



IN THE HIGH COURT OF JUSTICE

CO Ref CO/56522007

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

**BEFORE HIS HONOUR JUDGE HICKINBOTTOM SITTING AS AN ADDITIONAL
JUDGE OF THE HIGH COURT**

THE QUEEN

**ON THE APPLICATION OF SWAMI SURYANANDA AS A REPRESENTATIVE OF
THE COMMUNITY OF THE MANY NAMES OF GOD**

Claimant

-and-

THE WELSH MINISTERS

Defendants

APPROVED JUDGMENT

16 JULY 2007

**DAVID ANDERSON QC and MAYA LESTER (instructed by Bindman & Partners)
appeared for the Claimant.**

**CLIVE LEWIS QC and JOANNE CLEMENT (instructed by the Treasury Solicitor)
appeared for the Defendants.**

CARDIFF CIVIL JUSTICE CENTRE, 2 PARK STREET, CARDIFF CF10 1ET

I direct pursuant to CPR Part 39 PD 6.1 that no official shorthand note shall be taken of this judgment and that copies of this version, subject to editorial corrections, may be treated as authentic.

Introduction

1. By this application for judicial review, the Community of the Many Names of God (“the Community”) seek to quash the two relevant decisions of the Welsh Assembly Government (“the Government”) and prevent a bullock reference number UK 742266 200001 (known as “Shambo”) from being slaughtered pursuant to a notice to slaughter dated 3 May 2007 served under Section 32 of the Animal Health Act 1981 (“the 1981 Act” or “the Act”) and confirmed by letter dated 3 July 2007.
2. Those decisions were based upon Shambo testing positive in a reactor test for *Mycobacterium Bovis* (“*M Bovis*”), which is the bacterium that causes bovine tuberculosis (“bTB”). The Government have a policy of requiring all positively tested reactors to be slaughtered.
3. Shambo is the temple bullock at the Hindu Monastery and Temple at Skanda Vale, Llanpumsaint, Carmarthenshire. In the course of this judgment I will need to expand upon the role played in the Hindu religion by animals generally and bovines in particular: but, briefly, the temple bullock epitomises the Hindu belief that there is a spark of divinity in all animals and, as a result, the life of all animals is sacrosanct. In pursuit of those beliefs, the Community are consequently utterly committed to the preservation of his life. It is said on the Community’s behalf that, for both the Community and the wider Hindu world, if Shambo were to be slaughtered, that would be a particularly sacrilegious act, a serious desecration of their temple and a gross invasion of their right to manifest their religion, a right protected by Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”). That article provides:

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

Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the

interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”

4. The Government do not accept that the slaughter of the bullock would engage Article 9 at all. They do not accept that it would amount to any interference with the manifestation of the Community’s beliefs. However, if Article 9 is engaged, the Government submit that any right to religious freedom the Community may have is overridden by the public health imperative of not merely minimising the risk Shambo whilst alive may pose to the health and welfare of other animals and humans, but of entirely eliminating that risk. They also submit that the proper disease management of the rest of the Community’s herd can only be performed after the slaughter and post mortem examination of the bullock to see whether in fact he has developed active bTB disease (as opposed to merely being infected with the relevant bacterium). In pursuance of these public health objectives, it is submitted that it necessary to slaughter the bullock.

5. This case therefore brings into hard conflict the rights of the Community to manifest their religious beliefs, and the public health interest relied upon by the Government to justify the interference with those rights that the slaughter of Shambo would involve.

6. The application for judicial review was issued on 6 July 2007. That day, Collins J ordered the Community to serve any additional evidence by 9 July; the Government to file a response and any evidence by 10 July; and there should be a rolled up hearing of the application for permission to apply and, if granted, the substantive application itself. Those applications were heard by me on 12 July: and this is the reserved judgment from that hearing.

The Community

7. The Community, its beliefs and practices are described in the First Statement (dated 6 July 2007) of Swami Suryananda, who is also known as “Brother Michael”. This evidence was unchallenged.

8. The Community was established in 1973 when its founder, Guru Sri Subramaniam, purchased a farm at Skanda Vale which he established as a monastic centre. In 1975, the site became a registered public place of worship under the Places of Worship Registration Act 1855: and, the following year, Guru Sri Subramaniam transferred the farm to the Community for the specific purpose of it remaining a place of worship. In 1978, the Community purchased the adjoining farm. Both of the former farm houses have been converted into temples where daily public worship is held. A third temple was built 1999.

