. The infecting agent can survive outside the carrier's body for four months. The skin test adopted is the best currently available and, as stated in the policy document, it is specifically approved by the Union. The number of false positives produced is extremely small, put at 1/1000.

12. Dr Glossop deals with the proposition already cited, that treatment and cure is not at present possible. None of the Community's witnesses have successfully treated bovine TB though they say that in theory it should be possible. Any isolation involved in such attempt at treatment would need to be prolonged, raising animal welfare considerations as mentioned by Dr Glossop. Dr Glossop stated at paragraph 89:

"There are a number of significant practicalities that would need to be overcome before such a high level facility [that is, a facility known as a category 3 facility as laid down by the Health and Safety Executive] could be built by the Community and made operational. For example, the building would need to be designed, approved by Government, and would have to obtain planning permission. The time lag involved in such an exercise would mean an unacceptable amount of time before the affected bullock and any further reactors would be properly isolated. All the while, the affected bullock and others would be posing a threat to public and animal health. Further, as a result of the developing picture of disease within the herd, the eventual size of the required building cannot be properly assessed."

A slaughter policy has led to the elimination of bTB in some states of the Union.

13. Attempts to eradicate bTB are in conformity with Council Directive 77/391/EEC of 17 May 1977, which has the heading "Introducing Community measures for the eradication of brucellosis, tuberculosis and leucosis in cattle". Article 1 provides:

"The purpose of this Directive is to improve the state of health of cattle in the Community by means of Community action to accelerate or intensify the eradication of brucellosis and tuberculosis and to eradicate leucosis."

Article 3:

"For the purposes of this Directive, Member States in which the cattle populations are infected with bovine tuberculosis shall draw up plans for accelerating the eradication of this disease in their national territories, under the conditions laid down in paragraphs 2 and 3."

The slaughter of animals is one of the measures contemplated in Article 3.

14. Article 9 of the European Convention on Human Rights ("the Convention") provides:

"1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

The Issue and the Judgment below

15. The underlying issue in this dispute is the clash between the duties of the appellants as an agriculture and health authority and the rights of the members of the Community to practise and manifest their religious beliefs and practices. The Community recognised in its application for judicial review that:

"The protection of public health is a legitimate aim specifically acknowledged in Article 9(2) and both human and animal health are included within the definition."

16. The judge has accepted, in paragraph 101 of his judgment, that "the control or eradication of bTB in south west Wales" would be a "proper public interest objective". The appellants now accept that the proposed slaughter does infringe the Community's Article 9(1) right to manifest religious beliefs. That was not accepted by the appellants in their written submissions to the judge, who found at paragraph 85, correctly in my view, that Article 9 was engaged. He stated at paragraph 85(iv) that the proposed slaughter would be:

“A patent and gross interference with the manifestation of their beliefs by the Community.”

17. The judge cited the speech of Lord Nicholls of Birkenhead in R (Williamson) v the Secretary of State for Education and Employment [2002] AC 246 at paragraph 32:

“Thus, in deciding whether the claimants' conduct constitutes manifesting a belief in practice for the purposes of article 9 one must first identify the nature and scope of the belief. If, as here, the belief takes the form of a perceived obligation to act in a specific way, then, in principle, doing that act pursuant to that belief is itself a manifestation of that belief in practice. In such cases the act is 'intimately linked' to the belief, in the Strasbourg phraseology: see *Application 10295/82 v United Kingdom* (1983) 6 EHRR 558.”

18. I have no difficulty in concluding that the Community's opposition to the slaughter of Shambo is a manifestation of the religious beliefs of the members of the Community. It being acknowledged that the appellants have the power to slaughter, the issues were whether the appellants were pursuing a legitimate objective in ordering the slaughter and, if so, whether the decision to slaughter was proportionate in Article 9 terms. The judge found against the appellants on the first issue. He stated at paragraph 99:

“The elimination of any risk of a particular animal transmitting bTB may be appropriate in the pursuit of some wider public health objective (e.g. the elimination or control of bTB in a particular area), but it cannot be a public health objective in itself. Similarly, an unwavering requirement that positive reactors are slaughtered to ascertain whether they show clinical signs of disease, which might inform disease management of other animals in the same herd (but not animals in a wider scope) cannot be a public health objective. In public health terms, they may be a means but they cannot be ends.”

That proposition is repeated in paragraph 101:

“There is no proper identified public interest to balance against the individual rights of (in this case) the Community.”

At paragraph 103:

“Although the eradication or control of bTB may be worthwhile objectives for the Government, on the

evidence before me I certainly cannot assume that either is their objective or that, latently, either was an underlying objective when they came to consider the relevant decisions in this case.

(i) There is no compelling evidence that the Government has as an objective the elimination of bTB ...”

19. I acknowledge the danger, which the judge had in mind, that an objective may be framed so narrowly that the objective becomes coincident with the results sought, but, with respect, I am quite unable to accept the judge's reasoning on this issue. There was substantial evidence, both in the material published by the Government, in the evidence of witnesses already cited, and in the correspondence in relation to the case, to which I will refer, that the appellants had a public health objective, the eradication or at least the control of bTB, when adopting the policy of supervise and slaughter. For the Community, Mr Hoskins has not in his oral submissions attempted to justify the conclusion of the judge on this issue, and rightly so, in my view. The decision complained of was plainly taken in pursuance of a public health objective.

20. The judge went on to find that in the absence of a stated public health objective no proper balancing exercise under Article 9 was conducted or could be conducted. He stated at paragraph 103(vi):

“... there is a complete absence of evidence that the balancing exercise required by Article 9(2) was done.”

He stated at paragraph 90(i) that the appellants:

“... failed properly to approach the balancing exercise required by Article 9(2)”.

The judge stated at paragraph 105:

“That is sufficient to dispose of this case ...”

I reject the conclusion that a balancing exercise was not performed by the appellants and will refer to what was said in the correspondence.

21. While Mr Hoskins, for the Community, relies on points made in passing by the judge on the balancing exercise -- and indeed he may be putting a similar point but in a different way -- he does not attempt to justify that central conclusion of the judge. Mr Hoskins' case -- the fact that he has not submitted a respondent's notice is entirely understandable in view of the speed with which this court was able to hear the appeal -- is that the court should itself perform the balancing exercise required by section 9 on the basis of the

considerable evidence available, and have regard to the principle of proportionality in doing so. Failing that, it is submitted that a wrong test was applied, as will appear from a summary of Mr Hoskins' submissions, and the court should remit the case to the appellants so that they may conduct the necessary balancing exercise on the correct basis.

22. Having reached the conclusions he did, the judge did not perform his own balancing exercise. However, while noting that he made his comments cautiously, he stated, at paragraph 105:

"I would have had grave doubts as to whether the Government would have satisfied me on the evidence that it was proportional to require the slaughter ..."

23. The judge considered the evidence before him as to the extent of the risk presented by Shambo. The judge referred to a concession he believed had been made by Mr Lewis QC, then acting for the appellants, that the level of the risk has:

"... simply not been considered by the Government, because of their stance that any risk of an individual animal transmitting the infection must be eliminated by slaughter".

24. Mr Crow QC, who now appears for the appellants, contends that the concession went only to the quantum of risk, the amount of risk involved, not having been assessed; but it has to be said that the concession as understood by the judge is consistent with the evidence of Dr Glossop, at paragraph 81, that the proposals made by the Community as to how the bullock might be isolated:

"... would not eliminate (as opposed to minimise) the risk ... of infection to animals and humans".

25. The difference on that point is not, in the event, material because Mr Crow's case is to seek to justify, for the purposes of the Article 9 balancing exercise, a policy of elimination of risk, and hence a decision to slaughter unless risk is absent.

26. The judge referred at paragraph 105(iv) to evidence relied on by Mr Hoskins:

"However, the risk to humans is particularly small, and bTB in humans is easily treated with anti-biotics if caught early enough (see Paragraphs 35-6 above). The risk to other animals can be minimised, e.g. by isolating

the bullock, using badger-proof fencing etc. Mr Taylor is 'certain that Shambo can be prevented from becoming a threat to humans or animals' by employing testing, isolation and treatment measures ... Mr Webb [a veterinary surgeon] considers that the risk can be rendered 'negligible' ... Miss Ruth Watkins (a veterinary virologist who gave written evidence for the Community) said that, if properly managed, 'there will be almost zero risk of infection.' ... At the moment, no other animal in the herd has tested positive on the standard interpretation. As I have indicated, none of these means has been properly evaluated by the Government and its expert advisors, because they would not eliminate the risk of transmission and would not give data on the progress of the disease within the bullock that might inform the disease management of the rest of the herd."

In its present form, the evidence of the Community's witnesses was not before the Minister, but the extent of the dialogue which occurred was such that the substance of it almost certainly was.

27. The judge added at paragraph 106 that the appellants could

"... reconsider the public health objectives that underlie behind the surveillance and slaughter policy, and come to a view as to whether, in the reasonable pursuit of those objectives, the slaughter of this animal (or some less intrusive measure) would be proportional given the serious infringement of the Community's rights under Article 9 that slaughter would involve".

The authorities

28. I have thought it appropriate to set out the issues, as they now are, before describing the sequence of events. As to the law, Mr Crow has referred to the decision of the European Commission on Human Rights in X v The Netherlands (1068/61, 14 December 1962), where an application under Article 9 was declared inadmissible as manifestly ill-founded. Under section 4 of a 1952 statute, the applicant in that case was required to sign an application for membership of the Health Service as a requirement for owning cattle. He claimed that his religious conscience as a member of the Dutch Reform Church was offended by this legal obligation.

