



Neutral citation number: [2023] UKFTT 630 (GRC)

Case Reference: WA/2019/0023

**First-tier Tribunal
(General Regulatory Chamber)
Welfare of Animals**

**Heard at Birmingham Civil Justice Centre
Heard on: 17 & 18 January 2023
Decision given on: 27 July 2023**

Before

JUDGE NEVILLE

Between

EURO QUALITY LAMBS LIMITED

Appellant

and

FOOD STANDARDS AGENCY

Respondent

Representation:

For the Appellant: Mr I Thomas, counsel

For the Respondent: Mr N Ostrowski, counsel

Decision: The appeal is dismissed. The enforcement notice dated 29 July 2019 is confirmed without modification.

REASONS

1. Halal meat must comply with certain requirements. They include that the animal is killed by having its throat cut so that it bleeds to death, and that the slaughterman must be a practising Muslim and recite a prayer. Halal certifying bodies differ on whether the animal must be conscious: most animals slaughtered in this way in the United Kingdom are stunned before being killed, by applying an electric current to the brain to induce an epileptic fit, but around 25% are not.

2. Euro Quality Lambs Limited (“EQL”) operates an abattoir that performs both stunned and non-stunned Halal slaughter. This appeal is about whether the way in which EQL performs non-stunned slaughter complies with the requirements in the Welfare of Animals at the Time of Killing (England) Regulations 2015.

How EQL slaughters sheep without prior stunning

3. After sheep arrive at EQL’s premises they stay in lairage, a broad term meaning the place where an animal rests on its way to slaughter. They are divided into pens according to the anticipated production order, for example grouped by size or age. EQL avoids keeping animals on its premises for any longer than necessary. If there is an unanticipated problem, such as sheep arriving too late on a Thursday to be slaughtered, they are placed in fields in a nearby farm over the weekend. But most sheep are slaughtered on the day after they arrive.
4. A sheep is a flock animal and will naturally follow the sheep in front of it. It is also a prey animal and (in this country) likely raised outdoors, so is wary of humans. As it was put by Fraser J in R. (The Association of Independent Meat Suppliers) v Secretary of State for Environment Food And Rural Affairs [2017] EWHC 1961 (Admin) (“AIMS”) at [22]:
 22. *Anyone who has ever witnessed shepherds working with sheep dogs will know that manoeuvring groups of sheep is something that utilises the desire of sheep to remain in a group, and move away from external influences. ...*
5. So too indoors. If given a narrow run in a particular direction and prompted by a human from behind, sheep will follow one another in a line to their destination. In EQL’s premises, when a particular group of sheep are to be slaughtered, the correct number are let out of their pen and directed in that way to a crowd pen, as shown in this image.



6. It is a circular rotating pen, divided into segments. By opening and closing the entry gate to a segment of the crowd pen, and rotating it, a ring of sheep of the right density

can be achieved that simply follows itself in a circle. On the right of the image, sheep can be seen entering the pen with a human operative behind them. The sheep in the foreground have been moved clockwise, halfway around the pen. The third and final segment exits to two sets of devices known as V-restrainers. In AIMS, Fraser J described a V-restrainer:

9. *There is a piece of equipment, invented in New Zealand, and used in the UK from about 2004 onwards, called a V-restrainer, which can be used to restrain sheep as they are moved to be slaughtered in an abattoir. It was not invented solely for use in abattoirs, and has other farming uses where orderly movement of sheep is required (for instance drenching, which is administration of preventative medical treatment). Essentially, this equipment consists of two inclined conveyor belts, which are not quite vertical. They are further apart from one another at the top than at the bottom (hence making a V-shape in vertical cross-section). They do not touch at the bottom, and there is a small gap between them, big enough for the sheep's legs. A sheep in a V-restrainer is therefore held by the two belts along either side of its body; as the two conveyor belts (the sides of the V-restrainer) move, the sheep moves too. Usually the V-restrainer is set at an incline to the floor, moving upwards. A sheep will walk itself, or be directed, or manually loaded, into one end of the equipment. This will be at the lower end, where its feet can still touch the floor. As the V-restrainer moves, the sheep is moved along and upwards, away from the floor, and its feet no longer touch the ground, although its legs would still hang through the gap between the two belts. In this way, sheep can be manoeuvred mechanically to somewhere else, having started in a loading pen. Although there are different types of loading pens (some have movable floors, some do not) the type of loading pen is not directly relevant to these proceedings. These proceedings concern the use of V-restrainers for sheep in Traditional Halal slaughter, and in particular the effect that the Regulation has upon how they are used and loaded.*
 10. *Prior to the invention and use of the V-restrainer, sheep about to be slaughtered by the Halal method were restrained either in a cradle (a mechanical device that holds the sheep on its back, as though it were on a deck-chair) or on a table (where the sheep would be held on its side, shackled or fixed to it). The sheep would be manually handled into that position to be restrained by either of these pieces of equipment. Once so restrained, a sheep would have its throat cut in that position. [...]*
7. Sheep will naturally try to follow one another onto a V-restrainer, and the operative stood by the exit to the crowd pen assists and encourages those that do not. The operative can also slide a gate across to enforce single file and controls the turning of the pen. The utility of the crowd pen is that it enables sheep to be loaded onto the V-restrainers at a constant and predictable rate despite sheep arriving from lairage at irregular intervals. No sheep is brought into the crowd pen for any other purpose than to form part of the group to be killed in the next few minutes or hours. They would not, for example, rest there overnight. Sheep may have to wait in the crowd pen for a little while, depending on the speed of production, but as observed in AIMS at [38] they do so in a more conventional herd environment than if restrained in single file in a V-restrainer.

8. Each set of V-restrainers consists of three devices in series. The first V-restrainer entered by the sheep is the longest, and in stunned slaughter will hold around eight animals. In non-stunned slaughter only two sheep are loaded. The second and third V-restrainers follow immediately afterwards, and each holds only one sheep. Once two sheep have reached the end of the first V-restrainer, the belt pauses until the path ahead is clear. The sheep are then conveyed into the second and third V-restrainers, one in each. This means that one of the sheep passes through the second V-restrainer so that it can come to rest in the third. These two sheep, now stationary in separate V-restrainers, one in front of the other, then have their throats cut in turn. Each sheep's head is manually lifted by a slaughterman who severs the carotid arteries and jugular veins with a sharpened knife. In the foreground of the image below is the third V-restrainer, behind it is the second V-restrainer, behind that is the first V-restrainer inclining downwards out of sight, and the grid to the left is where the slaughterman stands:



9. As recorded in AIMS at [10], following the incision a sheep must remain in position for at least 20 seconds while it loses consciousness and dies through exsanguination. Restraint of the sheep at the time the incision is made and for these 20 seconds is a requirement of the regulations. The slaughterman can then operate a control to convey the two dead sheep out of the front two V-restrainers so that they can be taken

away for dressing, and to move the next two sheep out of the first V-restrainer to take their place.