9. The Community is now a registered charity (Regn No 511166) governed by a board of eleven trustees. Its governing instrument is a trust deed dated 17 September 1980 with a supplementary trust deed dated 9 February 2002. The charity's objects, as stated in the declaration of trust, include the following:

“1. To promote, for the benefit of the public, the public worship of God in his Universality in accordance with the spiritual teachings of Krishna as set out in the Bhagavad-Gita, at the Hindu Temple maintained by the Community at Skanda Vale or any other places of public worship maintained or used by the Community.

2. To advance religion and religious education by propagating to the public the said spiritual teachings about the worship of God in his Universality.

3. To maintain a community of people living together in accordance with the aforesaid spiritual teachings as a religious community promoting such public worship both at the temples maintained by the Community and elsewhere, offering shelter, hospitality and spiritual refreshment and where relevant relief from poverty to those who by reason of penury, physical disability or any form of mental or spiritual breakdown are in need of such refuge without regard to race or creed, sending out members of the Community to provide spiritual refreshment and spiritual advice to members of the public who are for the foregoing reason in need of such refreshment or advice and assisting in the rehabilitation of alcoholics, drug addicts or delinquents who are in need of such rehabilitation.

4. To relieve the poverty of deserving persons who are in need and to support by donations and otherwise charitable institutions for the relief of poverty.

5. To relieve the sickness and suffering and to promote the spiritual well being of persons of all ages requiring palliative, specialist and medical care by the provision of home care and hospice care for both day patients and resident

patients.”

Therefore, whilst primarily a religious charity, it also has wider charitable objects which, as I understand them, are founded upon the Community’s religious beliefs.

10. In terms of its religious objects, there are about 30 permanent residents, 25 of whom are ordained monks and nuns. They conduct daily services at the temples and, although the site is not advertised or promoted, they received over 90,000 pilgrims and visitors last year. Brother Michael said (First Statement 6 July 2007, Paragraph 11):

“[P]eople come of their own volition because of the personal experience of God that they gain through their pilgrimage. They are inspired by the love and dedication of members of the Community and enthralled by the experience through which the Community fulfils its work in worship and service to God.”

All visitors are offered free food and shelter. The Community also run a day hospice which provides free care for the terminally ill, and they also perform charitable work for the relief of poverty.

11. The Community now own some 92 acres at the site, the land being held on trust solely for the purpose of fulfilling the objects of the charity. Therefore, although the majority of the land is dedicated to agricultural use:

“... this is wholly ancillary to the religious use of Skanda Vale. Much of the livestock of the Community has come to us through pilgrims saving animals which would otherwise be slaughtered, by purchasing and entrusting them to us on the clear understanding that they will be cared for by the Community and live out the full duration of their natural life span. There is no attempt to run an agricultural enterprise in any ordinary sense. No sale of animals or produce takes place. No profit in any sense is made from agricultural activity and no attempt is made to make such profit.” (Brother Michael, First Statement 6 July 2007, Paragraph 12).

12. Whilst of course he made his findings on different evidence from that before me, it comes as some comfort that His Honour Judge Wyn Williams QC (as he then was) also found that the Community’s activities were entirely within their charitable objects in a case heard before him last year concerning rights of way (Guru Sri Subramaniam and

Others v Ieuan James Evans and Rachel Hefina Evans, Claim No 6CF30054, Judgment
24 November 2006)

The Community's Beliefs

13. That conveniently brings me to the Community's beliefs.

14. The Community is Hindu. Hinduism is a religion which has been established for many centuries, being one of the oldest monotheistic religions. Whilst believing in a single God, Hindus recognise the different facets of the personality of God, which are represented by a multitude of forms and symbols to be found in their temples.

15. Whilst Hinduism has a wide variety of traditions, within these there are fundamental themes and elements. The Community's tradition is of Sanatha Dharma (or "timeless consciousness of God"), as taught by Lord Krishna (a deity worshipped across many traditions of Hinduism) in the Bhagavad Gita (the central Hindu religious text).

16. The importance of animals (and, particularly, bovines) within Hinduism was described by Brother Michael as follows (First Statement 6 July 2007, Paragraphs 13-21):

"The Importance of Animals in the Community

13. The sacredness of life, recognising the embodied divinity in all life, is the cornerstone of Sanathana Dharma and in consequence Skanda Vale is a sanctuary for all forms of life. Worship of God in his Universality is recognising and serving this divinity in all of life and creation. The many animals and plants that are part of the Community provide an opportunity for both the monastic Community and the general public to discover and serve God not only in fellow human beings but also in all aspects of life and nature. It is therefore a key part of the Community's religious observance to provide all necessary facilities, veterinary care, feed, and any other related items to ensure opportunities for the highest possible quality of life for all the animals at Skanda Vale, from their birth, through life, health and sickness, to their natural death.

