



Neutral Citation Number: [2023] EWHC 1243 (Admin)

Case No: CO/2956/2021

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 24 May 2023

**Before:**

**SIR ROSS CRANSTON**  
**sitting as a High Court judge**

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**Between:**

**THE KING**  
**(on the application of**  
**THE HUMANE LEAGUE UK)**

**Claimant**

**- and -**

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

**Defendant**

**- and -**

**NATIONAL FARMERS' UNION**

**Interested Party**

**- and -**

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

**Intervenor**

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**EDWARD BROWN KC and BRENDAN MCGURK** (instructed by **Advocates for Animals**) for the **Claimant**

**RICHARD TURNEY and BEN FULLBROOK** (instructed by **GLD**) for the **Defendant**

**The Interested Party did not appear**

**NICK ARMSTRONG KC** (instructed by **Bates Wells & Braithwaite London LLP**) for the **Intervenor**

Hearing dates: 3, 4 May 2023  
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**Approved Judgment**

This judgment was handed down remotely at 10.30am on 24 May 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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## **SIR ROSS CRANSTON:**

### **INTRODUCTION**

1. In this judicial review the claimant seeks to challenge the Secretary of State for Environment, Food & Rural Affairs in relation to the rearing of fast-growing breeds of broiler (meat) chickens. The claimant accepts that breeding practices have increased meat yield and allowed producers to reduce cost significantly, but it argues that this is at the expense of substantial animal welfare. It contends that the Secretary of State had adopted and maintains policies and practices founded on legal error.
2. It goes without saying that the challenge has been advanced, and needs to be decided on legal, not policy grounds. Whatever legitimate public policy issues it highlights about fast-growing breeds of broiler chickens, the claimant must establish that the Secretary of State has erred in terms of ordinary principles of public law.
3. The legal character of the claimant's challenge has shifted over time and for that reason needs brief explanation. At the hearing the claimant, with the support of the intervenor, contended that the central issue in the case had become the construction of paragraph 29 of Schedule 1 to the Welfare of Farmed Animals (England) Regulations 2007. Paragraph 29 provides:

“Animals may only be kept for farming purposes if it can reasonably be expected, on the basis of their genotype or phenotype, that they can be kept without any detrimental effect on their health or welfare.”

In the judgment I call this Paragraph 29.

4. The claimant advanced its case around the correct interpretation of Paragraph 29. Since the Secretary of State had misinterpreted it, the claimant contended, she has adopted and maintains unlawful policies and practices, including a Code of Practice and a system of monitoring and enforcement (including the so-called “trigger system”). Her practices include a policy of non-enforcement because she has erred as to her position on compliance with the law. There is therefore a lack of equal treatment between producers.
5. As initially formulated in 2021, however, the judicial review challenge raised (a) as ground 1, what was said to be the Secretary of State's unlawful policy which permits farmers to breed and rear fast-growing breeds of broiler chicken, when these animals could not be kept without unlawful detriment to their health and welfare; and (b) as ground 2, her unlawful system for detecting, reporting and responding to evidence of detriment to health and welfare experienced by the conventional fast-growing breeds. The claimant sought declarations that the alleged policy and the monitoring system were unlawful.
6. Permission to bring the judicial review was refused by Kate Grange QC with detailed reasons on the papers in October 2021, and by Lieven J in a judgment on a renewed application at an oral permission hearing in May 2022. Permission was then granted on

appeal by Singh LJ in September 2022 on the basis that although the claim may fail on its merits, it should be fully considered in the public interest with a full hearing.

7. Following the grant of permission, Ritchie J allowed the claimant to amend its grounds. As a result the challenge to policy is advanced as well on the basis that the Secretary of State has misdirected herself as to the meaning of Paragraph 29 (ground 1A); secondly, that her Code of Practice is unlawful in that it permits irrelevant considerations to be taken into account when considering compliance with Paragraph 29 (ground 1B); and thirdly, that she is in breach of her *Tameside* obligations and/or has acted irrationally as regards her conclusions on the evidence relating to meat chicken welfare prior to formulating or promulgating her Code of Practice (ground 1C). Ground 3 is an allegation of breach of the principle of equal treatment as applied between different producers of chicken breeds, namely those who are compliant with welfare requirements, including Paragraph 29, and those who are not. The claimant did not seek any amendment to the relief it was seeking.

## **BACKGROUND**

8. Before proceeding further let me sketch some background to the legal challenge, first as to the parties, then something about the production of meat chickens, and then a summary of the RSPCA report, which forms the backdrop to these proceedings.

### **The parties**

9. The claimant is a charity whose mission is to end the abuse of animals raised for food. There are four witness statements from Victoria Bond, the chair of trustees of the claimant and a veterinary surgeon.
10. The defendant is the Secretary of State for Environment, Food & Rural Affairs (“the Secretary of State”). Her department is commonly known as “Defra”. Among other things she exercises powers in the Animal Welfare Act 2006, makes regulations under it, and issues codes of practice concerning the welfare of farmed animals. She has powers to prosecute in certain cases. There are two witness statements from a senior policy official in Defra.
11. The interested party, the National Farmers’ Union (“NFU”), did not participate at the hearing, although it did lodge Summary Grounds of Resistance at an earlier stage of the proceedings and made submissions at the appellate stage.
12. Earlier this year Bourne J granted the Royal Society for the Prevention of Cruelty to Animals (“RSPCA”) permission to intervene by way of written and oral submissions (up to 20 minutes). It is the world’s oldest and largest animal welfare charity. There is a witness statement from its chief legal officer, Raymond Goodfellow.

### **The meat chicken industry**

13. The evidence of the Secretary of State is that over one billion meat chickens are slaughtered in the UK every year, and that in 2021 the overall value of meat chicken production in the UK was £2.4 billion. Her evidence is that the vast majority of meat chickens are produced in what has been called an “integrated model”, whereby the farmer typically owns the land and buildings and is contracted to produce chicken for

an “integrator”. The integrator manages the slaughter of the chickens, their processing and packing, and contracts with retailers such as supermarkets. Apparently, the meat chicken market is highly concentrated with the top three integrators supplying approximately 75% of all meat chickens.