29. In reaching its conclusion that the application was ill-founded, the Commission stated at page 284 of the report:

“Whereas the 1952 Act was considered by the Netherlands Parliament to be necessary to prevent tuberculosis among cattle;

Whereas it appears to the Commission that the term ‘protection of health’ used in paragraph (2) of Article 9 may reasonably be extended to cover such schemes set up for the prevention of disease amongst cattle;

Whereas the Commission has no hesitation in holding that it is in the interest of the Community and necessary in a modern society that adequate measures are taken to that effect, including compulsory membership of the health service concerned, are taken by a government;”

30. In Tsedek v France [2000] EHRR 351, the Grand Chamber of the European Court of Human Rights stated that the issue of protection of public health was not engaged, but held *obiter*, at paragraph 84, that it was, in Article 9 terms, a legitimate aim. The measures contemplated in that case were assessed to decide whether they were “excessive or disproportionate”. That approach of the Court to the issues confirms the appropriateness of the way both parties have argued this appeal. The Court also confirmed, at paragraph 84, its regard for:

“... the margin of appreciation left to contracting states”.

That covers decisions taken by their institutions.

31. The approach to be taken by a court in England and Wales to evidence, in circumstances such as the present, has recently been considered in the House of Lords in R (SB) v Governors of Denbigh High School [2007] 1 AC 100, an Article 9 case. It concerned what might be worn in school. Lord Bingham of Cornhill stated at paragraph 30:

“Secondly, it is clear that the court's approach to an issue of proportionality under the Convention must go beyond that traditionally adopted to judicial review in a domestic setting.” The inadequacy of that approach was exposed in Smith and Grady v United Kingdom (1999) 29 EHRR 493, para 138, and the new approach required under the 1998 Act was described by Lord Steyn in R (Daly) v SSHD [2001] 2 AC 532, paras 25-28, in terms which have never to my knowledge been questioned. There is no shift to a merits review, but the intensity of the review is greater than was previously appropriate, and greater even than the heightened scrutiny test adopted by the Court of Appeal in R v the Ministry of Defence, ex

parte Smith [1996] QB 517, 544. The domestic court must now make a value judgment, an evaluation, by reference to the circumstances prevailing at the relevant time: Wilson v First County Trust Limited (No 2) [2004] 1 AC 816, paras 62-67. Proportionality must be judged objectively, by the court: R (Williamson) v Secretary of State for Education and Employment [2005] 2 AC 246, para 51.”

32. At paragraph 34, having considered the evidence before the decision maker and the court, Lord Bingham stated:

“It would in my opinion be irresponsible of any court, lacking the experience, background and detailed knowledge of the head teacher, staff and governors, to overrule their judgment on a matter as sensitive as this. The power of decision has been given to them for the compelling reason that they are best placed to exercise it, and I see no reason to disturb their decision.”

Lord Hoffman stated, at paragraph 68:

“... article 9 is concerned with substance, not procedure. It confers no right to have a decision made in any particular way. What matters is the result: was the right to manifest a religious belief restricted in a way which is not justified under article 9(2)? The fact that the decision-maker is allowed an area of judgment in imposing requirements which may have the effect of restricting the right does not entitle a court to say that a justifiable and proportionate restriction should be struck down because the decision-maker did not approach the question in the structured way in which a judge might have done. Head teachers and governors cannot be expected to make such decisions with textbooks on human rights law at their elbows. The most that can be said is that the way in which the school approached the problem may help to persuade a judge that its answer fell within the area of judgment accorded to it by the law.”

33. I approach the case on the basis that the court needs to make an evaluation but, as both Lord Bingham and Lord Hoffman recognised, the court should have regard to the expertise of the decision maker -- as Lord Bingham put it -- or permit the decision maker an area of judgment -- as Lord Hoffman put it.

The Sequence of Events

34. Shambo had been subject to an inconclusive bTB test in December 2004, the rest of the animals in the herd testing negative. The Community promptly made representations similar to those made in 2007. On 26 April 2005 the bullock tested negative and no further action was taken. The restriction order which had been imposed was removed. On 19 February 2007 Shambo was identified as an inconclusive reactor. The animal was re-tested in accordance with normal policy on 27 April 2007, and tested positive as having been exposed to *M. bovis*; that is, TB infection.

35. We are told that two other animals in the Community's herd could be classified as reactors on a severe classification as described in the document already cited at paragraph 8. Those animals had never come into contact with Shambo, so it is not clear where the origin of the infection was. It is submitted by the appellants that the isolation of Shambo will not necessarily solve the problem which has emerged. Slaughter is necessary, it is submitted, to develop an informed management policy for the Community's groups into which their cattle are separated, and we are told that there are four contiguous herds in neighbouring farms, which must also be borne in mind.

36. Considerable correspondence followed the positive test on 27 April 2007. In writing to the Community's own veterinary adviser, it is clear that Brother Michael, the writer, understood and appreciated DEFRA's position (that is the responsible authority in England) with regard to public health and the spread of bTB with a view to eliminate it from the national herd. Measures were proposed to protect both animal and public health. A very detailed letter based on veterinary advice received by the Community was sent by solicitors acting for them to the appellants on 3 April 2007 and in many subsequent letters. By letter of 4 May 2007 the appellants identified the policy to which reference has already been made. Paragraph 6:

"Bovine TB is an infectious zoonotic disease i.e. it can be passed from animals to humans. The policy in relation to TB reactors, which is common to Wales and England, is set out in the 'Government strategic framework for the sustainable control of bovine Tuberculosis (2005). UK and European Union policy is to seek the eradication of Bovine TB."

37. In a long letter of 23 May the solicitors for the Community set out detailed proposals for the introduction of a regime of care to minimise the risks presented by the positive finding. On 20 June 2007 a meeting was held between representatives of the parties, including their veterinary advisers. On 25 June the appellants wrote to the solicitors, stating, at paragraph 9:

"However, if the slaughter of the affected animal, and the making of arrangements for the slaughter of the affected animal, and requiring the Community to hand over the affected animal for that purpose constitutes an infringement within Article 9(1), those arrangements

would have to be assessed in light of Article 9(2) ECHR. Any such limitation on the exercise of rights guaranteed by Article 9(1) may only be permitted under Article 9(2) if it is prescribed by law and necessary for one of the aims listed above. The Welsh Assembly Government have proceeded on the basis that a course of action involving the slaughter of the bullock should only take place if that satisfied the requirements of Article 9(2) ECHR."

At paragraph 11:

"In order to address the public and animal health threats posed by TB, the Welsh Assembly Government in common with other GB administrations as part of the Government strategic framework for sustainable control of bovine tuberculosis in GB follows a two-pronged strategy in relation to bovine tuberculosis (bovine TB): surveillance and slaughter.

[...]

"14. Post-mortem examination is the only way of confirming the existence of TB in bovines. The results of post-mortem examinations determine how further results within a herd are to be interpreted. Where the presence of TB is confirmed, further test results are to be read in a more precautionary way (severe interpretation)."

38. The appellants' case is set out at paragraphs 15 to 19:

"The Minister has carefully considered the Community's representations in this case. The Minister is minded to exercise her discretion to arrange for slaughter the animal for each of two separate reasons, either of which would justify the slaughter. First, the aim is to take all steps necessary for the *elimination* (as opposed to the reduction or minimisation) of the risk of transmission of TB from the bullock. Slaughter is the best and most appropriate means of eliminating the risk. Secondly, the provision of data (confirmation of the presence of TB in the bullock) is critical to determining the testing and management regime in relation to the remainder of the herd. That confirmation can only be obtained by post-mortem examination and culture. It can only be obtained in the necessary time frame by the slaughter of the animal and rapid post-mortem examination.

16. The Minister has carefully considered your proposals for carrying out further tests on the bullock and for isolating and caring for the bullock. The Minister does not consider that further tests are necessary or appropriate. The Minister is not satisfied that the proposals made by the Community (or indeed other alternatives to slaughter) would meet the public health objectives set out above, namely, they would not eliminate (as opposed to minimise) the risk of transmission of TB from this animal, nor would they provide the information necessary for disease management of the herd, i.e. confirmation that the bullock has the disease.

17. Furthermore, this matter has become urgent in light of the test results received on 11 June, as communicated to the Community on 15 June. Those results, when read under 'severe interpretation' (i.e. confirmation of the presence of TB in the bullock) identify 2 further animals as reactors and 5 animals as inconclusive reactors. It has become extremely important that the presence or absence of TB in the bullock should be confirmed very soon, so as to determine what steps are required in relation to the remainder of the herd.

18. The Minister has carefully considered this matter in the light of her obligations to comply with ECHR and is satisfied, subject to any further representations the Community may wish to make, that the public health objectives set out above, that the necessity to slaughter the bullock satisfy the requirements of Article 9(2) ECHR.

19. The Minister wishes to make a final decision in this matter no later than 29 June 2007. Given the Minister's position as outlined above, you may wish to make further written representations. The Minister is willing to receive any further representations before that date.

As to the future, it was stated:

"23. The Community has previously indicated that if it were unable to agree to our requests it may wish to challenge the slaughter notice in relation to the bullock in the courts. If a judicial review application were made, we would be prepared to co-operate with such an

application, in terms of stressing to the court the urgency of the issue and the need for a speedy decision [I add that both parties have fully cooperated in the judicial proceedings which have occurred and with the expedition which has been given to them].

24. In summary, therefore, we would be grateful if:

a. you would provide any further representations in accordance with paragraph 19 above ..."

There is no need to refer to the rest of the summary.