14. Animal husbandry is a vital part of the Community's spiritual ethos and is seen as part of our worship of God. At Skanda Vale we care for many different animals including an elephant (1), ponies (10), water buffalo (13), goats (12), cows and bulls (40), llamas (2), deer (20), poultry and waterfowl (about 300), fish (over 100), terrapins (5) and rabbits (over 20). Their needs have to be met and their pasture carefully maintained and managed. The Community also runs a small dairy and grows large amounts of vegetables. A very great deal of what the Community

does, in caring for the animals and caring for and maintaining the land, is the observance of our religion through service to life. Valli, for example, is our Temple Elephant and is revered as the embodiment of Lord Ganesha, the Hindu aspect of God that removes obstacles.

15. It is unthinkable that we could be forced to allow the slaughter of any animal in our care. Any such action would be a direct violation of our spiritual values and desecration of our Temples. Such an act of violence to life would undermine the spiritual power of the Temples painstakingly established over thirty five years of disciplined religious observance.

The Importance of the Bull and the Cow in Hinduism

16. The bull and the cow are intimately linked in the worship of Lord Shiva (one of the [Hindu] Trinity) and the Divine Mother (the female polarity of the God head). Nandi is the bull which Lord Shiva rides. The feet of the cow represent the four cornerstones of life. These are Sathyam, absolute truth, Dharma, righteous living, Prema, love and Shanthi, peace.

17. In the Mahabharata, a holy scripture, Bhisma says that the cow acts as a surrogate mother by providing milk to human beings for their whole life. The Puranas, another holy scripture state that there is no gift more sacred than the gift of cows. All creatures are children of God, all are dear to him. Hindus treat the cow as mother.

18. Vedic philosophy teaches that there are seven mothers; the birth mother, the nurse, the wife of the father (if she is not the birth mother), the wife of the king, the wife of the spiritual master, the earth and the cow. All mothers should be held with the highest respect and, since one does not kill and eat ones mother, the cow should not be killed or eaten. Likewise the bull is our father and should be given the same respect and position in Hindu life. The Temple cow is a source of providing milk, ghee and yoghurt which are the principal ingredients used in the traditional act of ritual bathing of sacred images (mahabishekam) performed at least four times per week in our Temples. Produce from the Temple cows is used exclusively for this purpose.

19. ... [A]ll our animals are precious to us and key to our everyday religious observance. We realise that there is a fragment of divinity in every living thing and that each life force gradually evolves from one incarnation to the next in its eternal quest to discover its own identity as part of the nature of God. Therefore different life forces are at different stages of that developmental process. An undeveloped life force is, for example, an amoeba, and the most highly developed life source is a human because of their heightened consciousness, intellect and consequential ability to care for and nurture other life forces.

20. Shambo was born in January 2001 at Skanda Vale and raised by the Community and is known as a Temple bullock. His name has special significance as one of the names of Lord Shiva meaning “bringer of joy”.

21 We believe that Shambo is a highly developed life source and although the preservation of all animal life is fundamental to our religious observance, the slaughter of Shambo would be a particularly extreme affront to the beliefs that underpin our everyday lives. The spirit in a bullock is no different from the spirit in a human being; their souls are merely at different stages of their journey. It must therefore be recognised that any killing of an animal is no more justified than the killing of a human being.”

17. Of course, not everyone shares these beliefs which are largely alien to Western traditions. However:

- (i) Brother Michael’s evidence was not challenged in any particular by the Government. I accept it.
- (ii) I accept that the sanctity of life is a fundamental tenet of the Sanathana Dharma Hindu tradition, based as it is upon the belief that there is a spark of divinity within any living form - and, within that tradition, bovines play a special role, the soul or spirit of a bullock being in essence the same as that of a human albeit at a different stage of development. The temple bullock is of particular symbolic significance in this tradition. I accept that, within the tradition, in spiritual terms the killing of a such a bullock is comparable with the killing of a human being: and that, in the words of Brother Michael, “the slaughter of Shambo would be a particularly extreme affront to the beliefs that underpin [the everyday lives of the Community]”.
- (iii) These beliefs are well established - indeed, ancient - and are maintained by large numbers of people, particularly in India, but also not insubstantial numbers of people within Wales and the rest of the United Kingdom (the Hindu Forum Britain putting the numbers in the UK at 700,000). That is evidenced by the letters before me from representatives of the Hindu Forum Britain, the World Council of Hindus, the Hindu Council UK, the National Council of the Hindu temples, the Shaiva (Hindu) Federation of the UK and the Institute of Jainology which represents 20 separate Jain organisations throughout the UK. The Government challenges none

of this evidence. However, in any event, on the evidence before me it is abundantly clear that these beliefs - largely unknown as they might be in Western traditions - are firmly and most sincerely held by large numbers of people. I will return to the nature of these beliefs, in the context of the Community's human rights (see Paragraphs 83-5 below).