10. As with the crowd pen, the efficiency of the system lies in providing a constant and controlled flow of sheep to the slaughtermen. The operative in the crowd pen can ensure that the first V-restrainer is loaded while the sheep in the second and third are dying. That efficiency is also shown in there being two sets of V-restrainers. The slaughterman alternates between them, spending the 20 second waiting time slaughtering a sheep on the other line.
11. It is only fair to record that EQL's stated benefits for the process do not just include efficiency. EQL also puts it forward as more humane than the alternatives, for the reasons set out in AIMS at [12], [21]-[24] and in the evidence adduced in this appeal.

The challenge to the legislation

12. When the regulations were published, they were subject to a legal challenge by a trade association for abattoirs. In AIMS, the issue before the Administrative Court was the lawfulness of Paragraph 6(1)(a) of Schedule 3. For non-stunned slaughter, it provides as follows:

6.(1) The business operator and any person engaged in the killing of a sheep, goat or bovine animal in accordance with religious rites without prior stunning must ensure that –

(a) it is not placed in restraining equipment unless the person who is to carry out the killing is ready to make the incision immediately after it is placed in the equipment;

13. The claimant trade association relied upon evidence from one of its directions, Mr Rizwan Khalid, who is also a director of EQL. The practices considered by the Court were those of the very same abattoir with which this appeal is concerned, although they have altered in some respects since. Fraser J described the issues as follows:

11. The factual issue which sits at the heart of the claim for judicial review is that Paragraph 6(1)(a) as currently drafted, and also as interpreted by DEFRA, has the effect that only one sheep at a time can be put into a V-restrainer to be slaughtered in the Traditional Halal manner. This is because of the requirement that the sheep is not be "placed in restraining equipment" (which means for these purposes the V-restrainer) "unless the person who is to carry out the killing" (the slaughterman – a term that is supposed to be gender inclusive) "is ready to make the incision immediately after it is placed in the equipment". This therefore precludes the use of a V-restrainer to hold multiple sheep, one after the other in a line in the V-restrainer, waiting restrained in that line to be slaughtered at the top of the V-restrainer. The number of sheep that could potentially be held in such a V-restrainer in such a manner, during argument, was said to be four (because this was the figure used by Mr Khalid in his evidence). For stunned slaughter, the court was told that V-restrainers that can hold up to eight sheep at a time are in use in England.

12. *At the risk of appearing not to do justice to the scientific research behind this, I should summarise simply the argument raised by AIMS. It is said by AIMS that the natural flocking instincts of sheep are such that they naturally follow one another, and would naturally want to follow one another, onto a V-restrainer, if they could immediately follow behind another sheep directly in front of them. Being held in a V-restrainer, behind another sheep and in front of another, means that they would be in close proximity with other sheep, and this satisfies their herd instinct, helping the sheep to avoid isolation stress. The welfare of the sheep would be promoted were AIMS and its members to be permitted to use V-restrainers for more than one sheep at a time for non-stunned religious slaughter. This is because they would not need to be handled individually to be loaded onto the V-restrainer (avoiding stress) and would be held in the V-restrainer in proximity with other sheep whilst waiting (also avoiding stress). This point of view is something that AIMS considers has not been considered properly or at all by DEFRA, which has issued Paragraph 6(1)(a) and also interpreted that, and the relevant EU Regulation, in such a way that, AIMS submits, the welfare of sheep is less well-served than it would be were abattoir operators to be permitted to use V-restrainers for multiple sheep for Traditional Halal slaughter.*
13. *DEFRA does not agree that the welfare of sheep is promoted by use of V-restrainers for multiple sheep in such non-stunned slaughter. Ms Whitehead for DEFRA refers to the fact that "non-stunned slaughter is controversial". That statement is undoubtedly accurate. Mr Pievsky for DEFRA submitted that policy in such areas is a matter of the Minister balancing different interests of different groups, striking an overall balance having done so. Animal welfare organisations or charities would undoubtedly have a very different view about welfare of sheep and non-stunned slaughter than, say, AIMS and others involved commercially in this type of operation. Mr Mercer QC for AIMS adopted a bolder approach to the subject, and submitted that this subject was wholly about animal welfare, and that the subject was, as he put it, "completely science-based". Indeed, he went somewhat further and submitted that there was no scientific evidence to the contrary to justify the position of DEFRA on this subject, and/or that there was no evidence before the court to demonstrate that DEFRA had considered the relevant science at all.*
14. He went on to rehearse the history of the legislation, including that it stood as the United Kingdom's implementation of Council Regulation (EC) 1099/2009 of 24 September 2009 on the protection of animals at the time of killing ("the EU Regulation"), and the consultation and consideration of evidence conducted by DEFRA before the regulations were made. I take into account that full analysis without repeating it, only adding that the domestic regulations continue to apply as retained EU law.
15. The various grounds argued by AIMS were each rejected, the overarching conclusion being that Paragraph 6(1)(a) was rationally "aimed at ensuring more extensive protection of animals" within the meaning of Article 26 of the EU Regulation, DEFRA having established an underlying factual basis and reasoning such that its evaluative assessment could not be set aside on judicial review. There are other relevant parts of the judgment, to which I shall return.

The Welfare Enforcement Notices

16. Paragraph 6(1)(a) having emerged from the judicial review proceedings intact, attempts were made to enforce the legislation at EQL's premises. The first step in enforcing this part of the regulations is to serve a Welfare Enforcement Notice, pursuant to regulation 38. It materially provides as follows:

38. –

- (1) *An enforcement notice is a notice in writing –*
 - (a) *requiring a person to take specified steps to remedy a contravention of the EU Regulation or these Regulations;*
 - (b) *requiring a person to reduce the rate of operation to such extent as is specified in the notice until that person has taken specified steps to remedy a contravention of the EU Regulation or these Regulations; or*
 - (c) *prohibiting a person from carrying on an activity, process or operation, or using facilities or equipment, specified in the notice until the person has taken specified steps to remedy a contravention of the EU Regulation or these Regulations.*
- (2) *An inspector who is of the opinion that a person has contravened or is contravening the EU Regulation or these Regulations may serve on that person an enforcement notice.*
- (3) *An enforcement notice must –*
 - (a) *state that the inspector is of that opinion;*
 - (b) *state the date and time of service of the notice;*
 - (c) *identify the recipient of the notice;*
 - (d) *specify the matters constituting the contravention;*
 - (e) *specify the steps that must be taken to remedy the contravention;*
 - (f) *specify the period within which those steps must be taken; and*
 - (g) *give details of the right of appeal against the notice.*

[...]