39. Further representations were made on 28 June. Again, they are detailed. Paragraph 4:

"The WAG [Welsh Assembly Government] is under legal duty to act compatibly with the ECHR and with principles of public and administrative law in deciding whether to exercise its discretion under the Animal Health Act 1981 ('the Act'). That means that the WAG must decide whether to exercise its discretion not to slaughter Shambo, bearing in mind (inter alia) the following principles:

a) The need to treat like cases alike and indeed not to treat unlike cases in the same way;

b) The duty to take into account all relevant considerations, to exclude irrelevant considerations, and to approach decisions in an open-minded manner;

c) The duty to take decisions that are reasonable and proportionate in all the circumstances of the particular case;

d) The need to assess the nature of the rights and freedoms of the individuals affected by a decision, and to assess the degree to which a particular course of action intrudes on the exercise of that right or freedom; and

e) The requirement to interfere with the exercise of a right or freedom only to the extent *necessary* and *proportionate* to achieving a legitimate public health aim,

bearing in mind the need to strike a fair balance between the interests of the public at large and the Community in particular.”

40. Further representations are made under the heading “The WAG’S Approach So Far” of the need to consider the unusual circumstances of this case. Paragraph 16:

“... the risk of transmission, even if Shambo is infected with bovine TB and infectious, is vastly lower than in the normal case of cattle ...”

The reasons are set out, including the fact, which is not in dispute, that obviously the animal is not milked, and will never enter the food chain. There was no question of the animal being sold. Shambo is kept entirely apart from other animals, is showing no clinical signs whatsoever of having bovine TB and is in extremely good condition. Shambo is kept in an extremely strict biosecurity regime which was set out in full in the earlier letter. Reference is made to the Community being willing:

“... to go to all proportionate lengths in accordance with an actual identified risk in order to ensure that Shambo (if infected and infectious) cannot pass on the disease”.

A detailed management plan is set out.

41. The letter confirming the order to slaughter is dated 3 July 2007. Paragraph 2:

“In reaching her decision, the Minister has been deeply conscious of the importance of this issue to the Community at Skanda Vale, and to the wider Hindu community generally. The Minister is fully mindful of the religious beliefs of the Community. The Minister has carefully considered all the representations made by and on behalf of the Community. The Minister is also conscious of the need to protect animal and public health. For the reasons summarised in this letter, the Minister has decided that she should exercise her discretion to cause the bullock to be slaughtered. Consequently, arrangements will need to be made for the implementation of the notice to slaughter.”

42. In paragraph 5 it is stated that “all the representations have been carefully considered”. It involves some duplication, but I read several other paragraphs of the letter which, in my judgment, undoubtedly describe a balancing exercise:

“6. The Minister has accepted veterinary and health advice, and has decided to exercise her discretion and cause the affected bullock to be slaughtered. The reasons for her decision are summarised in this letter. The letter deals principally with the reasons why the Minister has decided to exercise her discretion in this way. The fact that it does not seek to respond to each and every point raised in the various representations made should not be taken as an indication that those points have not been considered. Further, the Minister is satisfied that her decision fully accords with the relevant legal principles set out in the representation made on 28 June 2007. That letter also suggests that the Minister has approached the matter with a closed mind. That is not the case. The Minister has considered the matter carefully. The decision was not reached lightly. Representations made by the Community were fully considered. A meeting between officials and representatives of the Community and their legal and veterinary representatives was arranged so that issues such as testing, isolation and treatment could be discussed in detail. The Minister gave a further opportunity for representations to be made. Those representations were considered.”

At paragraph 11:

“However, the Minister is fully aware of the position of the Community on this issue [that is, Article 9(1)] and its reasons for contending that the slaughter of the animal would involve a particularly grave and serious violation of its religious beliefs for the reasons given in correspondence and summarised most recently in the representations of 28 June 2007. The Minister is aware that the Community’s view is that slaughter of the animal would constitute a particularly grave and serious interference with their rights under Article 9(1) ECHR.

12. The Minister has proceeded on the basis that (without accepting that it is necessarily correct) therefore, that making arrangements for the slaughter of the affected animal, and requiring the Community to hand over the affected animal for slaughter will constitute an interference of a particularly grave and serious kind. Any limitation on the exercise of rights granted by Article 9(1) may only be permitted under Article 9(2) if it prescribed by law and necessary for the protection of one of the aims listed above. The Minister has proceeded on the basis that a course of action involving the slaughter of the bullock should only take

place if that satisfied the requirements of Article 9(2) ECHR.”

43. A further description is given of the surveillance and slaughter policy already described. At paragraph 14:

“In order to address the public and animal health threats posed by TB, the Welsh Assembly Government in common with other GB administrations as part of the Government strategic framework for the sustainable control of bovine tuberculosis in GB follows a two-pronged strategy in relation to bovine tuberculosis (bovine TB): surveillance and slaughter.”

44. A further description is given of the nature of surveillance, as to what happens upon a bovine testing positive, and as to the value of post-mortem examination:

“18. As indicated above, the Minister has carefully considered the Community’s representations in this case. The Minister has decided however to exercise her discretion to arrange for the slaughter of the animal for each of two separate reasons, either of which would justify the slaughter.

19. First, the Minister considers that it was necessary for the protection of health to take all steps necessary for the *elimination* (as opposed to the reduction or minimisation) of the risk of transmission from the bullock. Slaughter is the best and most appropriate means of eliminating the risk.

20. Secondly, the provision of data (confirmation of the presence of TB in the bullock) is critical to determining the testing and management regime in relation to the remainder of the herd. That confirmation can only be obtained by post-mortem examination and culture. It can only be obtained in the necessary time frame by the slaughter of the animal and rapid post-mortem examination.

21. The Minister has carefully considered your submissions and proposals for carrying out further tests on the bullock and for isolating and seeking to treat the bullock. The Minister does not consider that further tests are necessary or appropriate. For the reasons set out above, the tests used are approved by the EU and the OIE in such cases. The Minister has accepted the veterinary advice as to the efficacy of those tests when they identify a positive reactor.

22. Furthermore, the Minister is not satisfied that the proposals made by the Community (or indeed other alternatives to slaughter) would meet the public health objectives set out above, namely, they would not eliminate (as opposed to minimise) the risk of transmission of TB from this animal, nor would they provide the information necessary for disease management of the herd, i.e. confirmation that the bullock has the disease. Nor does the Minister consider that the circumstances of this particular case, as set out most recently in the representations of 28 June 2007, justify a different conclusion.

23. As indicated in earlier letters, this matter has become urgent in light of the test results received on 11 June 2007. It has been explained to the Community, TB tests carried out on the rest of the herd indicated that other animals may have been exposed to TB infection and have shown some reaction. The results of the tests, when read under ‘severe interpretation’ (i.e. if there has been confirmation of the presence of TB in the bullock) identify 2 further animals would be classed as reactors and 5 animals as inconclusive reactors. It is extremely important that the presence or absence of TB in the bullock should be confirmed as soon as possible, so as to determine what steps are required to protect the remainder of the herd.”

Under the heading “Next Steps” it is stated at paragraph 25:

“The Minister is acutely conscious of the distress that her decision will cause to the Community. The Minister hopes that the situation can be dealt with in a sensitive, sympathetic and co-operative way. The next steps in making the arrangements to implement the slaughter are as follows ...”

The Submissions of the Community

45. On behalf of the Community, Mr Hoskins emphasises that the power of the appellants under section 32 of the 1981 Act is discretionary. There is no duty to cause the slaughter, as there is under section 31, schedule 3, in respect of cattle plague and pleural pneumonia. Under section 31 the Minister may cause an animal to be slaughtered if he or she thinks fit. Mr Hoskins also cites section 13(1) of the Human Rights Act 1998. That provides:

“If a court’s determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the

Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right.”

46. Thus, only freedom of expression attracts a similar attention and emphasis. The balancing exercise required by Article 9 must, it is submitted, have regard to those considerations. Mr Hoskins’ main submission is that the decision was fatally flawed because no attempt was made to assess the level of risk attached to the Community’s proposals for the maintenance and welfare of Shambo. In the absence of such an assessment the balancing exercise under section 9 was, it is submitted, defective. A decision could not properly be taken on the basis that it was necessary to eliminate the risk presented rather than to reduce or minimise it. The judge stated, at paragraph 101 of his judgment:

“Such a balance would require consideration of the detrimental impact preserving the bullock’s life would or might have on that identified public interest objective: it would require an assessment of the chances of the disease being transmittable (i.e. active) and of it being actually transmitted, to whom (in human terms) and to what (in animal and wildlife terms), and if transmitted what adverse impact would or could that have on the objective.”

Reliance is placed on that conclusion of the judge.

47. It is also submitted that there was no real engagement with Article 9(1) rights in the decision-making process. The grossness of the intrusion involved in the proposed slaughter has not been recognised. It is submitted that the statement that “representations have been considered” is glib, and reciting an acceptance that slaughter would constitute an interference of a particularly grave or serious kind is not good enough. The judge referred, at paragraph 103(vi) to:

“...an apparent failure also properly to identify and weigh the legitimate interests of the Community ...”

48. No advice was sought by the appellants on the religious practices involved, unlike the position in SB where Baroness Hale, at paragraph 98, referred to an explanation of religious practices given by an academic writer.

49. The general policy of the appellants is not challenged. The submission is that, in the exceptional circumstances of this case, which include a very serious interference with the manifestation of religious beliefs and practices, and other factors, including there being no possibility that Shambo would enter the food chain, mean that an exception to the slaughter policy should be permitted in this case. Reliance is placed on the assessment by the Community’s witnesses of the smallness of the risk involved in their proposals, and the absence of a reply to their statements. That evidence is before the court, though it was not

in its present form before the Minister, and the court has a duty to assess it when making a ruling under Article 9.