(iv) Neither is there any doubt in my mind about the depth and sincerity of the beliefs of the individuals within the Community. The Community has been established for nearly 35 years. It is a charity, with primarily religious objects. The vast majority of the Community are ordained Hindu monks or nuns, having taken vows of poverty, chastity and obedience. In their beliefs, they are patently neither opportunist, nor irresolute, nor inconstant. They have collectively and individually exhibited a dedication to their beliefs over a considerable period of time, generally and specifically in relation to public health concerns over Shambo (to which I shall return). The Government have not sought to undermine the sincerity of the Community's beliefs by any evidence. On the evidence before me, the Community's beliefs in relation to the religious significance of Shambo as temple bullock are patently sincere and most deeply held.

(v) Whilst the Community's belief in the sanctity of life is as I have described, they have been far from blind to the public health concerns that have arisen from time-to-time in relation to Shambo and the other livestock they have at Skanda Vale. Mr David Taylor is an expert veterinary surgeon, who gave written evidence on behalf of the Community. He said (Statement 6 July 2007, Paragraph 23):

“It is abundantly clear that Community members hold the deepest respect and reverence for this sacred animal [i.e. Shambo] but, while having profound religious feelings regarding him, they are fully aware, and supportive, of modern scientific animal husbandry and veterinary medicine.”

This evidence was corroborated by that of Brother Michael. I accept it. The Community's approach to the health concerns raised by the Government is a matter to which I shall return.

The Statutory Scheme

18. The 1981 Act makes provision for a variety of matters relating to the health of animals.

19. Part II concerns “Disease”, Sections 31-34 dealing specifically with “Slaughter”. These provisions are divided into two parts, the categorisation for which is dependent upon the relevant disease. Certain diseases (cattle plague, pleuro-pneumonia, foot and mouth disease, swine fever, and poultry diseases) are specifically identified in Section 31, and the powers in relation to these are provided for disease-by-disease in Schedule 3 to the Act. They are clearly regarded as the more serious diseases. In relation to some of these diseases (e.g. cattle plague), there is a **duty** on the relevant Minister to slaughter affected animals. In respect of others (e.g. swine fever), there is a discretion to slaughter in certain circumstances, “if [the Minister] thinks fit”. By Section 32A, the Minister may “by order amend Schedule 3 for the purpose of ... authorising or requiring the slaughter of animals to be caused with a view to preventing the spread of disease other than foot-and-mouth disease”: but he can only do so after preparing and consulting upon a disease control (slaughter) protocol under Section 32B, which must indicate the purposes for which the power will be exercised, the principal factors to be taken into account in deciding whether to exercise the power, the procedure to be followed in deciding whether the power is to be exercised and the means by which any decision may be reviewed (Section 32B(2)). In any event, the Minister must not exercise such a power unless:

“... before he first exercises the power in relation to any description of circumstances he publishes his reasons in relation to the circumstances of that description

- (a) for the exercise of the power;
- (b) for not exercising his power under Section 16 to cause animals to be treated with serum or vaccine”:

otherwise, the exercise of the power is unlawful (Section 32D).

20. BTB is not a specified disease under Section 31, nor has it been the subject of the Section 32A amendment procedure.

21. However, in respect of diseases neither specified by Section 31 nor incorporated into the provisions of Schedule 3 by the relevant procedure, Section 32 gives the relevant Minister a **power** to slaughter, in the following terms:

- “(1) The Minister may, if he thinks fit, cause to be slaughtered any animal which
- (a) is affected or suspected of being affected with any disease to which this section applies; or
 - (b) has been exposed to the infection of any such disease.
- (2) This section applies to such diseases of animals as may from time to time be directed by order of the Ministers”.

22. Section 88(1) defines “disease” as those diseases specified by Section 31: but it provides that this definition can be extended by order. By this device, the relevant Minister can bring any disease within the scope of the Act, and specifically within the provisions of Section 32.