WEN 1

17. A Welfare Enforcement Notice dated 27 November 2017 ("WEN 1") was served on EQL by the Official Veterinarian assigned to its premises, Mr Mircea Pop. In a decision by Judge McKenna dated 5 July 2018, EQL's appeal against WEN 1 was allowed. Judge McKenna interpreted regulation 38(2) as requiring that the opinion

of the inspector be independently held. Having heard evidence from Mr Pop, she held that it was not, Mr Pop having simply served the WEN at the FSA's behest. WEN 1 was cancelled.

WEN 2

18. The second WEN was dated 21 March 2019 ("WEN 2"). It was served by a different veterinarian, Mr Juan Chulian. The subsequent appeal against WEN 2 was unopposed by the FSA. Its reasons were not given, save that it intended to serve a third WEN. The appeal being unopposed, in a decision dated 14 June 2019 Judge McKenna allowed the appeal and cancelled the WEN.

WEN 3

19. Dated and served on 29 July 2019, this is the WEN with which this appeal is concerned. I shall refer to it simply as the "WEN", save where it is necessary to distinguish it from WEN 1 and WEN 2. It was also served by Mr Chulian. The first relevant part of the notice reads that in the opinion of an authorised inspector, a contravention of Paragraph 6(1)(a) had been observed:

Ovine and caprine animals killed in accordance with religious rites without prior stunning in your establishment are placed in restraining equipment (usually at the point they are placed in the mechanical feeder restrainer) in circumstances where the person who is to carry out the killing is not ready to make the incision immediately after it is placed in the equipment. The animals are transported from the lairage to the killing room / area through the mechanical feeder restrainer. At the end of the mechanical feeder restrainer, individual consecutive restraining belts are in use with the result that some animals pass through more than one restrainer after the feeder restrainer before reaching the one where they are to be killed.

20. The next section reads:

The following steps must be taken to remedy the contravention

Modify your system for restraining ovine and caprine animals slaughtered by religious rites without prior stunning by ensuring that each ovine and caprine animal is placed in restraining equipment only when the person who is to carry out the killing is ready to make the incision immediately after it is placed in the equipment.

The appeal

21. This appeal was heard in-person at Birmingham Civil Justice Centre. It had been brought by EQL against the Food Standards Agency, and proceeded in that fashion up to and including the hearing. I have wondered since whether the correct respondent is actually Mr Chulian, but the parties have never raised the issue, nor has the FSA being the respondent been queried in other cases – see, for example, Food Standards Agency v Penny & others (European Union law, Other general regulatory

appeals) [2022] UKUT 64 (AAC). It would be wrong to delay the resolution of this appeal further by requesting submissions on the point.

22. At the hearing, oral evidence was given by Mr Chulian and Dr Collin Willson on behalf of the respondent. Dr Willson is a veterinary surgeon and employed by the FSA as its 'portfolio lead' on Welfare at Slaughter. While Dr Willson was not called to give expert evidence, inevitably some of his factual evidence expresses the type of opinion discussed in Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd [2008] EWHC 2220 (TCC) at [670]-[672]. No objection was taken on behalf of EQL, but when assessing the weight to be afforded to this evidence I take account of the distinction. On behalf of EQL, evidence was given by Mr Khalid and an expert, Mr Peter Hewson. Mr Hewson is a veterinary surgeon with a distinguished curriculum vitae, and he retired from the FSA at the end of 2008, having spent his final year as its acting Veterinary Director. His expert report and its three addenda contain the appropriate confirmation of his overriding obligation to the Tribunal and understanding of his duties as an expert. The Tribunal also viewed videos that Mr Khalid had recorded of the slaughtering process in operation. I have not found it necessary to record any witness's evidence in detail, but have taken it all into account.

Legal framework

23. The provisions entitling an inspector to serve a WEN are already set out above. By virtue of regulation 30(2), failure to comply with a WEN is a criminal offence. Regulation 39 entitles a person who is aggrieved by the service of a WEN to appeal against it. The powers of the Tribunal on appeal are set out in regulation 39(4):

(4) *On appeal the First-tier Tribunal may either cancel or confirm the enforcement notice, with or without modification, or make such order as it thinks fit as regards refusal to serve a completion notice.*

24. This is worded in a similar way to the regulations considered in Health and Safety Inspector v Chevron [2018] UKSC 7. Lady Black held that while the opinion of an inspector was necessary to bring the notice into existence, on appeal the focus shifts away from that opinion to the notice itself. She continued:

18. ... Everyone agrees that it involves the tribunal looking at the facts on which the notice was based. Here, as the inspector spelled out in the notice, the risk that he perceived arose by virtue of corrosion of stairways and gratings giving access to the helideck, and the focus was therefore on the state of that metalwork at the time when the notice was served. The tribunal had to decide whether, at that time, it was so weakened by corrosion as to give rise to a risk of serious personal injury. The inspector's opinion about the risk, and the reasons why he formed it and served the notice, could be relevant as part of the evidence shedding light on whether the risk existed, but I can see no good reason for confining the tribunal's consideration to the material that was, or should have been, available to the inspector. It must, in my view, be entitled to have regard to other evidence which assists in ascertaining what the risk in fact was. If, as in this case, the evidence shows that there was no risk at the material time, then, notwithstanding that the inspector

was fully justified in serving the notice, it will be modified or cancelled as the situation requires.

25. I apply those principles. The Tribunal finds any relevant facts according to the standard of the balance of probabilities, and decides for itself whether the WEN should be cancelled, confirmed, or modified. Careful attention should also be paid to the reasons given for arriving at the decision under appeal, bearing in mind that Parliament has chosen (here) that an authorised inspector will be responsible for deciding whether to serve a WEN. The weight that ultimately attaches to the regulator's reasons will depend on all these circumstances, taking into account their fullness and clarity, the nature of the issues, and the evidence: R. (Hope & Glory Public House Ltd) v City of Westminster Magistrates' Court [2011] EWCA Civ 31 at [45]; Hesham Ali (Iraq) v Secretary of State for the Home Department [2016] UKSC 60 at [44]-[46].