14. The Secretary of State’s evidence is that approximately 95% of meat chickens are reared in large, closed buildings with a maximum stocking density of 39kg per square metre, although assurance schemes and some retailers may stipulate lower stocking densities. This is known as “conventional” method of rearing meat chickens.
15. The present claim concerns what are called “fast-growing chickens” (or fast-growing broilers). As a result of genetic selection these are chickens which can be expected to reach a slaughter weight of around 2.2kg in 5-6 weeks when reared in an indoor commercial environment. It seems that all fast-growing meat chickens are conventionally reared, and that a small percentage of conventionally reared meat chickens are slow-growing breeds. Slow-growing chickens are those which can be expected to reach a slaughter weight of 2.2kg in 7-8 weeks when reared in an indoor commercial environment.

### **The RSPCA Report**

16. Victoria Bond explains in her first witness statement that it was the RSPCA Report, *Eat. Sit. Suffer. Repeat. The Life of a Typical Meat Chicken*, published in 2020, which led the claimant to launch this judicial review. This is referred to in the judgment as “the RSPCA Report”.
17. In his witness statement, Mr Goodfellow explains as background to the report that the RSPCA has had an interest in the welfare standards for meat chickens for some time, leading to its broiler breed welfare assessment protocol to assess the welfare of broiler breeds.
18. The executive summary of the report states that the genetic selection of meat chickens for performance:

“has been reported to be responsible for contributing to not only the most, but also the most severe, welfare problems seen in broilers today, such as chronic leg disorders and heart and circulatory problems. The severity of the welfare problems, the huge number of animals involved globally, and the fact that these welfare concerns have not been adequately addressed to date, means this long-standing issue requires urgent attention.”
19. After an overview of the broiler genetics industry, the report has a section on the welfare implications of intense genetic selection for performance. The first heading is “health”, and the report has three subsections. The first addresses heart and circulatory health and states that fast growth can increase the risk of two types of heart conditions, ascites, and sudden death syndrome. There is reference to several studies to support and explain this. Walking ability is the next subsection, and how fast growth can cause leg developmental disorders. Again the matter is developed by reference to relevant research on leg fractures and walking ability. The final sub-section, hock burn and foot burn, states that prolonged periods of inactivity can contribute to the development of

ulcers and lesions on those areas of the bird that are in contact with the floor, typically the feet (foot burn) and hocks (hock burn).

20. Following the section on health the report has a section on behaviour. Selective breeding for increased performance, it states, has resulted in a reduction in the activities the birds can carry out. It then explains that healthy chickens are motivated to perform a wide range of behaviours, including foraging, dustbathing, and perching, all of which contribute to good welfare. If a chicken cannot express a full repertoire of natural behaviour, the report continues, it may experience frustration, helplessness or boredom and may not have the opportunity to experience pleasure or other positive states. There are then sub-sections on foraging, dust bathing and perching.
21. For the purposes of the report, the RSPCA commissioned research by Dr Laura Dixon at Scotland's Rural College to assess the production and welfare characteristics of fast-growing meat chickens (conventional breeds) compared with a slow growing breed: "Slow and steady wins the race: The behaviour and welfare of commercial faster growing broiler breeds compared to a commercial slower growing breed" *PLoS One* 2020;15(4):e0231006.
22. The RSPCA report summarises the findings of Dr Dixon's research as follows:

"The trial revealed that, in general, compared to the slower growing breed, the conventional breeds had significantly poorer health: higher mortality (including culls), poorer leg, hock and plumage health, and more birds affected by breast muscle disease (white striping and wooden breast)... The conventional breeds were also less active, spending less time walking and standing, and more time feeding and sitting, and spent less time engaged in enrichment type behaviours: foraging, perching and dust bathing."
23. At the hearing the Secretary of State advanced some criticisms of the RSPCA report's methodology and of some of its conclusions, to which the RSPCA responded. There is no need to address these for the purposes of this judicial review.

### **Secretary of State's approach in outline**

24. During the judicial review, the Secretary of State set out her position. In general terms it is that there is no consensus that fast-growing meat chickens cannot be kept without detriment to their welfare. She acknowledges that there are welfare concerns with fast-growing breeds, and these need to be kept under review. After noting that there is no scientifically agreed definition of what is meant by detriment to welfare, her evidence is that in the poultry context her Code of Practice (see below) should ensure that the welfare requirements of meat chickens are met. In particular, it provides that producers must select breeds that are suitable for their intended production system and that the needs of those breeds should be addressed.
25. The Secretary of State's evidence is that the Code reflects her understanding that environmental conditions, animal husbandry, and stockmanship play an important role in determining the welfare of all meat chickens (and other farmed species), including those which are considered as fast-growing. New developments in farm animal welfare

science, she says, are kept under review. Her acceptance that there can be a higher risk of some welfare issues with fast-growing breeds of meat chicken does not mean, she says, that they will have unacceptably poor welfare in all circumstances and therefore cannot (based on their genetics) be kept without detriment to their health and welfare.

26. The Secretary of State states that she recognises the benefits of promoting higher welfare standards for meat chickens. As part of her commitment to raising standards of animal welfare, she has established the “Animal Health and Welfare Pathway”. For meat chickens, one of the pathway priorities is to support the implementation of the Better Chicken Commitment, an industry initiative which encourages meat chicken producers to meet higher welfare standards through various requirements, including the use of slow-growing breeds. At this point, however, the Secretary of State accepted that no decisions have been made as to how the commitment can be further supported, albeit that bodies like the RSPCA have suggested a way forward.

## **THE LEGISLATIVE FRAMEWORK**

27. The legal framework of this judicial review lies in statutory and regulatory law which in important respects is built on European Union law, specifically Directive 98/58/EC, the “Farming Directive”, and Directive 2007/43/EC, “the Chicken Directive”.

28. The Farming Directive recognised the need for common minimum standards for the protection of animals kept for farming purposes (Recital 8). Article 4 provides that Members States should

“ensure that the conditions under which animals... are bred or kept, having regard to their species and to their degree of development, adaptation and domestication, and to their physiological and ethological needs in accordance with established experience and scientific knowledge, comply with the provisions set out in the Annex”.

29. Paragraph 21 of the Annex to that Directive provides:

“Breeding procedures ...