23. The Tuberculosis (Wales) Order 2006 (SI 2006 No 1053, “the 2006 Order” or “the Order”) extends the Section 88(1) definition and applies Section 32 to bTB (see Paragraph 25 below).

24. Section 34(1) of the Act provides for compensation in the case of slaughtered animals.

25. Article 4 extends the definition of disease in Section 88(1) of the Act to include tuberculosis, and provides that the slaughter power in Section 32 of the Act applies to tuberculosis.

26. Article 12 provides that no one must not vaccinate, treat or test a bovine animal against tuberculosis without the written consent of the Government.

27. Article 13 permits an inspector to serve a notice on the keeper of bovine animals prohibiting unauthorised movement of bovine animals, for the purpose of controlling or preventing the spread of tuberculosis.

28. Article 14 provides:

“(1) Where the National Assembly intends to cause a bovine animal to be slaughtered under Section 32 of the Act in its application to tuberculosis, an inspector must serve a notice on the keeper of the animal informing the keeper of the intended slaughter and requiring the keeper to detain the animal pending such slaughter (or pending its surrender and removal for such slaughter) on such part of the premises as is specified in the notice and to isolate it as far as practicable from such other animals as are so specified.

(2) Where a notice has been served under paragraph (1), a person must not move the animal, other than to slaughter, except under the authority of a licence issued by an inspector.”

29. Article 15, headed “Precautions against spread of infection”, sets out a number of steps that the veterinary inspector may require the keeper of an animal to take if the inspector “is satisfied that any bovine animal kept on any premises is an affected animal or a reactor”, namely:

“(a) to treat and store manure or slurry from any place which has been used by any such animal in accordance with the requirements of this notice;

(b) not to spread any manure or to spray or spread any slurry from any place which has been used by any such animal otherwise than in accordance with the requirements of the notice;

(c) not to remove manure, slurry or other animal waste from the premises except under authority of a licence issued by an inspector;

(d) to take such steps as may be reasonably practicable to prevent any bovine animal kept on the premises from infecting any bovine animal kept on any adjoining premises;

(e) to arrange for the isolation of any bovine animal or animals which may be specified in the notice on any specified part or parts of the premises;

(f) to ensure that any part or parts of the premises specified in the notice must not be used by any bovine animal on the premises, or by such animal or animals as may be specified;

(g) at his or her own expense, and within such time and in such manner as may be specified in the notice, to cleanse and disinfect such part or parts of the premises as may be specified;

(h) to cleanse and disinfect all utensils and other articles used for or about an animal to which the notice relates within such time and in such manner as may be specified in the notice.”

30. Article 17(1) provides for the control of infection from other animals, as follows:

“Where a veterinary inspector reasonably believes that an animal kept on any premises is or may be affected with tuberculosis, he or she may by notice served on the occupier of such premises

(a) require the occupier to keep the animal under control in such manner as may be specified in the notice or to confine it to such part of the premises as may be specified; and

(b) prohibit the movement of animals on to or off such premises, except under the authority of a licence issued by an inspector.”

31. Until April 2007, the relevant Minister was the Secretary of State in charge of the Department for the Environment and Rural Affairs (“Defra”) from time-to-time. From April 2007, those functions passed to the National Assembly for Wales by virtue of the National Assembly for Wales (Transfer of Functions) Order 2004 (SI 2004 No 3044). Those powers are now exercisable by the Ministers of the Welsh Assembly Government. In practice, the Minister with the relevant responsibility is the Minister of Sustainability and Rural Development (“the Minister of SRD”). Accordingly, at the time of both decisions challenged in this claim, the discretion to slaughter a bullock under Section 32 of the 1981 Act was to be exercised by the Government through the Minister of SRD (or, of course, someone on his or her behalf).

Mycobacterium Bovis and Bovine Tuberculosis

32. BTB is a serious, chronic and potentially debilitating disease arising from infection

by the bacterium, *M Bovis*. It is contagious, an infected animal transmitting the infection by passing on the bacterium to another animal by shedding through aerosol, respiratory secretions (e.g. mucus), faeces, urine, milk or semen. After infection there is a latent period, in which the infected animal is asymptomatic. Some infected animals never develop clinical disease. Even where the disease is developed clinically - i.e. where it becomes active - it may take years from infection. However, during the latent period a clinically normal but infected animal may shed *M Bovis*, and hence may transmit the infection. As shedding may be intermittent rather than continuous, in respect of a live bovine it is not possible to confirm that it is **not** shedding *M Bovis*.