The issues

26. The parties structured their submissions around EQL's amended grounds of appeal, which can be summarised as follows:

- a. Ground 1 - Contrary to what is stated in the WEN, the process followed at EQL's premises does comply with Paragraph 6(1)(a).
- b. Ground 2 - The WEN was not lawfully served, for one or more of the following reasons:
 - i. It was not lawful for Mr Chulian to be the inspector that issued the WEN;
 - ii. Mr Chulian did not, as a matter of fact, hold the opinion required by regulation 38(2); and
 - iii. The opinion was not formed independently by Mr Chulian, instead being held by DEFRA, the FSA and/or by the company that employs Mr Chulian, Evill & Jones (Group) Limited.
- c. Ground 3 - The wording and structure of the WEN itself does not comply with the regulations.
- d. Ground 4 - Being the third WEN issued in respect of the same subject matter, it should be cancelled as an abuse of process.

27. I likewise set out my consideration according to the same headings.

Ground 1 - Is EQL's practice in contravention of the regulations?

28. There is no real factual dispute under this head, rather disagreement on how the statutory language should be applied to the way in which lambs are slaughtered at EQL's premises.

29. Despite EQL's dissatisfaction at the service of a third WEN, for the purposes of Ground 1 the respondent has, I consider, maintained a consistent position. Paragraph 6(1)(a) prohibits the placement of an animal in restraining equipment unless the person who is to carry out the killing is ready to make the incision immediately after it is placed in the equipment. At the point a sheep enters the first V-restrainer it is restrained, but the slaughterman is not ready to make the incision immediately afterwards. Even if only two sheep are placed in the first V-restrainer at once, the slaughterman is likely busy slaughtering the previous two sheep or waiting for the compulsory 20 second period. The sheep must wait its turn, in restraint, before the slaughterman is ready to make the incision. It is the same case as was made by DEFRA in AIMS, and discussed by Fraser J at [11]. The WEN can also be fairly read as complaining that sheep pass through more than one restrainer before being killed.
30. EQL's case focuses on the parts of Paragraph 6(1)(a) to which I have supplied emphasis below:

6.(1) *The business operator and any person **engaged in the killing of a sheep**, goat or bovine animal in accordance with religious rites without prior stunning must ensure that –*

(a) ***it is not placed in restraining equipment** unless the person who is to carry out the killing is ready to make the incision immediately after it is placed in **the equipment**;*

31. The requirement, argues EQL, therefore only applies once it is "engaged in the killing of a sheep". The phrase denotes a process rather than a one-off act, and can be contrasted with Paragraph 5 that refers to any "person who kills a sheep...". The most natural meaning of the process of killing is that it begins upon the slaughterman's knife severing the carotid artery. It is then that the process of killing begins, and EQL points to expert evidence that the sheep loses consciousness some 7 to 10 seconds later, and that death occurs at around 14 seconds. So, EQL protests, it is no more open to the respondent to describe loading the sheep into the first V-restrainer as part of the killing process than when it is led into the crowd pen, or the lairage, or (I suppose) if it were physically restrained at the farm on failing to cooperate with being loaded into the livestock trailer, or any of the other various steps that eventually result in the sheep's demise. No sheep is killed in the first V-restrainer, which simply transports a sheep from one part of the premises to another. The restraining device for the purposes of killing the sheep, argues EQL, is the V-restrainer in which it is actually killed.

32. At Regulation 3(2), the domestic Regulations explicitly adopt the definitions in the EU Regulation. So, EQL points to the following definitions at Article 2:

For the purposes of this Regulation, the following definitions shall apply:

(a) *'killing' means any intentionally induced process which causes the death of an animal;*

(b) *'related operations' means operations such as handling, lairaging, retraining, stunning and bleeding of animals taking place in the context and at the location where they are to be killed;*

...

(f) *'stunning' means any intentionally induced process which causes loss of consciousness and sensibility without pain, including any process resulting in instantaneous death*

...

(g) *'restraint' means the application to an animal of any procedure designed to restrict its movements sparing any avoidable pain, fear or agitation in order to facilitate effective stunning and killing;*

...

33. Next, EQL points to the requirement at Article 15(2):

2. *Business operators shall ensure that all animals that are killed in accordance with Article 4(4) without prior stunning are individually restrained; ruminants shall be mechanically restrained.*

which in turn should be read in light of the following recital:

- (43) *Slaughter without stunning requires an accurate cut of the throat with a sharp knife to minimise suffering. In addition, animals that are not mechanically restrained after the cut are likely to ensure a slower bleeding process and, thereby, prolonged unnecessary suffering. Animals of bovine, ovine and caprine species are the most common species slaughtered under this procedure. Therefore, ruminants slaughtered without stunning should be individually and mechanically restrained.*

34. EQL argues that this provides a complete picture of the process: stunning, if performed; restraint, mandatory if the animal is not stunned; and killing. It would be absurd, say EQL, to suggest that 'stunning' as so defined takes place anywhere other than the final V-restrainer in which the live sheep comes to rest: that is where the electrodes are placed on its head. Likewise, killing can only be said to occur in the final V-restrainer: that is where the 'intentionally induced process which causes the death' of the sheep is started, being the severing of its carotid artery by the slaughterman's knife. On the respondent's interpretation, the process of killing the animal begins before it is stunned. EQL argues that cannot be right.

35. In support of EQL's arguments, Mr Thomas put to the respondent's witnesses that the 'process which causes the death of an animal' begins with the application of the knife to its neck. Mr Chulian replied that he saw it as an individual step in the whole process, which began when the sheep was placed on the first, inclined, V-restrainer, and that otherwise the phrase 'immediately after' in Paragraph 6(1)(a) would serve no purpose. Dr Willson agreed that, in literal terms, killing the animal begins with

making the incision and ends 15 to 20 seconds later. Whether the 'process' of killing could begin sooner, and at what stage, he described as a philosophical question.

Consideration

36. Article 9(3) of the EU Regulation requires that:

3. *Business operators shall ensure that animals are not placed in restraining equipment, including head restraints, until the person in charge of stunning or bleeding is ready to stun or bleed them as quickly as possible.*

37. It is difficult to see how this can be read as doing anything other than regulating what happens in the moments *before* incision, not from incision. On the domestic regulations, Fraser J held as follows:

43. *In my judgment, Paragraph 6(1)(a) was clearly "aimed at" ensuring better animal welfare and more extensive protection of animals. Its aim was to reduce the length of time the animal in question would be restrained – a state which it is accepted causes stress to them – to the very minimum physically possible, because each sheep has to be killed immediately it is restrained, or, to use the language of the paragraph itself "immediately after it is placed in the equipment."*

38. Arguably at least, this is conclusive. Fraser J holds that the wording of Paragraph 6(1)(a) means the same as "each sheep has to be killed immediately it is restrained". At [53], he further held that it was lawful for Paragraph 6(1)(a) to impose stricter requirements than the EU Regulation. Even if I am not formally bound by either conclusion, I agree with them. On any rational view, sheep in EQL's process are not killed immediately after being restrained. They are restrained from the moment they enter the first V-restrainer, and must wait in it until the sheep in front of them have been killed. The longest a sheep did so in Mr Khalid's video was 52 seconds. It was not argued that this met the requirement of being "immediate" in Paragraph 6(1)(a), nor could it: see AIMS at [39].