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

30. The Chicken Directive set down minimum rules for the protection of chickens kept for meat production.

## **Animal Welfare Act 2006**

31. Section 4(1) of the Animal Welfare Act 2006 (“the 2006 Act”) makes it an offence for a person who is responsible for an animal to cause that animal unnecessary suffering. Section 9(1) provides that a person commits an offence if they do not take reasonable steps in all the circumstances to ensure that the needs of an animal for which they are responsible are met to the extent required by good practice. Subsection (2) goes on to

provide that for the purposes of the Act, an animal's needs shall be taken to include (a) its need for a suitable environment, (b) its need for a suitable diet, (c) its need to be able to exhibit normal behaviour patterns, (d) any need it has to be housed with, or apart from, other animals, and (e) its need to be protected from pain, suffering, injury and disease.

32. Section 12(1) provides that the appropriate national authority (for our purposes, the Secretary of State) may make regulations it thinks fit for the purpose of promoting the welfare of animals for which a person is responsible, or the progeny of such animals. The power to make regulations under subsection (1) includes power to provide that breach of a provision of the regulations is an offence: s.12(3)(a).
33. Section 14(1) of the 2006 Act confers on the Secretary of State the power to issue codes of practice for the purpose of providing practical guidance in respect of its provisions. A person's failure to comply with a provision of a code of practice does not of itself render them liable to proceedings, but in proceedings against a person for an offence under the Act, or under regulations under section 12, compliance or otherwise with a relevant provision of a code of practice may be relied upon as tending to establish or negative liability: s.14(3)-(4).

### **The 2007 Regulations: an overview**

34. The Welfare of Farmed Animals (England) Regulations 2007, 2007 SI No 2078 (“the 2007 Regulations”) were made under section 12 of the Animal Welfare Act 2006.
35. The 2007 Regulations implemented Article 4 of the Farming Directive by imposing a duty on a “person responsible for a farmed animal” to take “all reasonable steps to ensure that the conditions under which the animal is bred or kept comply with Schedule 1”: regulation 4(1). In complying with the duty in regulation 4(1), regulation 4(2) provides that a person responsible for a farmed animal must have regard to its (a) species; (b) degree of development; (c) adaptation and domestication; and (d) physiological and ethological needs “in accordance with good practice and scientific knowledge”.
36. Regulation 5(1) imposes additional duties on persons responsible for poultry, laying hens, calves, cattle, pigs and rabbits. For example, it requires that a person responsible for conventionally reared meat chickens comply with Part 2 of Schedule 5A. Regulation 6(1) requires that a person responsible for a farmed animal must not attend to the animal unless “acquainted with any relevant code of practice...” and must take all reasonable steps to ensure that a person employed or engaged by them does not attend to the animal unless acquainted with any code.
37. Regulation 7(1) creates an offence if, without lawful authority or excuse, the person contravenes a duty in regulation 4, 5 or 6 (subparagraph (a)), or causes or permits this to occur (subparagraph (c)). Enforcement is dealt with in regulation 8(1), which provides for enforcement as follows:

“(1) A local authority may prosecute proceedings for an offence under these Regulations.”

38. Regulation 8(2) provides that the Secretary of State (or the Director of Public Prosecutions where she delegates functions under regulation 8(3)) may direct that instead of the local authority she may prosecute “in relation to cases of a particular description or any particular case.”

### **Schedule 1 of 2007 Regulations**

39. Schedule 1 of the 2007 Regulations contains general conditions under which farmed animals must be kept, in doing so implementing the Annex to the Farming Directive.
40. The paragraphs contain conditions as to staffing (para.1), inspection (paras.2-6), record keeping (paras.7-8), freedom of movement (paras.9-10), building and accommodation (paras.11-16), animals not kept in buildings (para.17), automatic or mechanical equipment (paras.18-21), and feed, water and other substances (paras.22-27).
41. Paragraphs 28 and 29 appear under the sub-heading “breeding procedures”.
42. Paragraph 28(1) prohibits the practice of natural or artificial breeding or breeding procedures which cause, or are likely to cause, suffering or injury to any of the animals concerned. Subparagraph 2 provides an exception.
43. The terms of Paragraph 29 were set out earlier in the judgment.
44. Schedule 1 finishes with paragraph 30, electrical immobilisation.

### **Schedule 5A: additional conditions for conventionally reared meat chickens**

45. Schedule 5A to the 2007 Regulations is entitled “Additional conditions that apply in relation to conventionally reared meat chickens”. It was added to the 2007 Regulations in 2010 by the Welfare of Farmed Animals (England) (Amendment) Regulations 2010, SI 2010 No 3033 (“the 2010 Regulations”) to implement the “Chicken Directive”.
46. The provisions in the Chicken Directive “focus on the welfare problems in intensive farming systems” (Recital (8)) and set down various requirements applicable to farm holdings. It prescribes certain conditions for the keeping of chickens relating, for example, to maximum stocking density, litter, access to food and water and to ventilation, heat, noise, and light requirements.
47. To assist in the introduction of the Chicken Directive into UK law, Defra set up a Broiler Core Stakeholder Group which included the RSPCA, the British Poultry Council, the NFU and others.
48. Schedule 5A applies to “conventionally reared meat chickens”, which are defined to mean an animal of the species *Gallus gallus* that is kept for meat production: reg.2. The definition excludes other categories such as small holdings, hatcheries, organic, free-range and extensive indoor (barn-reared). Part 2 imposes various additional conditions in respect of the keeping of conventionally reared meat chickens.
49. Part 3 of the Schedule is concerned with “monitoring and follow-up at the slaughterhouse”.



50. Paragraph 14 requires the reporting of on-farm mortality rates which are treated as food safety information. Paragraph 15 makes provision for the identification of poor welfare conditions on-farm and follow-up. Paragraph 15(1) provides that an official veterinarian conducting controls under the Official Controls (Animals, Feed and Food, Plant Health Fees etc.) Regulations 2019, SI 2019 No 1488 in relation to chickens must evaluate the results of the post-mortem inspection to identify possible indications of poor welfare conditions in their holding or house of origin. Paragraph 15(2) provides:

“If the mortality rate of the chickens or the results of the post-mortem inspection are consistent with poor animal welfare conditions, the official veterinarian must communicate the data to the keeper of those chickens and to the Secretary of State without delay.”