33. The infection is capable of being transmitted to and carried by most if not all mammals. Of transmission, Dr Christianne Glossop (the Chief Veterinary Officer for Wales, “the CVO”) said (First Statement 10 July 2007, Paragraphs 15-17):

“15. Direct cattle to cattle transmission is recognised as an important factor in the spread of this disease. The distribution of pathological lesions in cattle, a high proportion of which are found in the respiratory system and associated lymph nodes, is clear evidence of the importance of airborne transmission. One infective particle (containing approximately 5 bacilli) is sufficient to cause the disease by the inhalation route.

16. *M Bovis* can infect most if not all mammalian species, including humans. Susceptibility to infection varies between species, with cattle, goats, pigs, deer, goats and guinea pigs most susceptible and sheep and horses showing high natural resistance....

17. There is clear evidence that the transmission of infection with *M Bovis* between cattle and wildlife species, has become an important part of the epidemiology of this disease in some parts of Great Britain, including South West Wales. Wildlife act as a reservoir of infection which is then transmitted back to cattle making control increasingly difficult. Preventing the spread of the disease into wildlife is consequently a very important element in its effective control.”

34. Whilst the incidence of *M Bovis* in wildlife is unknown, the prevalence in badgers is thought to be high. Mr Clive Lewis QC for the Government said that no way of dealing with this prevalence had yet been found. Culling is sensitive because badgers are a protected species. Local culling apparently failed (Government Veterinary Journal, Vol 16, No 1 (2006), at page 87): a general cull was considered but consultation in 2005-6

resulted in 95% opposition to such a move. No decision has been made to proceed with it, and the problem of badgers carrying the infection is a problem which (said Mr Lewis) there is currently no answer. In the meantime, a vaccine for badgers (and cattle) is being developed (ibid, at page 89-90).

35. Dr John Anthony Jewell (the Chief Medical Officer for Wales, “the CMO”) gave written evidence with regard to bTB in humans. He said that, “as a result of pasteurisation of milk and animal health measures such as the slaughter of infected animals”, *M Bovis* in man “is now rarely seen”: there being only 22 isolates in Wales for the 10 year period 1994-2004 (Statement 10 July 2007, Paragraph 21). “Primary cases of human *M Bovis* infection are now rare in the UK, despite the increasing number of animals found infected with the disease” (Paragraph 22). Mr Taylor said that: “Now the threat to humans is negligible and it is said that since 1990 only one case of human *M Bovis* infection acquired from an animal source has been documented in the UK” (Statement 6 July 2007, Paragraph 16 with relevant citation). In any event, although Dr Jewell referred to an article in the Lancet (Lancet 2007; 369: 1270-1276) which reported an outbreak of 6 cases in the West Midlands in 2006, resulting in one death from tuberculosis meningitis, deaths from TB are now extremely rare in the UK, because “it is curable with a full course of antibiotic treatment, provided it is diagnosed early on in the infection” (Statement 10 July 2007, Paragraph 10).

36. This very low risk to humans is also reflected in “Dealing with Bovine TB in your Herd”, an April 2007 publication of Defra, the Welsh Assembly Government and the Scottish Executive. At Paragraph 13, that says:

“... [t]he risk of people contracting [bTB] from cattle in Great Britain is considered very low nowadays. There are three possible ways in which people can be infected by *M Bovis* from cattle:

- 1 By drinking raw milk from cows with ‘disseminated TB’ (that is where the TB has spread to sites outside the lungs) or with lesions of TB in the udder.
- 2 By being frequently near animals that have TB lesions in the lungs or near carcasses from infected cattle.

3 By cuts or abrasions in the skin infected with *M Bovis*.”

The Tuberculin Test

37. In the UK, there is a routine screening programme for bTB. Bovines are regularly subjected to the Single Intradermal Comparative Cervical Tuberculin test (“the tuberculin test”). The tests are conducted by Government inspectors, and the Community bovines are tested regularly.