39. I nonetheless address the issue as it was argued. EQL's suggested interpretation of Paragraph 6(1)(a) has not remained entirely consistent. In the amended grounds, EQL argues that the provision "applies to handling during killing", and that "the killing process begins when the knife is put to the animal's neck, which is then cut to sever the carotid arteries that supply blood to the brain, and ends when the animal is dead from blood loss". EQL argued categorically that "the legislative clause thus does not apply to any process, or part of a process, that occurs before then (such as moving the animals from the motorised crown pen through [the first V-restrainer]". This was the case put to the respondent's witnesses in cross-examination.

40. In Mr Thomas's skeleton argument this argument is repeated, but with additional focus on the different V-restrainers. The only device in which the animal is restrained for the purposes of killing, he argues at paragraph 51, is the one in which it comes to rest: the animal is neither killed nor restrained for the purposes of killing in the first device.

41. Challenging EQL's case that the requirements only apply from the point of incision, Mr Ostrowski asked Mr Khalid how a slaughterman could ever *not* be ready to make the incision immediately, given that he was already making it. Mr Khalid's response was that the 'process of killing' actually begins when the sheep arrives in the V-restrainer in front of the slaughterman. This was echoed in Mr Thomas's closing submissions, where he described EQL's case as being that the process of killing begins when the animal 'comes to rest', at which point the slaughterman is ready to immediately make the incision. I cannot accept that this is consistent with EQL's case in the amended grounds. Either the requirements at Paragraph 6(1)(a) apply from the sheep coming to rest or they apply from the point of incision. It cannot be both.
42. None of the above should be taken as criticising Mr Thomas, who skilfully and persuasively argued EQL's case, nor Mr Khalid, who I am satisfied gave entirely honest evidence. The shift in focus simply reveals that EQL's primary interpretation cannot withstand analysis. Incision is the point from which the sheep *must* be restrained, pursuant to Article 15(2) of the EU Regulation. If that is also the point at which Paragraph 6(1)(a) begins to apply, then its obligation *not* to restrain could never arise. The provision would be rendered redundant.
43. The Tribunal can still address EQL's alternative case, being whether the requirements of Paragraph 6(1)(a) commence on the sheep coming to rest in its final V-restrainer. I accept, from the videos of the process, that the slaughterman is ready to immediately make the incision when the sheep finally comes to rest, but reject EQL's argument that this is the first time the sheep is restrained for the purpose of being killed. The argument depends on the three V-restrainers being seen as separate incidents of restraint. In AIMS, Fraser J appears to have contemplated that there would be only one V-restrainer, and I infer that placing three devices in series is a later development. In addressing the lawfulness of restraining multiple sheep in a single V-restrainer, he held as follows:
11. ... *This is because of the requirement that the sheep is not be "placed in restraining equipment" (which means for these purposes the V-restrainer) "unless the person who is to carry out the killing" (the slaughterman – a term that is supposed to be gender inclusive) "is ready to make the incision immediately after it is placed in the equipment". This therefore precludes the use of a V-restrainer to hold multiple sheep, one after the other in a line in the V-restrainer, waiting restrained in that line to be slaughtered at the top of the V-restrainer. ...*
- ...
51. *This is a straightforward matter of interpretation of the EU Regulation. Article 15.2 states that "Business operators shall ensure that all animals that are killed in accordance with Article 4(4) without prior stunning are individually restrained; ruminants shall be mechanically restrained." This means, on its plain language, that sheep (as they are ruminants) have to be mechanically restrained, and they have to be individually restrained.*

52. *A V-restrainer is undoubtedly mechanical restraint. Having four sheep in one at a time, however, cannot in my judgment be said to be restraining them individually in that same mechanical restraint. To be restrained individually, and to give that word its common and widely understood meaning (if not its only meaning), only one sheep must be in the V-restrainer at a time. If there are two or more, then the sheep are not being restrained individually.*

44. It might be wondered, after reading those extracts, how EQL can argue that its system of having four sheep restrained at a time is lawful. Again, its case depends on the first V-restrainer in the series falling outside the scope of Paragraph 6(1)(a). I reject this. The prohibition is against placing a sheep in “restraining equipment”, not against placing a sheep in an individual device. It is entirely consistent with the statutory language for three v-restrainers in continuous series to together form “restraining equipment”, into which the animal cannot be put until the slaughterman is ready to make the incision immediately, and I make such a finding here.
45. The above point can be further illustrated, were it necessary, by putting oneself in the place of the sheep. It finds itself subjected to only one period of restraint, undergoing an uninterrupted experience that meets the definition of Article 2(g) of the EU Regulation on its entire journey through the three V-restrainers, just as if it were placed in a stationary cradle then made to wait up to 52 seconds before the slaughterman is ready to make the incision. It is unreal to suggest that placing the sheep in the first V-restrainer is not for the purposes of killing, when it commences the same action of restraint in which the sheep is ultimately killed. Any enhancement to the sheep’s welfare from being behind another sheep does not undermine this conclusion, and in any event was considered in AIMS when deciding that the regulations were lawful as drafted.
46. I therefore dismiss EQL’s appeal on this ground without needing to address the respondent’s further arguments in detail. Nonetheless, it is right to set out a brief assessment:
- a. In meeting EQL’s case that killing is a process, Mr Ostrowski referred to the definition of a process in R. (Higginshaw Abattoir Ltd) v Greater Manchester Magistrates Court [2022] EWHC 378 (Admin), per Choudhury J at [82]-[83], as a series of steps to achieve a result. I agree, and further hold that what EQL puts forward as the process of killing is actually the process of dying. If I kill someone with an arrow, then drawing back the bow is unquestionably part of the process of killing despite it doing them no damage whatsoever. As already held above, putting the sheep in the same restraint as in which it is killed is unquestionably part of the process of killing.
 - b. Mr Ostrowski’s suggested dissection of Paragraph 6(1)(a) into two limbs is correct, but unnecessarily elaborate given the plain meaning of the language used and the absurdity of EQL’s rival interpretation. The respondent’s interpretation of the provision is further supported by the various non-statutory materials to which Mr Ostrowski refers in his skeleton argument,

but can be satisfactorily established simply by reference to the judgment in AIMS.