## **POLICY AND COMPLIANCE FRAMEWORK**

51. An important statement of the Secretary of State’s policy on meat breeding chickens is contained in her Code of Practice. This also sets out her policy for the monitoring of compliance of those keeping meat breeding chickens with their legal obligations.

### **The Code of Practice**

52. *The Welfare of Meat Chickens and Meat Breeding Chickens* (“the Code of Practice”) was made in 2018 under section 14 of the 2006 Act. The Secretary of State’s evidence is that as with other welfare codes the government’s aim is to produce modern, user-friendly guidance; to establish robust standards of animal welfare; and to support efficient and effective enforcement. They provide guidance on minimum legal standards which all animal keepers must adhere to and which some keepers may surpass.
53. The preface to the Code of Practice states that it is intended to help those who care for meat chickens and meat breeding chickens to practise good standards of stockmanship to safeguard chicken welfare. Without good stockmanship, it says, animal welfare can never be adequately protected. Adherence to the recommendations “will help keepers to maintain the standards required to comply with legislation.” The essentials of stockmanship are said to be a knowledge of and skills in animal husbandry and personal qualities (affinity and empathy with animals, dedication and patience).
54. The introductory part of the Code states that relevant animal welfare legislation applies to owners as well as any person looking after the chickens on their behalf, wherever the chickens are located. A written protocol should clearly set out for all parties their responsibilities in respect of welfare. However, the relevant paragraph adds, the obligations imposed by the law will still apply and Paragraph 29 is set out in full. Following that the code continues that the strains of bird selected must be suitable for the production system.
55. In section 1, under a sub-heading “stockmanship and staffing”, the code states that all keepers should have a full and demonstrable understanding of the welfare needs and basic biology of the birds. As a minimum, it says, they should be able to recognise whether the birds are in good health; understand the significance of behavioural

changes in the birds; and appreciate the suitability of the total environment for the birds' health and welfare.

56. Under a further sub-heading "leg health", the code states:

"59. Welfare and health considerations, in addition to productivity, should be taken into account when choosing a strain for a particular purpose or production system. In line with this, meat chickens should stem from broad breeding programmes, which promote and protect health, welfare and productivity. Keeping birds in line with appropriate growth curves that optimise these criteria, particularly with regard to leg health, should be considered."

57. Section 3 of the code contains additional recommendations for meat breeding and grandparent chickens. It begins at paragraph 116 with the high standards required for breeding birds. Under the sub-heading "breeding procedures" paragraphs 28 and 29 of Schedule 1 of 2007 Regulations are set out. There then follow various paragraphs such as 117 (birds should come from balanced breeding programmes) and 118 (feedback of information within the breeding pyramid).

### **Compliance machinery**

58. The Secretary of State is responsible for ensuring, in relation to regulations 4 to 6 of the 2007 Regulations, the efficient and effective coordination between all authorities which are involved in compliance with the legal and regulatory regime outlined.

59. The Animal and Plant Health Agency ("APHA") is an executive agency of Defra. It is responsible for carrying out overall monitoring and assessing compliance of those keeping animals with the 2007 Regulations. As part of APHA's responsibilities, it carries out inspections of meat chicken premises which may follow trigger report information, and it responds to welfare referrals from other bodies and persons. If it detects non-compliance with animal welfare legislation, it may inform the relevant local authority. It may support a local authority in bringing a prosecution.

60. The Food Standards Agency ("FSA") is a non-ministerial government department that is responsible for protecting public health from risks that might arise from the consumption of food. It is responsible for ensuring that meat hygiene standards are upheld at slaughterhouses. This involves FSA veterinarians monitoring and identifying welfare issues in meat chickens, both ante- and post-mortem. FSA staff gather evidence about welfare issues and refer welfare issues to the keeper of the animals, APHA and the relevant local authority.

61. Local authorities are statutory prosecuting bodies for the purposes of non-compliance with the provisions of the 2007 Regulations.

### **The trigger system**

62. Pursuant to the monitoring requirements in paragraph 15 of Schedule 5A of the 2007 Regulations, the Secretary of State has developed a so-called "trigger system". It is intended to identify poor welfare conditions in conventionally reared meat chicken

holdings (the production site where chickens are kept) or houses of origin (the building on a holding where a flock of chickens are kept). It is designed to monitor all batches of conventionally reared meat chickens.

63. The trigger system was designed in consultation with animal welfare organisations including the RSPCA and has been reviewed over time. The Secretary of State contends that it has been upheld consistently as an example of best practice. As one example she points to a report by the EU Commission's Directorate-General for Health and Food Safety in 2016, which described it as a "key to system effectiveness" for monitoring on-farm welfare issues.
64. As described in the Code of Practice, the trigger system operates by assessing the results of ante-mortem and post-mortem inspections which are carried out by FSA staff at slaughterhouses in order to discern whether there are any welfare problems on farm: para.46. The post-mortem conditions monitored are listed in annex 3 to the Code, which establish pre-defined thresholds, known as "trigger levels": para.47. A "trigger report" is generated if these levels are exceeded in respect of chickens from the same flock: para.48. Reports are shared with the producer and APHA, which "uses the trigger report information to identify farms at highest risk of non-compliance...and targets inspections to those farms identified as being at highest risk": para.48.
65. Appendix 3 of the Code of Practice sets out specific trigger levels in two tables for different conditions for post-mortem levels and cumulative daily mortality rates.
66. The evidence is that under 5% of meat chicken batches generate a trigger report each year. It seems that reports do not necessarily generate an investigation, a visit from APHA, or a review of conditions on farm. The Secretary of State's evidence is that local authorities may be informed of non-compliance to consider enforcement action. She accepts that there have been no prosecutions under Paragraph 29.

### **Monitoring: other mechanisms**

67. Further mechanisms for ensuring possible breaches of animal welfare legislation in the Secretary of State's evidence are the system of FSA welfare referrals and a general complaints system.

### **EVIDENCE RELATING TO HEALTH AND WELFARE**

68. At the hearing I was taken to various scientific studies. I was not invited to reach any conclusion on the scientific issues. However, the claimant's case was that all the studies concluded that fast-growing breeds of chicken experience significantly worse welfare detriment than slower growing breeds. In her witness statement, Victoria Bond says that there is not one study of which she is aware which, after assessing the situation holistically, shows that fast-growing strains can be kept without detriment to their health and welfare.