38. The tuberculin test was described by Dr Glossop as follows (Statement 10 July 2007, Paragraph 30):

“The test involves injecting 0.1ml of both bovine and avian tuberculin [i.e. a protein extracted from mycobacterial cultures] into the skin of the animal. The avian tuberculin acts as a control. In the majority of cases of cattle infected with *M Bovis*, the tuberculin will cause the animal’s immune system to react and cause a localised allergic inflammatory response at the site of the bovine tuberculin injection, resulting in a swelling of the skin a few days after the injection. The skin will react in this way if the animal has been exposed to *M Bovis* previously. The thickness of the skin is measured before the tuberculin is injected with an instrument known as a ‘calliper’.... The handle of the calliper includes a gauge to measure the thickness of the skin carefully and accurately. The extent and size of any swelling is measured again 72 hours later. The difference in thickness of the skin at 0 hours and the extent of any swelling at 72 hours, and the nature of any skin thickening, are used to decide whether an animal has tested clear (negative), as a reactor (positive) or as an inconclusive reactor (IR).”

39. Where the skin at the site of injection with the bovine tuberculin has swollen causing an increase in thickness of more than 4mm greater than any swelling at the site of the avian tuberculin injection, the animal is classified as a positive reactor using the standard interpretation. However, where another animal in the herd has already been found to have the active disease, a “severe interpretation” is used, under which an increase of only 2mm is classed a positive reactor. In any event, two tests are performed on each animal. Where one test is positive and the other is not, that is regarded as an “inconclusive result”: and there is a re-test after 60 days.

40. This test is designed merely to detect the presence of *M Bovis* bacterium, i.e. to

detect infection not disease. Based upon veterinary literature, Dr Glossop explained (Statement 10 July 2007, Paragraphs 38-40):

“38. The performance of a screening test is primarily defined in terms of its *sensitivity* and *specificity*, which are calculated from the proportions of truly infected and uninfected animals that are correctly identified by the test.

39. The *sensitivity* of a test is the proportion of truly infected animals that are identified as such (i.e. positive). The tuberculin test as applied in GB has been shown to have a sensitivity of 80% at a standard interpretation.... Thus in a population of 1000 truly infected cattle subjected to this test 800 would be expected to give a positive result and approximately 200 would be expected to give an incorrect negative result.

40. The *specificity* of a test is the proportion of truly non-infected animals that are identified correctly as such (i.e. negative). Field studies in Great Britain have demonstrated that the specificity of the tuberculin skin test is 99.9%.... Thus in a population of 1000 truly non-infected cattle subjected to this test, approximately 999 of them would be expected to give a negative result and 1 to give a positive result.”

Therefore, on this evidence, there is only a very small proportion of false positive results from the tuberculin test. This screening test is the only test prescribed for international trade by the Office International Epizooties of the World Organisation for Animal Health, in its Manual of Diagnostic Tests and Vaccines for Terrestrial Animals. It is also the screening test for bovine animals prescribed by EU Directive 64/432/EEC.

41. Although the Community do not accept the 99.9% figure used by the Government - yet alone the figure of 99.99% found in Government Veterinary Journal, Vol 16, No 1 (2006), at page 150 - as necessarily valid (see, e.g., Mr Taylor Statement 6 July 2007, Paragraph 11), they do accept that the chances of a false positive result from this test are very small. That was conceded by Mr David Anderson QC on the Community's behalf during the course of debate.

42. A second type of test for bTB infection is the gamma-interferon blood test (“the IFN- γ test”), which has been used in the UK since 2002. This too is based upon an immune response, but on blood not the skin. Dr Glossop's own evidence was that this

test is less specific and more sensitive, i.e. the test has more false positives and less false negatives (Statement 10 July 2007, Paragraphs 68 and following). In her view, “where an animal has already tested positive to the tuberculin test there are no benefits associated with carrying out the IFN- γ test”. However, that does not precisely accord with the “Dealing with Bovine TB in your Herd” (see Paragraph 36 above). That says (at Paragraph 12):

“Additionally, Animal Health [an agency of all three governments] may sometimes decide to use the blood test to reduce the probability of a false positive result:

- 1 In chronic, unconfirmed [bTB] incidents in 2, 3 or 4-yearly cycle testing areas, where non-specific cross reactions to tuberculin are suspected; and
- 2 For re-testing of tuberculin test reactors with abnormal skin responses or where [interference] with the skin test is otherwise suspected.”

However, the circumstances referred to are very limited in scope. I accept that, generally, the tuberculin skin test produces very few false positives: and, in relation to specificity, the IFN- γ test adds little to the skin test.