50. Mr Hoskins attempted to downplay the value to public health of a post-mortem on the bullock. The Community’s witness, Mr Taylor, stated that under half slaughterhouse reactor cattle are subsequently found to have bTB. Further, Regulations, the Control of Substances Hazardous to Health Regulations (2002/2677) (“the 2002 Regulations”), are in force, which would ensure that those caring for the bullock are protected from infection.

Conclusion

51. There can be no doubt that the Minister’s decision was taken only after very substantial dialogue with the Community over a period of two months. The correspondence between the appellants and the Community’s solicitors was in considerable detail. A meeting attended by experts was also held. The Minister plainly had her responsibilities well in mind, including her duty to consider the representations made to her, their nature and their weight. The advice available to her too now been set out in detailed statements, parts of which I have cited, as has the substance of the representations made to her by the Community.

52. bTB is a serious problem in rural south west Wales and is capable of having a most serious impact on the activities of the farming community in the region. Its incidence is increasing in the United Kingdom, where it is above the general level in the European Union. A slaughter policy has, as Dr Glossop said, led to the elimination of bTB in some other countries. Following an EU Directive, it is to be expected that the appellants would adopt a firm policy in order to achieve the control and eradication of the disease, the stated objective of the Directive. Such a policy has been adopted, supervision and slaughter. The reasons for it and the manner of implementation are set out in policy documents and in the evidence of the Minister’s advisers, including in particular the Chief Veterinary Officer.

53. The Community themselves are not unmindful of public health needs. The issue is whether an exception should be made in the case of Shambo, the Community’s temple bullock, on Article 9 grounds. The importance to the Community, with its religious beliefs and practices, of preserving the bullock’s life, is very great. I have no doubt that its importance was brought home to the Minister by the Community in the course of the representations and discussions, and equally that she had full regard to it in the balancing exercise she was required to perform, and did perform, under Article 9 of the Convention. It did not require further research into religious practices to acknowledge and understand the importance to the Community of preserving life, and in particular the life of the temple bullock. Nor does the absence of a description of religious beliefs and practices in the decision letter mean that the Minister has failed to understand them and have regard to their importance.

54. I have come to the conclusion that the Minister was entitled to make the decision she did. Having regard to the very considerable problems presented by bTB, the decision to eliminate the risk presented by the bullock by slaughter, and not to permit an exemption to the slaughter policy, was in my judgment justified. The Minister had very firm advice from her Chief Veterinary Officer. The decision was not unlawful by reason of the absence of an assessment of the extent of the risk which would remain upon a consideration of the Community's management proposals, and that is because an elimination of risk decision was justified and justified notwithstanding the infringement of Article 9(1) rights.

55. The Minister was entitled to conclude that it was necessary for the protection of public health, which includes animal health, to interfere with the manifestation of the Community's beliefs in a way which, the Minister accepted in her decision letter, was of a particularly grave and serious kind. I would allow the appeal on that basis.

56. I bear in mind the importance of the agricultural industry in this part of Wales, the relatively high incidence of bTB there, and the likely reasonable expectations of those conducting other enterprises in this area, including those on the four contiguous farms. I bear those considerations in mind in the context of policy documents issued and policies followed by the elected arm of government following an EC Directive, and the real concerns arising from the incidence and possible spread of the disease.

57. Strong reasons were provided in the material before the Minister as to why an elimination of risk policy -- that is, the policy of supervision and slaughter -- is necessary. Even if the risk of transmission is small, if it arises, its consequences for other animals and their owners may be grave. Further, an integral part of the slaughter policy is the need for post-mortem. That is important whether or not bTB is found to be present in the animal because of the opportunities it provides for decisions as to the health and better management of the rest of the herd and for other herds in the area, as explained in the evidence. The Minister was entitled to regard this consequence of the policy as an important one. Its importance is reinforced in the present case by the presence of other animals in the Community's herd, not kept with the temple bullock, where reaction to the skin test has been inconclusive.

58. I do not doubt the good faith with which the expert witnesses instructed by the Community have expressed their views as to the smallness of the risk the bullock would present if managed in accordance with the Community's proposals. I have concluded that assessment of the degree of risk is not in the circumstances required but, even if it were to be, it does not appear to me that those witnesses were having regard to the whole picture when using the expressions they did, and which I have quoted. The management difficulties, including the delays involved, are on the evidence as a whole, including that of Dr Glossop at her paragraph 89, already cited, substantial, and the importance of the post-mortem aspect of the policy is in my view plain. Nor does it follow from the protection which may be afforded to employees and

self-employed workers by the 2002 Regulations, that creating a situation in which such a regime is necessary becomes acceptable in public health terms.

59. The Minister was in my view justified in not making an exception in this case. Her decision was properly reached and sufficiently reasoned. To the extent it is relevant, my evaluation of the evidence on an Article 9 assessment leads to the same conclusion as hers.

60. It follows that I would allow the appeal, and set aside the orders quashing the slaughter notice and the confirmation letter.

Lord Justice Thomas:

61. I agree and add a short judgment of my own, as the case has raised important issues on its facts, and as we are differing from the judge, who in a careful and considered judgment had to deal with the matter urgently when the issues were not as clear as they had become during the course of the hearing in this court.

62. By the end of the hearing before this court it was clear that there were two distinct issues for decision.

i. Did the Minister for Sustainability and Rural Development (the Minister) in the Welsh Assembly Government, *Llywodraeth Cynulliad Cymru*, approach the issue which she had to determine in a lawful manner?

ii. Would the interference with the manifestation of the rights of the Community of the Many Names of God of Skanda Vale under Article 9(1) of the Convention by the decision to slaughter a bullock known as *Shambo* be justifiable under Article 9(2) Convention?

The lawfulness of the Minister's approach

63. It was not accepted by the Minister that it was open to the Community, in the present proceedings, to raise the first issue I have identified. That issue, in contradistinction to the second issue, did not call for a determination by the court of an issue under the Human Rights Convention, but the determination of a conventional judicial review issue where the contention made on behalf of the Community was that the Minister had failed to have regard to material considerations.

64. I can express my views very shortly on the first issue.

i. It was accepted before us that it was open to the Minister to determine the issue of proportionality under Article 9(2) on the assumed basis that the interference of the Community's rights to manifest their beliefs under Article 9 would be of a particularly grave and serious kind. The letter written on 3 July 2007 on her behalf stated:

“The Minister has proceeded on the basis (without necessarily accepting that it is correct) therefore, that the making of arrangements for the slaughter of the affected animal, and requiring the Community to hand over the affected animal for slaughter will constitute an interference of a particularly grave and serious kind. Any limitation on the exercise of rights guaranteed by Article 9(1) may only be permitted under Article 9(2) if it is prescribed by law and necessary for protection of one of the aims listed above. The Minister has proceeded on the basis that a course of action involving slaughter of the bullock should only take place if that satisfies the requirement of Article 9(2) ECHR.”

Making an assumption as to facts or as to an issue is a very common way in which decision makers approach a decision based on that assumption. There is nothing at all wrong in principle with such an approach and the judge was not correct in questioning the ability of the Minister to proceed in that way, provided that the decision was in fact made on the basis that assumption.

2. On the evidence I am satisfied that the Minister did genuinely and conscientiously proceed to make her decision on the assumed basis that the slaughtering of the bullock *Shambo* would be, for the Community at Skanda Vale, a sacrilege, a desecration of their temple and undermine the spiritual power of the temple. She therefore plainly approached the issue on the assumed basis that Article 9(1) was engaged.
3. I also do not accept the submission made on behalf of the Community that it was necessary for the Minister to research or to spell out in any greater detail the effect on the Community’s religious beliefs. She had proceeded to make her decision on the assumption I have set out, which was sufficient for the purposes.
4. Pill LJ has set out in considerable detail the way in which the Minister approached the issues before her. I am satisfied that the Minister approached those issues in a lawful manner, examining the points raised and the materials then before her, taking into account the material circumstances and relevant considerations and coming to a decision which was properly open to her.

65. It is therefore not necessary for me to express a view on the question of whether it is now open to the Community to raise their first issue, and if it was, whether the right course would be to remit the matter to the Minister. I would consider that that course would, in any event, fail.

Justification under Article 9(2)

66. The second issue calls for a determination under the Convention. As has been made clear in R (SB) v Governors of Denbigh High School [2006] UKHL 15, the task of the court is not to determine the lawfulness of the Minister’s approach, but to make its own determination whether the rights of the Community at Skanda Vale would be violated by the decision to slaughter the bullock *Shambo* or whether that could be justified under Article 9(2). That task of the court is not to undertake a merits review but involves an intense review by the court of the decision and the court then making a value judgment by reference to the circumstances prevailing at the time: see the judgments of Lord Bingham of Cornhill at paragraphs 26 to 32 or Lord Hoffman paragraphs 66 to 68 to which Pill LJ has referred.

67. It is also clear that the task of a challenge is made more difficult if the decision maker has conscientiously paid proper attention to the human rights considerations. Moreover, particularly in a case where scientific judgments are an issue, the decision maker has a considerable margin of discretion to which the court must pay proper regard (see R v the DPP ex parte Kebilene [2002] AC 326; M v Secretary of State for Work and Pensions [2006] UKHL 11 at paragraphs 137-138; R v The Secretary of State for Health ex parte Eastside Cheese Co [1999] EULR 968 at 987; and the Denbigh High School case at the paragraphs to which I have referred).

68. In determining the issue under Article 9(2) it is necessary to consider three questions:

1. Was the action prescribed by law?
2. What was the legitimate objective?
3. Was the proposed action proportionate in scope and effect to the achievement of that objective?

69. It was common ground that the burden of establishing a justifiable interference with the rights under Article 9(1) lay on the Minister.

(1) Was the action prescribed by law?