### **Scientific studies highlighted by claimant**

69. Mr Brown KC for the claimant took me to three studies published after the RSPCA Report. The first was undertaken by researchers based at FAI Farms, Bristol Veterinary School, and the Norwegian University of Life Science. They compared four conditions

for broiler chickens varying in growth rate (varying across three breeds) and planned maximum stocking density (higher vs lower): “Slow-growing broilers are healthier and express more behavioural indicators of positive welfare”, *Scientific Reports*, v.10, article no: 15151 (2020). It was an observational study under practical commercial conditions. In general terms the findings indicated that the most significant overall welfare improvement could be achieved utilising a slow-growing breed compared to standard fast-growing breeds. There were suggested benefits of utilising a slightly lower planned maximum stocking density and further health benefits in systems utilising the slowest growing genotype. However, these benefits did not give welfare benefits of the same magnitude as could be realised by moving away from the fast-growing broilers.

70. Second was a report from researchers at the University of Guelph, Canada, who studied over 7,500 broiler chickens from 16 different genetic strains over a two-year period: *Final Research Results Report Prepared for Global Animal Partnership*, July 2020. Its findings included that growth rate reduced activity levels, mobility, and interactions with environmental enrichments, and was related to increased foot pad lesions and hock burns, known to be painful. However, it found no effect of growth rate on mortality and there were no disease outbreaks. Overall, the study found that conventional strains of broiler chickens grew faster, more efficiently, and had higher breast yields than did slower growing strains. However, in comparison to strains with slower growth rates and lighter breast yields, there were lower activity levels, poorer indicators of mobility, poorer foot and hock health, higher biochemical markers of muscle damage, higher rates of muscle myopathies, and potentially inadequate organ development. “Fast growth rate coupled with high breast yield is associated with poor welfare outcomes.”
71. Finally, there was a study from researchers at the Royal Veterinary College which examined birds reared from hatch in pens of 50, one conventional and two slow-growing broiler breeds: “Associations between behaviour and health outcomes in conventional and slow-growing breeds of broiler chicken” *Animal* 15 (2021) 100261. Birds were assessed for health (gait, plumage cover and dirtiness, pododermatitis, hock burn, and leg deviations) at 2.2 kg liveweight and at periods after birth. Better growth rate and feed conversion but poorer health outcomes (mortality, gait, pododermatitis, feather cover) were more prevalent in conventional broilers.

### **EFSA Scientific Opinion**

72. In December 2022, at the invitation of the European Commission, the European Food Safety Authority prepared a “Scientific Opinion” entitled “Welfare of broilers on farm”: *EFSA Journal* 2023; 21(2): 7788. Among the issues considered was the impact of genetics on broiler welfare. The opinion noted:

“Without doubt, other factors besides growth rate, like the health of the birds, management, and housing, influence animal welfare conditions leading to variation between flocks within hybrids. Some of these factors interact, such as slower-growing hybrids in lower stocking densities and provided with enrichment achieve on average higher welfare scores than the fast-growing hybrids (de Jong et al., 2022)...

The feasibility of transitioning to higher welfare standards by using slower-growing genetics of broilers as one of the measures has been successfully demonstrated by the Dutch market (Saatkamp et al., 2019). In conclusion, the health and welfare status of broilers mainly depends on the genetics. Welfare in broilers and their breeders must be improved both by emphasising these traits in the selection index, as well as using hybrids with lower growth rates.”

### **APHA Report, 2022**

73. Following on from the impact on the mortality of meat chickens of the hot weather in 2022, APHA prepared a review of the scientific literature, *Meat Chicken Review of Standards* in October 2022. The executive summary contained seven questions, including as question 7: Should current environmental standards for fast-growing breeds apply to all meat chickens? Are they stringent enough given the higher summer temperatures we now experience? The answer given was: “The evidence suggests, that given they improved welfare benefits, as well as signs of improved tolerance to heat, a move to slower-growing breeds would be positive. Alternatively, environmental standards for fast-growing birds should be made more stringent.”
74. At point 4.1 of the APHA report is a collection of studies under the heading “Given the known animal welfare problems with fast-growing breeds, should these be phased out?” The discussion began with the observation that the genetic selection of meat chickens over the past 60 years had focused on production traits, namely growth rate and feed efficiency. That had led  

“to significant welfare problems in birds grown for meat, including leg disorders, cardiovascular diseases, and resulting high mortality rates, while the breeder birds are subjected to severe feed restriction. Bone problems such as bacterial chondronecrosis and tibia dyschondroplasia are prevalent, and recent studies have reported the prevalence of birds with moderate to severe gait impairment to be between 5.5 and 48.8% (Hartcher and Lum, 2020).”
75. There was then a paragraph referring to eight studies identifying bone issues in fast-growing breeds. A further paragraph noted that, overall, slower growing birds, such as those permitted for use under the Better Chicken Commitment, have improved welfare.
76. The two passages highlighted in heavy type under point 4.1 are as follows:  

“Many studies recommend the use of slower-growing breeds that have lower mortality, less incidence of leg weakness, cardiovascular and metabolic diseases, and generally improved welfare compared to current commercial breeds (Bessei 2006; Wilhelmsson et al. 2019). Addressing these welfare issues is essential to improve bird welfare and for social acceptability and sustainability of the meat chicken industry worldwide.

Two of the most serious welfare problems in the meat chicken industry – feed restriction in breeders and health issues in meat chickens grown for meat – are directly linked to genetic selection. There is an urgent need to address these problems by making welfare traits high priorities in breeding programmes and integrating these with other breeding goals.”

### **The Secretary of State’s assessment**

77. Following an assessment of the scientific evidence by departmental animal welfare advisors, the Secretary of State takes the view that there is no scientific consensus that fast-growing meat chickens have a genetic make-up which means they cannot be kept without detriment to their welfare. In her view, the scientific studies which the claimant exhibited in its evidence do not provide conclusive evidence that all fast-growing meat chickens cannot be kept without detriment to welfare. The Secretary of State’s evidence was that she well understood that the evidence suggested that the prevalence of certain health conditions can be greater among fast-growing meat chickens than among slower-growing breeds. However, she:

“... does not agree, as a matter of scientific judgment, that the reports cited by the claimant together indicate that there is consensus in support of the proposition that it is not possible to breed and keep fast-growing meat chickens without detriment to their welfare... Moreover, other studies indicate that environmental conditions have a significant influence on birds’ health and welfare for both fast- and slow-growing breeds... The welfare of meat chickens depends on many factors, plus any interactive effects between them. Other studies indicate that environmental conditions, such as lower stocking densities and the use of straw bales or step platforms, can improve the welfare outcomes of meat chickens, including fast-growing breeds.”