- c. I do reject the respondent's argument concerning 'related operations' in the EU Regulation, a definition which appears nowhere in the provisions concerning slaughter of this type.

Ground 2 – was it lawful for Mr Chulian to serve the notice?

47. Regulation 38(2) provides that:

- (2) *An inspector who is of the opinion that a person has contravened or is contravening the EU Regulation or these Regulations may serve on that person an enforcement notice.*

48. So, a WEN may only be served by “an inspector”, being a person who has been appointed by (in this case) the FSA pursuant to regulation 34. The FSA cannot serve a WEN itself. While it appoints inspectors, it does not have a direct employment relationship with them. Instead, inspectors are employed by a private company called Eville & Jones, operating on the FSA's behalf. Judge McKenna held that the opinion required by regulation 38 must be an “independent” opinion, but her judgment must be seen in the context of the unsatisfactory evidence before her, leading to findings that Mr Pop had simply served the notice at the behest of others, without forming his own view. I reject that she intended to place any gloss on the provision, which should be approached according to normal public law principles.

EQL's case

49. In the amended grounds of appeal, this second ground makes multiple assertions of non-compliance with the statutory scheme. These were narrowed significantly in Mr Thomas's closing submissions, and can now be approached as an argument that Mr Chulian's opinion was insufficiently independent to meet the requirement of regulation 38(2). This is said to arise in two linked ways. First, EQL argues that an impermissibly 'top-down' approach was taken to approaching compliance. If DEFRA were of the view that a particular practice contravened the legislation, this guidance was cascaded down to inspectors such as to strip them of the independence intended by the legislation. Second, this independence is further undermined if the FSA or Eville & Jones (and perhaps DEFRA) can simply send any inspector of their choice to serve a WEN. They argue that a WEN must instead be served by the Official Veterinarian (“OV”) actually assigned to the premises, rather than an inspector who has been hand-picked for that purpose.

50. At the time he served the WEN, Mr Chulian was a Deputy Area Veterinary Manager for Eville & Jones and appointed as an inspector under regulation 34. Approved premises, such as those operated by EQL, each have their own assigned OV. This enables a direct relationship between the OV and the managers of the premises; issues of concern can be discussed and tracked, as well as their improvement. Mr Chulian represented the layer of management above OVs.

51. The first WEN had been served by the OV assigned to EQL's premises, Mr Pop. Mr Chulian explained that numerous WENs had been served on different premises following the judgment in AIMS, and that this had been done by their OVs. After the first WEN served on EQL had been successfully appealed, it was decided that the legal issues warranted involvement of a manager. Mr Chulian had previously worked as the OV at EQL's premises himself, so was considered the most suitable person.
52. Despite the passage of time since the events in question, a subsequent change of employment, and comprehensive cross-examination by Mr Thomas, Mr Chulian's evidence was careful, well-compiled and consistent. He struck me as a thoughtful witness, willing to analyse his and others' actions candidly and critically. Mr Thomas conceded that Mr Chulian's evidence was credible, and that he had genuinely held an opinion that there was a contravention.
53. Prior to serving the second WEN, Mr Chulian had seen EQL's process in operation on around 13 occasions, as part of his OV and management duties and as part of his consideration of the present issue. He accepted that he had not held any concerns about EQL's process on most or all of those occasions. His view of the requirements had changed following the publication of the regulations, the case of AIMS, different iterations of DEFRA and FSA guidance, and conversations and training in his workplace. I pause to observe that significant evidence was provided of these matters, particular in the evidence of Dr Collin Willson, who had a senior role in the FSA's handling of the issue and wrote much of its guidance. It does not all need repeating in these reasons, but it is fair to say that the perceived requirements of the legislation, and whether businesses such as EQL complied with them, was a rapidly changing picture.
54. The challenge put to Mr Chulian in cross-examination was that he had simply followed guidance received from above instead of reaching his own independent view. He denied this, but candidly accepted that he had regard to guidance and legislation as setting out the basis for his own views on animal welfare. He had taken part in meetings with others from Eville & Jones, and the FSA, on the issue of whether EQL complied with Paragraph 6(1)(a). He had not, as EQL initially suggested, been compelled (in the sense of receiving a lawful instruction from an employer) to visit the premises and serve a WEN. He had been fully in agreement with both the decision that he be the inspector, and had formed his own view upon visiting the premises that EQL was in contravention. While responsibility for serving notices was that of an individual inspector, he valued working as a team when addressing particular issues.

Consideration

55. The credibility of Mr Chulian's evidence was accepted by Mr Thomas. That evidence included the following:

...it was likely that I would witness a breach of the Regulations and in preparation attended the plant with a draft wording for the WATOK Enforcement Notice. This

wording had been discussed between veterinary and non-veterinary colleagues within the FSA. However, I understood that this was only a suggested wording and it was a matter for me to consider whether this was appropriate in light of what I observed at the plant.

56. I have no hesitation in finding that Mr Chulian approached his task in that way.
57. Consequently, this ground concerns only whether the opinion formed by Mr Chulian satisfies regulation 38(2). That opinion concerns whether a person has contravened or is contravening the regulations or the EU Regulation. Some of the arguments put forward by EQL tended to conflate that issue with whether a particular practice gives rise to animal welfare concerns more generally. That is not a necessary ingredient. An inspector is concerned with assessing what is happening, and then forming an opinion on whether it contravenes the legislation. For example, Paragraph 6(2)(a) prohibits moving an animal for at least 20 seconds after the cut is made. If an inspector was of the personal opinion that only 15 seconds is necessary to safeguard the animal's welfare, that would be no bar to him issuing a WEN in response to a practice of only allowing 18 seconds. What matters is the legislation.
58. The relevance of the inspector's opinion on animal welfare would only be potentially relevant to (a) interpretation of legislation, where ambiguous, (b) where specifically incorporated by a particular provision or (c) the exercise of discretion as to whether the WEN should be issued. For the reasons already given in relation to ground one, I do not consider that issues of animal welfare can make a material contribution to interpreting Paragraph 6(1)(a) or deciding whether it has been contravened. Animal welfare considerations might, in some cases, be relevant to discretion; as observed during evidence, not all breaches justify taking formal enforcement action. That is, however, a separate issue to whether the opinion required by regulation 38(2) has been established.
59. The best fit for EQL's arguments, in my assessment, is the concept of bias or predetermination: that Mr Chulian has been told what to think and / or approaches the decision with a closed mind. The test was expressed as follows in Persimmon Homes Teesside Ltd v R. (Lewis) [2008] EWCA Civ 746:

96. *So the test would be whether there is an appearance of predetermination, in the sense of a mind closed to the planning merits of the decision in question. Evidence of political affiliation or of the adoption of policies towards a planning proposal will not for these purposes by itself amount to an appearance of the real possibility of predetermination, or what counts as bias for these purposes. Something more is required, something which goes to the appearance of a predetermined, closed mind in the decision-making itself. I think that Collins J put it well in R (on the application of Island Farm Development Ltd) v. Bridgend County Borough Council when he said (at paras 31/ 32):*

"The reality is that councillors must be trusted to abide by the rules which the law lays down, namely that, whatever their views, they must approach their decision making with an open mind in the sense that they must have regard to all material considerations and be prepared to change their views if persuaded that they should...[U]nless there is positive evidence to show that there was indeed a closed mind, I do not think that prior observations or apparent favouring of a particular

decision will suffice to persuade a court to quash the decision...It may be that, assuming the Porter v Magill test is applicable, the fair-minded and informed observer must be taken to appreciate that predisposition is not predetermination and that councillors can be assumed to be aware of their obligations."

97. *In context I interpret Collins J's reference to "positive evidence to show that there was indeed a closed mind" as referring to such evidence as would suggest to the fair-minded and informed observer the real possibility that the councillor in question had abandoned his obligations, as so understood. Of course, the assessment has to be made by the court, assisted by evidence on both sides, but the test is put in terms of the observer to emphasise the view-point that the court is required to adopt. It need hardly be said that the view-point is not that of the complainant.*

60. That authority (referred to as Lewis v Redcar) was applied in R. (Fraser) v National Institute for Health and Clinical Excellence [2009] EWHC 452 (Admin), the facts of which bear some similarity to those in this appeal. The Claimant had argued that some of the members of a committee had been nominated according to an impermissible preference for a particular form of treatment, and had then carried forward that predetermination into the decision under challenge. Like Mr Chulian, they were accused of having been both chosen for their particular stance, and of having predetermined the issue. After summarising the relevant authorities at [49], Simon J held that:

50. *In the present case, the context is the recommendation of an independent expert body, whose members had been chosen for their knowledge and expertise. In such a case, the law does not, in my view, call for a more rigorous test than was expressed in Lewis v Redcar. It is not enough for the Claimants to demonstrate the expression of prior views. They have to show (at least) predetermination: a closed mind at an early stage. This, as Longmore LJ stated in Lewis v Redcar at §109, is a difficult test to satisfy.*

61. In the present appeal there is no direct evidence, or evidence from which an inference could fairly be drawn, that Mr Chulian had a mind that was closed to the issue. On the contrary, I find that he formed his own independent view. Nor, having regard to the overall context of the scheme by which inspectors are appointed and carry out their work, is bias or predisposition demonstrated by him being the particular inspector who served the WEN. Simply gaining his understanding of the law from guidance and training provided by the FSA or DEFRA cannot show bias or predisposition. The law is replete with statutory officeholders who must independently apply laws on which they have received guidance and training, from police officers to judges to health & safety inspectors. Independence does not mean closing one's ears, it instead demands the opposite. If, hypothetically, an inspector were told by their employer "you must serve this notice or you will be dismissed", then that might, on the particular facts, undermine his opinion. That is not the case in this appeal. Having heard the FSA and DEFRA's view of the law and EQL's rebuttal, Mr Chulian agreed with the former.

62. Nothing in the statutory scheme restricts the ability to serve a notice to the premises' own OV. In any event, EQL was unable to identify any formal way in which an OV

is 'assigned' to particular premises, and accepted during argument that this might change from day to day to address sickness and annual leave. That is a matter of employee management for Eville & Jones to determine, subject only to any relevant provision of its agreement with the FSA. An OV is not assigned to premises by way of a formal legal decision, like a First-tier Tribunal Judge to a Chamber, it is simply a working arrangement. There is certainly no basis for elevating that arrangement to a statutory restriction on who may serve a WEN, and in many regulatory fields it will be appropriate for an inspector in a particular position, or with specialist knowledge, to serve a particular notice. Nor is there any basis upon which to consider that Mr Chulian unlawfully delegated his statutory responsibility, or served the notice acting as the agent of Eville & Jones or the FSA.

Ground 3 – does the WEN comply with the regulations?

63. Regulation 38(3) mandates particular information to be included in a WEN. The parties agree that if the WEN under appeal fails to comply, the appeal will succeed.

64. EQL argues that the WEN fails to comply with regulation 38(3), in that it fails to:

(d) *specify the matters constituting the contravention;*

(e) *specify the steps that must be taken to remedy the contravention;*

65. EQL's grounds argue that a WEN must tell the recipient "precisely what is alleged to be the breach or non compliance and also to know precisely what it is being asked to do", and that this should be "without the need to refer to other documentation or information." Likewise, Mr Thomas argued that the recipient must be informed "simply by reading the WEN, what law it is alleged to be contravening, or has contravened, why the inspector has formed that opinion and what the inspector is telling the [recipient] to do."

66. Mr Thomas cited Miller-Mead v Minister of Housing and Local Government [1963] 2 QB 196, CA, a case concerning an enforcement notice issued under the provisions of the then-applicable Town and Country Planning Act 1947. On the content of such a notice, Upjohn LJ held as follows:

... It was at one stage submitted by counsel for the appellant that we must look at some application for a site licence in order to construe the enforcement notice. But I must protest in strong terms against looking at any document except the enforcement notice. This is a most important document, and the subject, who is being told he is doing something contrary to planning permission and that he must remedy it, is entitled to say that he must find out from within the four corners of the document exactly what he is required to do or abstain from doing. For this is the prelude to a possible penal procedure. It is comparable to the grant of an injunction and it is perfectly plain that someone against whom an injunction is granted is entitled to look only to the precise words of the injunction to interpret his duty. The order cannot be construed by reference to the earlier proceedings unless expressly incorporated in the order. ...

67. Mr Thomas also referred me to the application of that authority by HHJ Waksman KC in Oates v Secretary of State for Communities and Local Government [2017] EWHC 2716 (Admin). In considering an argument that the enforcement notice in that case was a nullity by reason of deficient wording, the Judge held as follows:

47. *The question then was what would render a defect sufficiently serious to amount to a non-compliance with the statute. As to the example of vagueness, while Upjohn LJ used the words “hopelessly ambiguous and uncertain” at one point he later refers to the position where the recipient “could not tell with reasonable certainty what steps he had to take”. That seems to me to be a preferable way of putting it not least because it is phrased in language familiar to lawyers; the expression “reasonable certainty” is to be distinguished from absolute certainty. Provided that the essential steps to be taken were clear enough that would suffice even if there was some uncertainty at the margins.*

68. Mr Ostrowski cautions against over-reliance on the judgment in Miller-Mead, given subsequent changes to the statutory scheme for planning enforcement, citing several more modern authorities in support. I agree, and note that in Oates the Judge preferred the phrase “could not tell with reasonable certainty what steps he had to take”.