70. As to the first question there was no dispute; it plainly was.

(2) What was the legitimate objective?

71. As to the second question, there was by the end of the argument before us little dispute. I agree respectfully with the formulation of the legitimate objective by Lloyd LJ, which can be put in the following terms:- The legitimate objective was that of aiming to reduce the economic impact of bTB and to maintain public health protection and animal health welfare, and to slow down and prevent the geographic spread of bTB to areas currently free of the disease, and to achieve a sustained reduction of the disease incidence in cattle in high incident areas.

72. In my view, the judge unfortunately fell into error in treating the policy of surveillance and slaughter as the objective. It was in fact simply one of the means by which the Minister sought to achieve the objective to which I have referred. One can understand how his view logically can be seen as leading to the judgment he reached in respect of the actions of the Minister. However,

once it is appreciated that the policy of slaughter and surveillance was only a means and not the objective, the question as to whether this policy and the refusal to make any exception to it in the case of *Shambo* was proportionate to the objective which I have set out is one that has to be examined more broadly.

(3) *Was the proposed action proportionate?*

73. I therefore turn to the third question – proportionality. This was in fact the only matter in real dispute in relation to the issue under Article 9.
74. In considering whether the means were proportionate, the evidence both before the judge and this court was more extensive than that which was before the Minister, both as to the beliefs of the Community at Skanda Vale and as to the scientific evidence about bTB and the alternative management plan.
75. The question of proportionality was not decided by the judge, though he made some observations on it, so the Minister could take them into account when she reconsidered the issue, as his decision required her to do so.
76. It is important to note that the Community did not challenge the general slaughter policy. They contended that an exception had to be made of it in the case of *Shambo* in what were undoubtedly highly particular circumstances. The argument therefore centred, on the basis of the evidence which was before us, on the question of whether, in the light of the alternative management plan put forward by the Community (which they contended would reduce the risk in the case of *Shambo* of spread to zero or almost zero), a policy of surveillance and slaughter as applied in this case was nonetheless still a proportionate means of achieving that objective.
77. I approach that question on the assumed basis, as the issue was not argued before us, that the slaughter of *Shambo* would be a grave and serious interference with the Community's manifestation of their religious beliefs, for the reasons to which I have already referred. I have very carefully taken into account the considerable weight to be attached to the Community's belief in approaching the question of proportionality: see paragraphs 27 to 28 of the judgment of Lord Steyn in *R (Daly) v SSHD* [2001] UKHL 26 and of Baroness Hale of Richmond at paragraph 98 of *Denbigh High School* case and section 13(1) of the Human Rights Act 1998).
78. The task of the court is the application of these principles to the facts in this case. It is a task which requires the very careful analysis of the evidence which has been so clearly set out in the judgment of Pill LJ. On that evidence I have reached the same conclusion of that of Pill LJ. The factors that have weighed most heavily in my consideration are the nature of bTB, the way the disease is spread; the increase of the incidence of the disease in the United Kingdom, the particular incidence of the disease in south west Wales (making it a hot spot), the success of the slaughter and surveillance policy elsewhere, the importance of agriculture and animal husbandry to the local economy of Carmarthenshire and that of Wales, the additional evidence for the management of the herd and adjoining herds that may (in about 50 percent of cases) be obtained from a post-mortem of the slaughtered animal, the present

lack of a known treatment for bTB, the considerable period of time that is likely to elapse before one is developed, the difficulty in providing facilities for isolation and the adverse effect of isolation on the welfare of animals (together with the unlikelihood that this would guarantee the disease would not spread), the very real difficulties in assessing risk and the identification of two other animals of the herd as reactors despite the fact that that was on a severe interpretation of the tests carried out on 4 and 5 June 2007.

79. I cannot accept the argument advanced by the Minister that the court should simply defer, without critical scrutiny, to the judgment of the Minister's experts, despite their obvious eminence. However, I consider that as a major issue was the dispute between the experts, and as the views held by the Minister's advisers were, on the evidence, in conformity with well recognised veterinary and medical opinion, the views of those experts must be given significant weight when considering the margin of discretion to be accorded to the Minister.
80. On the totality of the evidence and according a significant margin of discretion to the Minister, I have come therefore to the firm conclusion that the decision to slaughter is justified under Article 9(2) as proportionate in both effect and scope, recognising however, as I do, the assumed basis on which this issue has to be considered, namely it will represent a very grave and severe interference with a manifestation of the beliefs of the Community in Skanda Vale.
81. For those reasons, in addition to those given by my Pill LJ I would therefore allow this appeal.

Lord Justice Lloyd:

82. This appeal raises in an acute form the tension inherent in Article 9(2) of the European Convention on Human Rights between the right to manifest a person's religious beliefs on the one hand and considerations of, in this case public health, on the other. I agree with the judgments of my Lords, Lord Justice Pill and Lord Justice Thomas, but propose to set out my own reasons having regard to the importance and sensitivity of the issues arising.
83. The cornerstone of the beliefs of the respondent Community is the sanctity of life and the worship of God through caring for its animals. The respondent is utterly committed to the preservation of this life, regarding all animals as having a spark of divinity. The Community would regard the slaughter of the bullock as a sacrilege and a desecration of their temple. The approach of the Welsh Assembly Government is that while the bullock is alive, there is a risk that infection with bTB will spread to other animal life and in particular to other cattle, with a smaller risk of a spread to humans, and that this danger outweighs all other relevant considerations.
84. In terms of Article 9, the question is whether the freedom of the respondent Community to manifest its religion by keeping the bullock as its temple bull and doing all that they can to ensure that it lives on to a natural death is to be subject to a limitation by virtue of the steps taken by the Government under

the Animal Health Act 1981 (plainly one which is prescribed by law) which is necessary, in a democratic society, in the interests of public health. The test is whether the objective is sufficiently important to justify limiting a fundamental right, whether the measures designed to meet the objective are rationally connected with it and whether the means used are no more than is necessary to accomplish the objective or, in other words, whether they are proportionate. It is accepted that it is for the Government to justify the interference with the Article 9 rights.

85. As the judge said, this formulation makes it necessary to identify the objective. Different formulations could be put forward at different levels of generality. On the one hand it must not be too general: the protection of public health would be so general that one could not test the measures in a meaningful way against it. On the other hand, it must not be too specific. The slaughter of all bovines infected or suspected of being infected with bTB is a means of achieving an objective rather than an objective in itself. It was right for the judge to look for the objective, but I respectfully disagree with him as to what it was. He considered that the objective was: 1) the total elimination of the risk of transmission of bTB from any bovine which has a positive reaction test, and, 2) the provision of data confirming or otherwise the presence of active bTB in the animal which is important to determining the appropriate management regime for the rest of the herd (his judgment, paragraph 95). He recognised that there could be a legitimate objective of the control or eradication of bTB in south west Wales, but held that this had not been the objective in pursuance of which the Government had acted (see paragraph 101 of the judgment, from which Lord Justice Pill has read the principal passages).
86. On behalf of the Government, Mr Crow QC submitted that the Minister's objective in issuing the slaughter notice under Section 32 of the 1981 Act was the protection of animals and humans against the risk of infection with bTB and that this is a legitimate objective under Article 9(2). I agree that this would be a legitimate objective and this was not seriously in dispute. That proposition is supported by the early Commission decision of X v The Netherlands, from which Pill LJ has read a relevant passage. The point is emphasised by Council Directive 77/391/EEC, to which Pill LJ has also referred. It is to be noted that, presumably for practical reasons and perhaps also having regard to the different nature of the different diseases, the objective as regards TB in that Directive is to accelerate or intensify the eradication of it, whereas as regards leucosis, the plan must be to eradicate the disease, not merely to accelerate its eradication.
87. As Lord Justice Pill has mentioned, we were also shown several government publications, including the Government's strategic framework for the sustainable control of bTB in Great Britain, published in March 2005, and a special edition on bovine TB of the Government Veterinary Journal published in September 2006. The strategic framework document, published on behalf of the UK government and of the devolved governments in Scotland and Wales, set out an overall vision at paragraph 2.1.1 as follows:

“To develop a new partnership based on the Animal Health and Welfare Strategy so that Government and stakeholders can work together to reduce the economic impact of bTB and maintain public health protection and animal health and welfare. We aim to slow down and prevent the geographic spread of bTB to areas currently free of the disease, and achieve a sustained reduction in disease incidence in cattle in high incidence areas.”

The document described bTB as one of the most difficult animal health problems that the farming industry faces in Great Britain today, and called the scale of the challenge of reversing the long term upward disease trend significant.

88. It set out a number of strategic goals, including cattle surveillance and control. In relation to this the document said at paragraph 4.4.1:

“The cattle test and slaughter scheme will remain central to controlling spread of disease. In the absence of a wildlife reservoir of disease, similar cattle controls in other countries have been effective in controlling the disease. Details of the minimum testing regime are determined by Council Directive 64/432 (as amended). We will continue to explore scope for maximising the effectiveness of existing tests and developing improved diagnostic tests.”

89. At paragraph 4.8.1 the document set out four reasons for government intervention: protection of public health, international trade, protect/promote animal welfare, and to protect the interest of wider society/economy. Under the first heading the text is as follows:

“Historically this has been the main reason for Government intervention on bTB, based on risks to consumers from milk and meat. Current controls (cattle surveillance and control, slaughterhouse inspections and heat treatment of milk) are considered to be effective, and these minimise these risks and justify continued intervention. There are also minimal occupational health risks (regulated by the Health and Safety Executive) and potential risks to the general public from exposure to wildlife (and potentially companion animals). We must remain vigilant as bTB is an infectious and zoonotic disease which has increased in the GB cattle population and there is a wildlife reservoir of disease. The increase in bTB in cattle has not, to date, been coupled with an increase in

the incidence of human disease in the UK caused by *M.bovis*. Nevertheless, there remains a need for stringent and continued monitoring and action if the risks increase.”