78. In early August 2022 the Secretary of State’s policy officials produced a submission for ministers following the high mortality rate in the meat chicken industry during periods of hot weather that summer. In a ministerial submission, one of the three issues to be further examined was expressed as follows: “c. ... Recent academic studies show that the rearing of such birds inevitably compromises their health and welfare.” The Secretary of State’s evidence is that this did not represent what is her more nuanced view.

### **Conclusion on the scientific literature**

79. It is not my task to form a view on the scientific literature regarding fast-growing chickens. My task is to review what the Secretary of State has done and to decide whether it falls short in public law terms. As regards the specific issue of her assessment of the scientific literature, she has taken advice from her expert advisers, including APHA, who are well aware of this literature and the findings of studies such as those the claimant majored on before me, as well as EFSA’s Scientific Opinion and the study by Dr Dixon which forms part of the RSPCA Report.

80. Given that this is how the Secretary of State has reached the judgment she has, in particular that environmental conditions have some bearing on the health and welfare of fast-growing chickens, it is not one where it is possible for a court to say that she has reached a conclusion which is flawed in public law terms. Her conclusion is not irrational, and it cannot be said she has left out of account material findings to which she should have given attention: see *R (Mott) v Environment Agency* [2016] EWCA Civ 564. Let me turn to the implications of this for the grounds of judicial review.

## **GROUNDS OF JUDICIAL REVIEW**

81. As indicated at the outset of the judgment, the claimant's case has been refined several times during these legal proceedings. At the hearing the Secretary of State claimed that the claimant was now proceeding in certain respects without regard to what it had permission to advance and as to the relief it was able to seek. The Secretary of State also contended that the claimant is out of time in its challenges in relation to the Code of Practice and the trigger system. In my view the best way of proceeding is to address the claimant's substantive challenges directly without regard to any procedural or timing obstacles.
82. There is one issue, however, to be dealt with at the outset, the application for declaratory relief as to the meaning of Paragraph 29. In my view this is not an appropriate case for a declaration for reasons given by Mr Turney for the Secretary of State: the claimant's case is concerned with an area where expert scientific judgment on facts is required, and absent a clear factual matrix it is not appropriate for the court to make a declaration in the abstract: cf. *R (on the application of Compassion in World Farming Ltd) v Secretary of State for the Environment, Food and Rural Affairs* [2004] EWCA Civ 1009.
83. Since the claimant's case now turns on the construction of Paragraph 29, however, it seems inevitable that I should address that issue. That then leads to the three issues Mr Brown addressed, whether the Secretary of State is operating an unlawful policy or practice, whether the Secretary of State's trigger system is unlawful, and whether there is a breach of the principle of equal treatment.

### **The meaning of Paragraph 29**

84. Mr Brown (with the support of Mr Armstrong KC for the RSPCA) contended that, in line with the heading of Schedule 1 in which it lies – “general conditions under which farmed animals must be kept” – Paragraph 29 is concerned with the keeping of farm animals and, more specifically, with the impact of breeding procedures on the keeping of animals. On his construction, Paragraph 29 is a prohibition subject to a conditional permission, namely, that “it can reasonably be expected, on the basis of their genotype or phenotype, that they can be kept without any detrimental effect on their health or welfare”.
85. If that conditional permission is not satisfied, Mr Brown added, the keeping of the animal is prohibited. The conditional permission is expressed in absolute terms: if a reasonably informed observer, with knowledge of modern farming conditions, would conclude that there was “any” detrimental effect on health or welfare on the basis of the genotype or phenotype, the prohibition applies. On Mr Brown's interpretation, the genotype or phenotype must reasonably be the cause of the detrimental effects in

question. Paragraph 29 is therefore concerned with the specific mischief of raising animals whose genotype or phenotype is such that, in modern farming conditions, detrimental effects on health and welfare arise. It is accordingly directed at the unsuitability, from a health and welfare perspective, of fast-growing breeds as against slower growing breeds.

86. On the other hand, Mr Turney for the Secretary of State highlighted the subheading under which Paragraph 29 appears, “breeding procedures”, and contended that Paragraph 29 is not concerned with farming practices but with the way in which animals may be bred or the choice of breed kept. In his submission, Paragraph 29 is targeted at those breeds of animal which, regardless of how well they may be kept, cannot be kept without any detriment. It was wrong to read Paragraph 29 as a “conditional permission” – a prohibition on the keeping of farmed animals subject to a “proviso” which needed to be established by the keeper. In his submission there is no burden of proof on the keeper of farmed animals, on whom the statutory duty rests, nor on the Secretary of State. Rather, the prohibition acts as a final check after compliance with the other provisions of Schedule 1 to ensure that breeds are not kept when it could not be reasonably expected that they could be kept at all without detriment because of their genotype and phenotype, even if all other statutory duties are discharged.
87. As with any legislative provision, the language of Paragraph 29 must be construed in the light of its statutory and policy context. An aspect of the statutory context is that a breach of Paragraph 29 constitutes a breach of regulation 4 of the 2007 Regulations, which imposes a duty on the person responsible for a farmed animal to take all reasonable steps to ensure that the conditions under which it is bred or kept comply with Schedule 1, of which Paragraph 29 is part. Breach of regulation 4 gives rise to an offence under regulation 7.
88. In other words, the construction of Paragraph 29 must take account of the potential criminal liability to which its breach can lead. That is a steer to a narrower interpretation than what otherwise may obtain. It rules out, for one, the notion that Paragraph 29 constitutes a conditional permission if this means that keepers of animals are prohibited from keeping them subject to the condition that they can satisfy a criminal court (in practice, the magistrates’ court) that as regards their genotype or phenotype they can be kept without detrimental effect on their health or welfare.
89. The language of Paragraph 29 itself is about keeping, in line with the heading of Schedule 1 (“conditions under which farmed animals must be kept”) and with other (but not all) paragraphs in the Schedule. But it is also about particular breeds of animals (“their genotype or phenotype”), confirmed by the sub-heading to it and paragraph 28, albeit (as Mr Armstrong points out) that sub-headings can be an imperfect guide to construction (see e.g., Bennion, Bailey and Norbury on *Statutory Interpretation* (8th ed), at 16.7). The result is that as far as keepers of animals are concerned Paragraph 29’s focus is on their duties with the choice of breed kept.
90. The requirements of Paragraph 29 break down as follows: (i) if it can reasonably be expected; (ii) on the basis of the animals’ genotype or phenotype; (iii) that they can be kept without any detrimental effect on their health or welfare. As to (i), the standard of reasonableness is an objective one and is that of the reasonable person responsible for the animals since the obligation in the paragraph is placed on them. In plain terms the issue is what would that reasonable person reasonably expect not, as the claimant