69. I question whether the clear language of regulation 38(3) requires elaboration at all, and whether relevant guidance can really be drawn from authorities concerning enforcement notices issued under planning legislation. Nonetheless, asking whether the recipient can “tell with reasonable certainty what steps he had to take” is a useful way of asking oneself whether those steps have been specified, as required by the present legislation. I reject any argument, and EQL’s grounds of appeal could be interpreted as going that far, that the nature of the contravention must be entirely and precisely definable from the four corners of the notice itself, perhaps even to an ignorant third party. That would ignore both the ‘reasonably’ part of the test and that it is the recipient who must be able to tell what steps to take. If the actual recipient of the notice can tell with reasonable certainty what matters are said to contravene the legislation, and what to do to remedy that contravention, that is sufficient. Finally, I reject that the regulation requires any particular reasoning be given in support of the inspector’s opinion, let alone how that opinion was formed. The WEN is not a pleading, and need not specify any other information than is explicitly required by regulation 38(3).

70. On the WEN itself, Mr Thomas attempted to illustrate its non-compliance by dissecting the wording. The contravention is specified as follows:

Ovine and caprine animals killed in accordance with religious rites without prior stunning in your establishment are placed in restraining equipment (usually at the point they are placed in the mechanical feeder restrainer) in circumstances where the person who is to carry out the killing is not ready to make the incision immediately after it is placed in the equipment. The animals are transported from the lairage to the killing room / area through the mechanical feeder restrainer. At the end of the mechanical feeder restrainer, individual consecutive restraining belts are in use with the result that some

animals pass through more than one restrainer after the feeder restrainer before reaching the one where they are to be killed.

71. On the basis, he argued, that the first two sentences must be introductory, only the final sentence can be taken as specifying the contravention, and it fails to do so with the requisite precision. I disagree. The various matters put forward by EQL as establishing a lack of precision are those it has already fielded in support of ground 1: the killing process only starts on incision, the first V-restrainer is not used for the purposes of killing and is not the same restraint in which the animal is killed, and so on. If the WEN makes no sense on EQL's interpretation of Paragraph 6(1)(a), that says rather more about EQL's interpretation than it does about the notice. The notice could hardly be clearer that, using the language of these reasons, the inspector is of the opinion that placing the animal in the first V-restrainer when the slaughterman is not yet ready to immediately make the incision is unlawful. EQL does not pretend to be ignorant as to the distinction drawn in the notice between the feeder restrainer and the restrainer in which an animal is to be killed, which is clear on both its face and in context.

72. On the steps required, the notice specifies the following:

The following steps must be taken to remedy the contravention

Modify your system for restraining ovine and caprine animals slaughtered by religious rites without prior stunning by ensuring that each ovine and caprine animal is placed in restraining equipment only when the person who is to carry out the killing is ready to make the incision immediately after it is placed in the equipment.

73. I reject EQL's contention that this fails to meet the requirement at regulation 38(3). It had been told what it was doing was wrong, and the notice told it to stop. That is enough. As argued by Mr Ostrowski, there is no duty to provide EQL with advice on how to implement a system that does comply. An injunction not to do something in a particular way does not require instruction on how to do it in another way, unless failing to do so would make compliance impossible. The remainder of EQL's arguments on this topic, relating to animal welfare and the practicability of a non-restrained 'race' to the restrainer in which the sheep is killed, do not assist it. The former amounts to further disagreement with the merit of the legislation, already addressed in AIMS; and on the latter, the evidence establishes that by the time the WEN was served, EQL were fully aware of how other premises were conducting non-stunned slaughter that met the requirements of the regulations.

74. The WEN is compliant with regulation 38.

Ground 4 - should the WEN be cancelled as an abuse of process?

75. Some of EQL's arguments on this ground, such as the lack of an independent opinion, have already been addressed. This leaves an argument that the WEN should be cancelled due to it being the third attempt at enforcement, the two previous WENs

having been cancelled by the Tribunal on appeal. Mr Thomas relied on the principle of *Henderson* abuse. In Johnson v. Gore Wood & Co [2000] UKHL 65, Lord Bingham approved the description of the rule given in Barrow v. Bankside Agency Ltd [1996] 1 WLR 257:

The rule in Henderson v. Henderson (1843) 3 Hare 100 is very well known. It requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the court so that all aspects of it may be finally decided (subject, of course, to any appeal) once and for all. In the absence of special circumstances, the parties cannot return to the court to advance arguments, claims or defences which they could have put forward for decision on the first occasion but failed to raise. The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on for ever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed.

76. I was not referred to any authority for the proposition that a party may rely upon *Henderson* abuse in an administrative tribunal. There is some discussion of the whether the doctrine of issue estoppel, a similar concept, applies in judicial review proceedings by Kerr J, in R. (Fire Brigades Union) v South Yorkshire Fire And Rescue Authority [2018] EWHC 1229 (Admin) at [85]-[88]. In this appeal, I consider that a Tribunal is entitled to take into account its own previous decisions in the way discussed in Secretary of State for the Home Department v BK (Afghanistan) [2019] EWCA Civ 1358, particularly at [39]. If an appeal against a WEN were to be allowed on the basis that the impugned procedure did not contravene the substantive requirements of the legislation, then an appeal against a subsequent identical WEN could be allowed on the basis that the issue had already been resolved.
77. In this appeal, whatever the precise juridical basis for addressing the issue, I reject that the previous enforcement activity justifies the Tribunal cancelling the present WEN. First, neither of the previous appeals resolved whether EQL is in contravention of the regulations. That is a matter of importance, and there is a public interest in the real dispute between the parties being decided. Second, as well put by Mr Ostrowski, if this WEN is quashed on abuse grounds then EQL will be left immune from a regulatory requirement that will continue to apply to others. While *Henderson* abuse might stand as grounds for denying a private remedy due to the way in which it had been pursued, I have not been referred to any authority in which it stood as justification for permitting indefinite future illegality.

Conclusion

78. EQL's grounds of appeal each fail. The appeal is dismissed and the notice confirmed without modification.

Signed

Judge Neville

Date:

26 July 2023

Pursuant to rule 40 the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, on 18 and 21 August 2023 this decision was amended to correct purely typographical errors at paragraphs 1, 8, 41 and 73.

Signed

Judge Neville

Date:

21 August 2023