90. This publication is accompanied in Annex A, as it is required to be, by a Regulatory Impact Assessment. Mr Hoskins referred us to a passage in section 2 of this headed “Purpose and intended effect of measure” under the heading “Risk assessment”. It is convenient to read certain passages on which he relied:

“The animal health and welfare risks from TB are minimised through the Government funded cattle surveillance and control programme that requires slaughter of cattle identified as being infected with TB and puts affected farms under movement restrictions until they are clear of the disease. In 2002 this necessitated slaughter of 22,000 cattle, at a cost to the taxpayer of £31 million.

The trend is for increasing incidence of disease despite current controls which risks increasing costs to Government and industry.”

Then passing over some passages:

“Public health risks arising from bTB are minimal though there is a need for continued monitoring. To date, the increase in incidence of disease in cattle has not been accompanied by an increased incidence of disease in humans. Consumers are protected as a result of the cattle surveillance and control regime, meat inspections in slaughterhouses and pasteurisation of milk. Occupational risks are subject to guidance from the Health and Safety Executive (HSE). There is a wildlife reservoir of bTB infection that poses potential risks to the general public, and there is also a potential risk of spillover into domestic/companion animals.

In light of the above, the primary reason for intervention over and above the existing controls is to reduce economic impact for both the taxpayer and industry.”

91. In the special issue of the Government Veterinary Journal referred to already, “Policy Development since the Publication of the Strategic Framework” (as described), the problem was noted as being severe in areas where the disease

is concentrated, which includes south west Wales. The article spoke of the aim of the strategic framework as being:

“To slow down and stop the spread of disease into areas currently free of the disease and achieve a sustained but steady reduction of TB incidents in high incidence areas.”

92. The most recent government document in evidence was a publication called “Dealing with Bovine TB in your Herd” updated to April 2007. This appears to be aimed at those whose herd has been put under restriction because of known or suspected infection with bTB. As Lord Justice Pill has said, it describes the cornerstone of TB control in cattle as the accurate detection and removal of animals infected with the bacteria before they become infectious to other animals. It describes the steps that are taken, including the post-mortem test, pointing out its value if it does show an infection, although recognising the risk that it may not show an infection in all cases where the animal was infected, i.e. false negative results. It also speaks of disinfection, which is required when an animal has reacted positively to the skin test. Mr Hoskins, for the respondent, pointed out that the steps required in respect of disinfection do not impose the most stringent possible procedures.

93. Mr Crow also relied on some of the correspondence between the parties to show that the Minister did act in pursuance of the public health objective which I have summarised. Thus in the Government’s “minded to” letter dated 25 June 2007 to the respondent’s solicitors the writer referred specifically to the strategic framework for the sustainable control of bTB and to the two-pronged strategy of surveillance and slaughter as being pursued as part of that strategic framework. In the decision letter of 3 July 2007, confirming what had been said in the “minded to” letter, paragraphs 18-20, which Lord Justice Pill has read are consistent with this.

94. Dr Glossop, the Chief Veterinary Officer for Wales, described in her witness statement the history of the disease in Great Britain with extensive infection in the 1930s reduced over time by a voluntary, and then a compulsory, programme of testing and slaughter, so that there was a low level of infection nationally by 1980, but with an increase since then. That is the context for the efforts now being made to control the spread and reduce the impact of the epidemic of bTB. Lord Justice Pill has read the paragraph 23 of her witness statement, so I do not need to do so to show its relevance in this context.

95. The respondent contends that Dr Glossop showed a mind closed to any other course than slaughter in relation to the bullock in question. Thus in the part of her witness statement, paragraphs 81-90, where she discussed the respondent’s proposals for isolation she commented that “these suggestions would not eliminate (as opposed to minimise) the risk of transmission of infection to animals and humans” in paragraph 81, and at paragraph 90 she commented that isolation “could not eliminate the risk for this animal as effectively as slaughter”, and that it would not allow a post-mortem examination to obtain information necessary for the management of the rest of the herd.

96. Mr Crow pointed out that the respondent Community itself, when asking for advice from its own vet about the animal at the stage of an earlier inconclusive reaction, described its aim as being to take measures which are:

“... robust and appropriate to minimise any risk of possible spread of disease either to other animals in our care, other farm animals, wildlife, the members of the Community involved in direct animal husbandry or members of the public visiting the Community for worship.”

97. If viewed as a statement of a general policy rather than in relation to this one animal that approach does not differ from that of the Government. The difference is that as regards a particular animal which is, or is suspected of being, infected the Government's attitude is that it must be slaughtered to eliminate the risk, because there is no other way of eliminating the risk, and to gain information on a post mortem examination which is relevant to the management of other animals whereas the Community would not be prepared to contemplate slaughter under any circumstances and it therefore wishes to adopt a different approach including taking steps which for economic and practical reasons no commercial farmer would dream of taking.

98. In his judgment at paragraph 89 the judge recognised the significance of public health concerns, and said that a court should be reluctant to interfere with a decision made by a responsible decision maker, after consultation with its expert advisers, citing in support of that R (Eastside Cheese Co. RA Duckett & Co Ltd) v Secretary of State for Health [1999] EULR 968, per Lord Bingham, Lord Chief Justice at 987G. In the present case, the Minister had advice from both the Chief Veterinary Officer and the Chief Medical Officer for Wales.

99. The judge identified the issue correctly as regards proportionality at paragraphs 90-91 of his judgment. Then he sought to identify the particular public health objective which the Government must pursue. I agree with Pill LJ that, with respect to the judge, at this point he confused statements of the particular steps which the Government sought to take in relation to this one animal with statements of the more general policy, of which the course to be taken as regards this one animal is no more than an application. The overall policy is identified, in documents such as the strategy framework, as the “overall vision”. The policy could even be stated in terms of the Directive previously quoted, “to take steps to accelerate the eradication of bTB”, but it seems to me that that might be at one level of generality too high. I would hold that the Government's objective is that of aiming to reduce the economic impact of bTB, to maintain public health protection and animal health and welfare, to slow down and prevent the geographic spread of bTB to areas currently free of the disease, and to achieve a sustained reduction in disease incidence in cattle in high incidence areas.

100. The policy of surveillance and slaughter is one of the means by which the Government seeks to achieve that objective. That objective is legitimate, and it is possible to test the application of a particular policy against the objective in terms of the proportionality of the means adopted, and to balance it against the Community's Article 9 rights.

101. I therefore turn to the issue of proportionality, as between the objective as set out above to be pursued by the particular means of slaughter of this animal, and as against that the fact that to kill this animal would adversely affect the freedom of the respondent Community to manifest its religious beliefs, which would require that this animal -- as also all others kept at those premises but this one even more so than most -- be allowed to live on so as to die a natural death.

102. Mr Hoskins reminded the court that rights under Article 9 are, like those under Article 10, singled out for express reference in the Human Rights Act 1998, section 13(1), as Lord Justice Pill, has said. He submitted that the Minister had proceeded in the wrong way because she had not sought advice about the religious aspect of the matter, nor as to the importance of the right which would be infringed, by contrast to the extensive advice she had about the health issues. I would not accept that criticism for two reasons. The first is that the Minister had ample material to inform her about the importance of the relevant religious beliefs in the correspondence from and on behalf of the Community itself. She proceeded on the basis that to require the Community to hand over the animal for slaughter would constitute an interference with Article 9 rights of a particularly grave and serious kind; see paragraph 12 of the decision letter. On the basis of what she had been told by and on behalf of the respondent, I see no need for her to have sought further advice to add to that. I would also reject Mr Hoskins' suggestion that the Minister's treatment of the religious aspect was glib or bland, and that this suggested that that aspect was not taken sufficiently seriously.

103. The second reason is that, according to the decision of the House of Lords in R (SB) v Governors of Denbigh High School [2006] UKHL 15, what matters is not whether the decision maker proceeded in the right way, but whether the decision taken does or does not infringe the relevant rights. Thus, even if the Minister should have taken further advice as to the religious aspect, her failure to do so would not have vitiated the decision of itself. The court has to form a view on the basis of the evidence, which includes what was put to the Minister, but is not limited to that, whether the balance was struck in a legitimate way or not. As appears from passages in the speech of Lord Bingham in the SB case, which Lord Justice Pill has read, while the court's task is not that which applies in a judicial review case, nevertheless it is not a merits review either. It requires a particular intensity of review so as to make a value judgment, or an evaluation of the facts as they stand. The decision is not to appear vulnerable on the basis that the decision maker may have followed a flawed procedure, but the court does not make the decision of itself. It examines the merits of the decision, acknowledging the particular case; but the decision maker has particular relevant knowledge or

experience, or has recourse to particular sources of expert advice. In an appropriate case it should respect the knowledge, experience, and judgement of the decision maker. The same appears from paragraph 68 of Lord Hoffman's speech, which Lord Justice Pill has also read.