submitted, the reasonable informed observer with knowledge of modern farming conditions.

91. To my mind Mr Armstrong puts the matter too high in relation to broiler chickens, that there must be a reasonable expectation that the RSPCA evidence and the other supporting evidence which points the same way will be known by those who keep them, if this means a knowledge of the scientific literature advanced before me, albeit recognising the obligation under regulation 4(2)(d) on a person responsible for a farmed animal to have regard to its physiological and ethological needs “in accordance with good practice and scientific knowledge”.
92. As to point (ii), the harm in point (iii) must be reasonably attributable to the animal’s genotype or phenotype, in other words its genetic make-up or genetic traits. The harm in (iii) is to the animal’s health or welfare, which I accept is a broader phrase and more general than the “suffering or injury” used in paragraph 28. Both the claimant and the RSPCA emphasise the word “any”, but the paragraph refers not to “any effect” on an animal’s health and welfare, but to “any detrimental effect” which connotes obvious or deleterious harm. I reject Mr Armstrong’s submission that this means any harm, other than *de minimus* harm.
93. There is no support in the language or context of “kept for farming purposes” in point (iii) that this means kept in reasonably foreseeable farming conditions, which the claimant takes to mean what is reasonably acceptable, and the RSPCA submits indicates conditions where the minimum requirements of the 2007 Regulations will have been met. To my mind “kept for farming purposes” in Paragraph 29 does not mean kept in any particular farming conditions. It could mean kept in environmental conditions which improve the health and welfare outcomes of the animals from what might be the case if kept in other conditions. The obligation on the person responsible under Paragraph 29 is to keep the breed chosen in appropriate conditions without any detrimental effect on the animals’ health or welfare.
94. Consequently, my view is that Paragraph 29 means what it says given the matters referred to above. Given the breed of animal chosen for keeping for farming purposes, it must reasonably be expected by the reasonable person responsible for them that given their genotype or phenotype they can be kept in appropriate conditions without any obvious or deleterious effect on their health or welfare.

### **The Secretary of State’s policy and practices**

95. Given this interpretation of Paragraph 29, the issue becomes whether as the claimant contended the Secretary of State’s policies and practices are founded on legal error. In advancing the claimant’s case, Mr Brown referred specifically to the Code of Practice and the Secretary of State’s policy on prosecuting breaches of Paragraph 29.
96. As to the Code, Mr Brown submitted that it materially misstated the meaning of Paragraph 29 when it was intended to be relied upon by a range of persons apart from keepers, particularly in relation to the reporting and enforcement requirements by prosecutors and the magistrates’ courts. The Secretary of State’s own evidence was that it was intended to establish robust standards of animal welfare. Under section 14(4) of the 2006 Act the Code could assist in establishing liability. However, the submission continued, the Code did not address the welfare issues inherent in keeping fast-growing

breeds. It recognised that genetics can be a cause of detriment to the health and welfare of meat chickens, but it wrongly suggested in paragraph 58 that health and welfare detriment can be off-set or sufficiently mitigated by relying upon productivity considerations such that no breach will occur. The Code needed to inform keepers that they could not keep certain breeds but was inaccurate or erroneous by omission.

97. With respect to prosecutions, Mr Brown contended, while under regulation 8 of the 2007 Regulations local authorities were empowered to prosecute breaches of Paragraph 29, the Secretary of State may also prosecute, and her error of law had infected her policy position on prosecutions. The fact was that she had not conducted any prosecutions because she has erred in her interpretation of the basis on which the infringement of Paragraph 29 occurs.
98. In advancing the case at the hearing, Mr Brown took the realistic view that the *Tameside* challenge in the grounds was of a piece with these error of law challenges. Specifically, the submission was that the Secretary of State had failed to discharge her *Tameside* duty to take reasonable steps to acquaint herself with relevant information prior to formulating or promulgating her Code of Practice. In particular, she could not be satisfied, on the basis of all of the scientific evidence, that fast-growing breeds can be kept without any material detriment.
99. The starting point in considering these submissions must be the statute and the regulations. Firstly, the Secretary of State has under section 12 of the 2006 Act what the Court of Appeal described as a “broad power” to make “such provision as [she] thinks fit” for the purpose of promoting the welfare of animals or their progeny for which a person is responsible: *R (Electronic Collar Manufacturers Association and Petsafe Ltd) v The Secretary of State for the Environment, Food and Rural Affairs* [2021] EWCA Civ 666, [96]. The code-making power in section 14 of the 2006 Act confers a similarly wide power on the Secretary of State to issue codes of practice to provide practical guidance in respect of the 2006 Act. Against this statutory background there cannot be any obligation to cover in the Code the whole domain of issues which arise in keeping meat growing chickens: *R (BF (Eritrea)) v Secretary of State for the Home Department* [2021] UKSC 3967. For that reason the claimant’s case on omission fails.
100. Secondly, the primary duties under this legislative scheme in relation to health and welfare issues are placed on those responsible for the animals. Section 9 of the 2006 Act imposes a general duty on the person responsible for an animal to ensure that its needs are met to the extent required by good practice. As is clear from regulation 4, the legal duty arising from Paragraph 29 is placed on the person responsible for the farmed animal, enforced through criminal sanctions which can follow under regulation 7. The specific provisions for conventionally reared chickens – those in intensively farming systems – in Schedule 5A of the 2007 Regulations, derived from the Chicken Directive, are placed on keepers, defined in paragraph 1 as those responsible for or in charge of the chickens.
101. Turning to the Code of Practice, I cannot read it as the Secretary of State having a policy that keeping certain breeds of chicken is lawful, least of all that she has a policy that fast-growing breeds of meat chicken can be kept. The Code of Practice, as its provisions indicate, provides practical guidance to assist the keepers of meat chickens to comply with minimum standards in animal welfare legislation. There is general advice as to the