104. In the present case the judge did not decide the issue of proportionality, and he did not decide that a decision in favour of slaughter could not be proportionate. At paragraph 106 he indicated that it would remain for the Government to decide according to, as he saw it, the correct procedural considerations. This seems to me to be the same approach as in judicial review, and the approach which the Court of Appeal had followed but the House of Lords struck down in the SB case. For that reason also, the judge's decision cannot stand on the basis of his actual reasoning.
105. In the short time between delivery of the judgment below and the hearing of the appeal, the respondent did not serve a respondent's notice, but no point is taken on that. Counsel approached the case on both sides on the footing that we have to address the matters in issue on the correct legal basis. If on that footing we found that the judge's order was right, then that order would stand albeit for different reasons.
106. At the conclusion of the hearing Mr Hoskins invited the court to dismiss the appeal, first because the judge was right in any event, but alternatively, even if he was wrong, then either because the decision taken was disproportionate, this court taking the decision that the judge did not, or because the Minister failed to have regard to factors relevant under Article 9, in which case, as the judge said, the decision would be set aside but would remain open to be taken again. It seems to me that the latter option is not open to the court in the present case even if it might possibly be in other cases, for example, if the decision maker has not addressed the correct issue and the court does not consider that it is in a position to come to a conclusion on the issue once correctly identified.
107. In the present case it seems to me that the court has to examine the decision taken, not as a matter of procedure but on its substance, and has to evaluate whether the objective is sufficiently important to justify limiting a fundamental right such as those under Article 9 (that is not an issue here); secondly, whether the measures adopted to meet the objective are rationally connected to it (that is hardly likely to be in dispute here either); and thirdly, whether the means used to limit the right on were no more than is necessary to accomplish the objective; see R (Daly) v SSHD [2001] UKHL 26, paragraph 27 in the speech of Lord Steyn. For this purpose, as Lord Steyn said later in the same paragraph, the court may need to assess the balance struck by the decision maker, not merely whether it is within the range of rational or reasonable decisions, and it may need to direct attention to the relative weight accorded to interests and considerations.
108. I approach this question accepting that the sanctity of life of animals as well as of humans is a fundamental tenet of the Community's relevant religious beliefs, and central to those beliefs, and that because this animal is

the Community's temple bullock it would be particularly offensive and sacrilegious to require the animal to be removed for slaughter and then slaughtered. I have already identified the objective, in pursuance of which in my judgment the Government acted, and it is not in dispute that that is capable of being sufficiently important to warrant limiting a right as fundamental as that under Article 9. There is no question but that the means used, namely the policy of surveillance and slaughter, is rationally connected with the objective. So the question is whether the requirement of slaughter in the present case is no more than is necessary to accomplish the objective.

109. Mr Crow submitted that a variety of factors demonstrate that the slaughter of the animal is necessary, in the course of which he referred both to points in favour of the Government's policy and to weaknesses in the respondent's alternative proposals. I do not propose to refer to all of these but some of the principal factors were these. The disease is serious, chronic, and disabling. It is infectious not only between cattle, but also between cattle and other animals and back to cattle, and between cattle and humans. The period between an animal becoming infected and showing clinical signs of infection may be years; some infected animals show no outward signs of infection at any stage. Animals which are infected but are clinically normal may shed bacteria, and shedding of bacteria may occur early in the progress of the infection. Shedding is intermittent, so that if the animal is tested for shedding with a negative result, this does not show that it has not been shedding bacteria before or after the test. In cattle it is primarily a disease of the respiratory tract, whether or not there are clinical signs of respiratory disease. There is also evidence that *M. bovis* can survive outside a carrier's body for extended periods of time, up to months.
110. bTB has increased in Great Britain, particularly in the last 15 years. Great Britain now sustains the highest incidence of bTB in the European Union, with a particularly high incidence in south west Wales. The skin test under government policy is the best screening test currently available, the only one prescribed for the purposes of international trade, and is prescribed by European Directive 64/432 EEC. Its specificity is 99.9 percent; that is to say only one case in a thousand testing positive is not infected, i.e. a false positive. The alternative tests are no more specific, so that there is no point in conducting other tests on an animal which has showed a positive reaction to the skin test. The policy of skin tests and slaughter has been used by many countries for the successful eradication of bTB. Established veterinary opinion is that slaughter of an animal which has shown a positive reaction to the skin test is necessary in order to eliminate the risk of the spread of bTB from that animal, and to be able to conduct a post-mortem examination in order to establish whether the animal was infected, which information is needed so that the rest of the herd can be properly managed.
111. The bullock in question cannot be viewed in isolation for several reasons. Two other animals in the herd would be regarded as reactors on the severe interpretation, if this animal were found on post-mortem examination to be infected; they would not be so treated otherwise. Those two are said never to have come into contact with the particular animal in question, so isolation

may not be the answer to the problem, and it is possible that there could be a separate common source of the infection. A post-mortem examination is therefore all the more necessary so as to provide the best available information for a management policy with the herd. Moreover, there are four other contiguous herds which could be affected by the position on the Community's farm.

112. All those various factors, so Mr Crow submitted, pointed strongly towards the need to slaughter this animal, it having tested positive. As regards the alternative approach proposed by the respondent of isolation of the animal and treatment, he argued that this would have serious limitations and weaknesses which have to be borne in mind when striking the balance. Clearly, the alternative approach would not achieve what are seen as the two particular advantages of the Government policy, namely to eliminate the risk of transmission from a particular animal, and to provide more accurate information from a post-mortem for setting the management policy for the rest of the herd. He pointed out that there is no possibility of any kind of mathematical assessment of the degree of risk posed by the alternative approach, nor had any such assessment been attempted.
113. In her evidence Dr Glossop considered the respondent's proposals as regards isolation of the animal from several aspects. She compared the respondent's proposals for isolation with those used for the isolation of Category 3 organisms, which *M. bovis* is, for example for research purposes. She described the particularly stringent biosecurity measures which are required. According to Mr Hoskins' submissions, these go further than that which is required of employers under the relevant regulations, the Control of Substances Hazardous to Health Regulations 2002. But Dr Glossop's evidence related rather to the guidance issued by the Advisory Committee on Dangerous Pathogens and to licensing criteria used for isolation facilities used for research purposes. It does not seem to me that the 2002 regulations, which seem to impose somewhat less stringent obligations on employers, should be regarded as negating the force of Dr Glossop's evidence in this respect.
114. Moreover, Dr Glossop pointed out that isolation was required not merely from other cattle but also from other susceptible species such as horses and goats, and from wildlife, and she observed that no farm building can be rendered 100 percent animal-proof, as shown by the experience of farmers' unsuccessful attempts to keep badgers away from direct or indirect contact with their cattle. She commented that there would need to be stringent procedures for the disposal of faeces and bedding material, and that even so there remained a risk that the bacilli may survive outside the carrier in soil and grass, which cannot in practice be disinfected.
115. It was in this context that Mr Hoskins pointed out that the practices required by the Government's publication, *Dealing with Bovine TB in your Herd*, appeared to be less stringent than those suggested in relation to the respondent's proposals. That may be a fair point, though it would have to apply for a good deal longer under the respondent's proposals than in the circumstances contemplated by this publication. Dr

Glossop's view is that because the respondent's proposals fall short of that which would apply in a Category 3 isolation unit, the risk of the spread of infection from the animal would not be eliminated. Even an animal kept in such a unit will be slaughtered after the research has been completed for which the isolation was established. She also observed that permanent isolation of the animal in question would be inconsistent with the welfare requirements of the animal itself, which include not only freedom from pain, injury and disease, but also the freedom to mix with other animals of the same kind.

116. As regards treatment, her evidence is that there is no accepted and effective treatment for bTB in cattle in Great Britain. Antibiotics would be necessary but there are no drugs licensed in the UK for the treatment of *M. bovis* in cattle. It would therefore be a matter of experiment, necessarily over a long period, and not only with no certainty as to the outcome, but also no certain way of establishing whether the treatment had proved successful and therefore whether the treatment could be discontinued.
117. Of the respondent's witnesses, Mr Taylor spoke of medication for up to two years, Dr Watkins of at least six months. They pointed out fairly that this animal will never enter the food chain and does not produce milk, so that there are at least two important points of difference from animals on commercial farms. Moreover, the Community is willing to undertake rigorous isolation and to consider treatment in a way which no commercial farmer would or could contemplate. Their opinion was that the animal could be safely quarantined and isolated from all contact with the Welsh cattle farming Community, and indeed from other animals on the Community's own land, and that it could be subjected to more advanced tests of its blood, and it could also be tested to see whether it is excreting bacilli by tests of sputum, urine and faeces. Dr Watkins expressed the view that if the proposed course of isolation and treatment were followed there will be "almost zero risk of infection". Mr Webb, the Community's own vet, said that by taking the measures which they have been advised to take, the Community had "rendered negligible the risk of transmission of disease to other animals or humans".
118. As against that, none of the respondent's witnesses has treated a bovine successfully for bTB. There is evidence of successful treatment of a gorilla at Melbourne Zoo from which Dr Lesley concluded that "it should be possible to treat an animal", though even he has reservations about the time required to establish that treatment has been successful, if it has.
119. The respondent's evidence in reply exhibited an article published in Brazil in 2004 in Portuguese, but with a brief summary in English, which from the summary seems to refer to successful treatment of almost all of 95 bovines which had tested positive or inconclusive out of 240 animals in a naturally infected herd. This seems to have taken place over the period 1997 to 1999, but in the absence of an English translation of the article and fuller opportunity for the Government's witnesses to consider it, in my judgment it would not be appropriate to place any reliance on this. It remains altogether speculative whether a bovine can be successfully treated for bTB, if so, how and over what period, and there is also a good deal of uncertainty as to whether, and if

so when and how, one could establish, if it be the case, that the treatment has been successful so that the animal's isolation could be brought to an end. It follows that in any event the animal would have to be isolated for a long time, and quite possibly for a very long time. If the animal is infected and cannot be treated successfully, or cannot be shown to have been treated successfully, it would have to be isolated for the rest of its natural life.

120. Mr Crow invited the court to consider the factors favouring slaughter as summarised above and to compare the alternative course proposed by the respondent, and to look at the Minister's decision in the context of that contrast, and of the Minister having acted on expert advice from the designated expert advisers: the Government's Chief Veterinary Officer and Chief Medical Officer. He referred us to M v Secretary of State for Work and Pensions [2006] UKHL 1, where at paragraphs 137 and 138 Lord Mance considered the international rather than the domestic status of the "margin of appreciation". Lord Mance cited Lord Hope in R v DPP ex parte Kebilene [2000] 2 AC 326 and other decisions of the House of Lords and recognised that:

"The legislature or executive are in some circumstances recognised as being better placed to evaluate and decide, and on that basis as having a greater or lesser margin of decision making or discretionary power."

121. Mr Crow referred to the Eastside Cheese case and to X v Netherlands, both of which I have mentioned, and also to Cha'are Shalom Ve Tsedek v France, to which Pill LJ has also referred. From X v Netherlands I would quote a brief passage in the Commission decision which appears shortly before the passage cited by my Lord as follows:

"Whereas in regard to the other conditions mentioned in paragraph (2), [that is to say of Article 9] a considerable measure of discretion is left to national Parliaments in appreciating the vital interests of the Community;

"Whereas, however it is ultimately for the Commission to judge whether or not a measure taken by a government is justifiable under the provisions of a paragraph ..."

In conclusion, Mr Crow invited the court to hold not only that the judge had approached the matter incorrectly, but also that if the matter were rightly decided, the slaughter notice could not be said to be a greater interference with the Article 9 rights than was necessary to achieve the objective. He pointed out that even in the respondent's skeleton argument on the appeals, the case was put no higher than that if the Minister had considered the level of risk posed by the respondent's alternative proposals and had formed the view that such risks were negligible, she:

"... may have decided that the proportionate approach, taking into account the very significant importance of the religious rights at stake, was to adopt the respondent's proposals or some variation of them".

He argued that the case would have to be capable of putting much higher if the respondent's challenge to the slaughter notice were to succeed. It is fair to say that this proposition was put forward in the context of a contemplation that the matter would have to go back to the Minister for a fresh decision. In that context, the possibility of a different outcome might have been sufficient. Mr Crow's point is well made so far as it goes, but it is for the court to decide without being limited by the formulation of the respondent's case in the skeleton argument.

122. Mr Hoskins' argument in support of the judge's order centred on the proposition that the Minister had not undertaken the exercise of balancing the two possible courses against each other. In paragraph 105(iv) of the judgment, the judge referred to a concession, made by Mr Lewis appearing before him for the Government, to which Pill LJ has referred, as he has also to Mr Crow's comment on the limited extent of that concession as truly understood.

123. The judge also commented on the balancing exercise which was necessary in paragraph 101 of his judgment, also quoted by Lord Justice Pill. In the opening passage of his paragraph 105 he said this:

"... any balancing exercise would be dependent upon the precise public health objective identified and evidence as to the extent to which such objective would or might be compromised by allowing the bullock to live. That is precisely the exercise the Government have not done, or sought to do."

He expressed doubt as to whether the Government would have satisfied him that the slaughter notice was proportional. He did make a number of observations relevant to this exercise, including that on the evidence before him it is very likely that the animal is infected with bTB, but that it is not known whether the disease is active and transmittable.

124. Mr Hoskins did not seek to challenge the Government's policy in relation to cattle generally. The question was whether in this highly unusual case an exception should be made. It is highly unusual both because nothing from the animal will ever get into the human food chain and also because of the willingness of the respondent to take steps which would not be relevant in practice to a commercial farmer. While Mr Hoskins would accept that the same considerations would apply to any of the forty or more bovines cared for by the Community, he said that even so this was an altogether exceptional case and the making of an exception for this animal, and even for others at the Community's premises if the need arose, would have no relevance as a precedent for farmers generally and their cattle. He pointed out the limitations

to the second aspect of the Government's reasoning in favour of slaughter, to which Lord Justice Pill has referred, and the substantial risk of false negatives on a post-mortem examination. A negative result does not provide information or assurances to the management of the rest of the herd, but it will affect the manner in which the Government considers that the herd should be managed in the sense that unless the post-mortem does show infection, the severe interpretation of the results of skin tests on other animals would not be applied.

125. Mr Hoskins pointed out, as my Lord has referred, that section 32 of the Animal Health Act gives a discretion to require slaughter, in contrast to section 31, which in other cases imposes an obligation. He submitted that the Minister had acted as if she had no discretion and also said that if an exception is not to be made in a case of this kind, affecting one or at the most a very small number of animals which can and will be effectively isolated, and where the reason not to slaughter is the need to protect fundamental and strongly held religious beliefs bringing Article 9 into application, it is hard to suppose that the policy is treated in practice as anything other than mandatory in all cases.

126. Acting upon the guidance given by the House of Lords in SB and other cases as referred to above, this court's task on the evidence before the court is to examine the Minister's decision in order to see whether the decision to slaughter the bullock is or is not consistent with Article 9, on the basis that although it would interfere with the respondent's ability to manifest its religious beliefs by the continued care of the animal throughout its natural life, that interference is justified as being no more than is necessary to achieve the particular public health objective already identified, namely aiming to reduce the economic impact of bTB, to maintain public health protection and animal health welfare, to slow down and prevent the geographic spread of bTB to areas currently free of the disease, and -- most relevantly in the present case -- to achieve a sustained reduction in disease incidence in cattle in high incidence areas.

127. As I have already said, I do not agree with the judge that the Minister did not have in mind a legitimate objective, nor that she failed to ask the right questions. Plainly she had had advice from expert sources of particular authority on the public health aspects, which is the topic on which she needed advice. It is accepted that she did not attempt to quantify the level of the risk of the spread of infection that would exist according to the respondent's proposals. She was, however, well aware of the seriousness of the risk of exposure to infection, if there is still such a risk in relation to other animals, especially cattle such as those in the four adjacent herds.

128. In correspondence before the Minister had taken the final decision expressed in the decision letter of 3 July, the respondent's solicitors asserted the risk of spread of infection that the animal was infected with was "vastly lower than in any normal case". In the evidence, as already mentioned, the level of risk was put at almost zero by one witness and as negligible by another. I agree with Lord Justice Pill's observations about those comments

entirely; I do not suggest that they were not put forward in good faith, but as he says it seems that they do not take into account the full context.

129. The Government's advice as manifested in the evidence identified a number of limitations of the respondent's proposals. I do not need to refer to them all, having summarised the evidence, but one of the principal areas of weakness is that it is said to be impossible to ensure that there will be no contact, direct or indirect, with wildlife, and another is the ability of the bacillus to exist outside a carrier, whether in grass or in soil, for a considerable length of time. As against the proposal that further tests be carried out on the animal, including tests to see if it is shedding bacilli, these tests are said to be unreliable because shedding is intermittent. Another problem identified is the need for the animal to be kept in isolation for what could be a long or very long period of time, at least months and quite possibly years, perhaps for the rest of its natural life. Clearly, if the animal is infected and cannot be cured, or shown to be cured, by treatment, that would be the consequence of the respondent's proposals. Even if treatment, which at present is entirely speculative, were carried out on the animal, this would not only be likely to take a period of months or years in any event, but it would be particularly difficult to tell whether the treatment had been successful. Therefore, the animal might have to continue in isolation for a very long time in any event. That itself presents issues of animal welfare. The respondent Community argue that the issue concerns only one animal, as well isolated as it could reasonably be, and needs to be, from all others in its herd and from neighbouring herds. From the Government's point of view, concerned with public health, there is seen to be a risk of infection spreading from this animal to others in the herd, quite apart from the possibility that others are already infected, or to wildlife and indirectly to other adjacent herds. That would be plainly inconsistent with the Government's objective and it is the threat against which the Government's policy is limbed.

130. I see some force in the respondent's contention that if ever there were a case in which it would be legitimate to make an exception to the policy, this might be such a case, because of the lengths to which the respondent is prepared to go to reduce as far as possible the risk of infection spreading from the animal and because of the grave interference which killing the animal would cause to the respondent's Article 9 rights. Taken with the proposition that to slaughter the bullock is only legitimate under Article 9(2) if it is necessary, and I emphasise that word, in pursuance of the Government's objective, it could be said that the Government faces a heavy burden in showing that the slaughter is justified in this case. The Minister's conclusion expressed in the decision letter and amplified in evidence was in favour of slaughter on the basis that elimination of the risk of the transmission of bTB from this bullock was necessary, and that steps taken as proposed to reduce or minimise that risk short of its elimination were not sufficient, and that the provision of data which could only be obtained in post-mortem examination was also necessary in the interests of determining how the rest of the herd should be tested and managed. Again, I emphasise the word "necessary", where it appears in that sentence. The latter factor was more pressing in the light of the results of the tests on other animals in the herd.

131. I do not accept that the Minister's mind was closed to the relevance of the respondent Community's religious beliefs or their Article 9 rights. Examining the Minister's decision to confirm the slaughter notice closely, and with the benefit of the guidance provided by the recent cases in the House of Lords and elsewhere, including in particular SB, I conclude that she was entitled to come to the view that elimination of the risk of infection was necessary, and that even the extensive steps proposed by the respondent Community to reduce and minimise that risk were not sufficient in the light of the objective already identified, pressing as that objective is because of the high incidence of bTB in south west Wales and the effects of that disease on cattle if it is transmitted. She was also entitled to come to the view that despite the limitations on the information which can be obtained from a post-mortem, to which reference has been made, it is necessary to obtain that information on post-mortem examination of this animal after its slaughter in order to be able to approach the testing and management of the rest of the herd in a more informed way.

132. Those are the reasons for which I agree with my Lords that the appeal should be allowed.

Order: Appeal allowed.