breed a keeper should choose for a particular purpose or production system as in paragraph 59 - as well as productivity, welfare and health considerations should be taken into account, particularly as regards leg health – and paragraph 117 – birds should come from balanced breeding programmes. However, the Code does not provide specific advice as to any specific breed of meat chicken. Although the terms of Paragraph 29 are set out, the Code of Practice offers no interpretation, nor is any provision of the Code reliant on (or contrary to) its terms.

102. Overall, then, the Secretary of State has not “positively authorised or approved unlawful conduct by others” so as to be in breach of any public law duty: *R (on the application of A) v Secretary of State for the Home Department* [2021] UKSC 37, [38], per Lord Sales and Lord Burnett (with whom the others agreed). As to the science she has reviewed the literature, taken expert advice including from APHA, accepts that there may be a higher risk of welfare issues with fast-growing meat chickens, but takes the view that they can be kept without detriment to their welfare since environmental conditions can have an influence on the health and welfare of birds with both fast- and slow-growing breeds. To my mind it cannot be said, a matter of law, that the Secretary of State has acted contrary to her legal duties in the guidance the Code offers.
103. As to the *Tameside* duty, this aspect of the challenge fails given that there is no way the claimant can surmount the high threshold of irrationality given that there is no policy in the Code of Practice permitting the keeping of certain breeds of meat chicken and that the Secretary of State has taken the advice she has, as described earlier in the judgment: *Balajigari v Secretary of State for the Home Department* [2019] EWCA Civ 673, [70], per Underhill LJ.
104. As to prosecutions under the 2007 Regulations, these generally lie in the hands of the local authorities under regulation 8. It may appear surprising that there have been no prosecutions, although during the course of the hearing Mr Turney informed the court on instructions that there had been one prosecution resulting from the FSA referral mechanism. To the extent that there is an absence of prosecutions that, without more, does not demonstrate public law error. The enforcement mechanisms for prosecutions must exhibit reviewable flaws. The trigger system is a major component of the compliance machinery for breaches of the 2007 Regulations; it is appropriate to turn to that.

### **The trigger system**

105. The claimant’s case is that the trigger system is unlawful since it is based upon the same error in interpretation of Paragraph 29 as with the Secretary of State’s policies. In addition, there is a second error arising out of paragraph 15(2) of Schedule 5A to the 2007 Regulations, which establishes the system of reporting described earlier. Mr Brown KC submitted that under it a report will only be triggered if poor welfare conditions are exceptionally high, and that even if a report is triggered that will not ordinarily lead to an APHA inspection. Consequently, the mandatory reporting requirement in paragraph 15(2) will not be met even if mortality or poor welfare conditions are consistent with detrimental animal welfare. The prospect that issues arising for meat chickens because of fast growth will be reported outside the trigger system is remote. Thus, Mr Brown submitted, the Secretary of State operates an unlawful monitoring system which has the effect of concealing rather than revealing the true extent of the welfare problems flowing from fast-growing breeds.

106. To begin again with the legislative framework, there are no errors in the construction of Paragraph 29 which bear on this issue. As to paragraph 15(2) of Schedule 5A, quoted earlier in the judgment, although it lays down a process for reporting welfare issues – through monitoring both mortality rates and the outcome of post-mortem inspections - it does not quantify the thresholds to trigger reporting or, indeed, further action. As mentioned earlier the system built on the regulatory framework was designed with input from animal welfare organisations and has been reviewed over time. The Secretary of State has also established other referral and complaints mechanisms.
107. In the Code of Practice, the Secretary of State outlines the process, and in Annex 3 sets out the thresholds for trigger levels covering both ante and post-mortem reporting. In his evidence Mr Goodfellow criticised the number of standard deviations above the average the Code has chosen; the Secretary of State responded that he misunderstands how she has gone about the task and also draws attention to the volume of reports which might otherwise be triggered. The legal point is that as a matter of her judgment the Secretary of State has chosen these thresholds as the appropriate levels to ensure reporting of poor welfare conditions. None of the claimant’s criticisms of the trigger system meet the high threshold for a successful irrationality challenge, especially in this type of technical area where experts can differ.

### **Unequal treatment**

108. The claimant’s case on equal treatment is that the Secretary of State’s Code of Practice and the trigger system violate the principle of equal treatment as applied between compliant producers on the one-hand and non-compliant producers on the other. The operation of the trigger system treats compliant and non-compliant producers equally, but without justification. Non-compliant lower-welfare producers whose flocks suffer much higher levels of detriment are being treated identically, through non-enforcement, compared to higher welfare producers whose flocks exhibit much lower levels of welfare detriment and are more likely to be compliant. This is to the benefit of non-compliant producers who forego regulatory costs without any material sanction, thereby skewing the market.
109. On the assumption that as retained EU law the 2007 Regulations attract the principle of equal treatment the claimant must surmount the high threshold of irrationality. That is because consistency of treatment is regarded as rational behaviour, so that inconsistent treatment is only reviewable if it involves drawing irrational distinctions: *R (on the application of Gallaher Group Ltd) v Competition and Markets Authority* [2018] UKSC 25, [55], per Lord Sumption; *Inclusion Housing Community Interest Co v Regulator of Social Housing* [2020] EWHC 346 (Admin), [98], per Chamberlain J. Even if it could be shown that the trigger system leads to failures of enforcement, that of itself would not amount to inconsistent treatment. Moreover, it would be necessary to demonstrate that inconsistent treatment in enforcement was irrational before the court could interfere. The claimant has demonstrated neither of these preconditions to a claim of unequal treatment.

### **CONCLUSION**

110. For the reasons set out above the claimant’s challenge must be dismissed.