43. I will come on to deal with the Government’s policy for slaughtering positive reactors to the tuberculin test shortly. However, once slaughtered, under EU legislation (Annex B of EU Directive 64/432/EEC), there is a requirement to conduct post-mortem and bacteriological examinations of the slaughtered animals. The overall proportion of individual test reactors that are confirmed by post mortem and/or bacteriological examination to have active disease (as opposed to mere infection) is relatively low - about 40% (ibid, page 146: although this article suggests that post mortem tests are less sensitive for diagnosis of infection than the immunodiagnostic tests conducted in live animals, see page 149). Be that as it may, a bTB incident is not “confirmed” for statistical or other purposes until at least one of the slaughtered animals in a herd presents itself with some form of sign of active disease, e.g. characteristic TB lesions on post mortem examination or, in the absence of such lesions, *M Bovis* can be cultured from a pool of selected lymph nodes (ibid, page 145).

Surveillance and Slaughter Policy

44. In her evidence, Dr Glossop outlined the background to the Government's current policy for dealing with bTB (First Statement 10 July 2007, Paragraphs 20 and following).

45. In the 1930s, a large proportion of dairy cattle in the UK were infected with *M Bovis*. In 1935, the UK Government introduced a voluntary bTB testing scheme for cattle in an attempt to control the disease, with any animals testing positive being slaughtered. That testing and slaughter policy became compulsory in the 1950s, and by the 1980s it had reduced the incidence of bTB to a very low level.

46. However:

“Over the last 15 years, the incidence of [bTB] has increased again. Great Britain now sustains one of the largest incidences of [bTB] in the EU. Significant efforts are now being made to control the spread, and reduce the impact, of this epidemic.” (Dr Glossop Statement 10 July 2007, Paragraph 20).

Dr Glossop continues (Paragraphs 23-4):

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

24. A [bTB] reactor is an animal that has shown a positive response to the tuberculin skin test... When a [bTB] reactor is identified, established veterinary opinion establishes that slaughter is necessary for the following two reasons:

(i) The elimination of the risk of spread of [bTB] from that animal to other animals and also to humans.

(ii) Confirmation that a reactor has [bTB] can only be provided by post mortem examination. That confirmation is required urgently as the presence or absence of active disease in a [bTB] reactor is a vital piece of information in interpreting the test results from other animals on the same farm.”

47. Those two reasons given by Dr Glossop for the necessity of slaughtering any

bovine which tests positive to a tuberculin reaction test lie at the heart of the Government's decisions that are challenged in this application. I shall return to them.

48. I will deal with the Government's reaction and correspondence in relation to this case shortly. However, in its general literature, the Government's stance is firmly and consistently put: where a bovine has a positive reaction to a bTB diagnostic test (whether a tuberculin skin test or an IFN- γ test), then the animal must be slaughtered. For example:

(i) "All skin test reactors are considered to be affected with [b]TB and **must** be slaughtered" (Government Veterinary Journal, Vol 16, No 1 (2006), at page 145: emphasis added).

(ii) "What happens when a reactor is found? ... [W]e will value and slaughter the reactors..... What happens to reactor animals? Unless you decide to arrange private slaughter the animals will be valued and taken directly to slaughter..." "Dealing with Bovine TB in your Herd", referred to in Paragraph 36 above, at Paragraph 3)

(iii) "The Tuberculosis Orders provide for compulsory slaughter of animals failing any diagnostic test for bTB" ("Dealing with Bovine TB in your Herd", at Paragraph 12).

49. Although these documents clearly relate primarily to commercially farmed animals, the Government through Mr Lewis said that the policy was no different for other bovines, e.g. those that might live in a zoo (although in practice there appear to have been no positive tests in any such creatures).

Factual Background to the Challenged Decisions

50. Shambo was born at Skanda Vale in January 2001. The Community herd is the subject of approximately biannual tuberculin tests and, until 2004, these were uneventful.

The Community have always fully cooperated with those responsible for performing the tests.

51. In December 2004, Shambo had an inconclusive reaction to a skin test which resulted in Defra (then responsible for animal health issues in Wales: see Paragraph 31 above) on 20 December 2004 issuing a notice prohibiting movement of the Community's bovine animals, pending the usual re-test 60 days after the first test. The rest of the animals all tested negative.

52. Guru Sri Subramaniam wrote to Defra on 25 January 2005 explaining that:

(i) It is the Community's religious duty to care for and support all animals for their natural lifespan, and it could not allow an animal to be killed.

(ii) The Community wished to agree alternative measures to protect animal and public health without the need for slaughter. Shambo was isolated from the rest of the animals, would not under any circumstances enter the food chain and, if tested positive for bTB, would continue to be isolated and treated by any means available, and the Community would take any other precautionary measures that were reasonably required.

(iii) The Community asked Defra to exercise its discretion in these very exceptional circumstances to agree a plan of action that would avoid slaughter.

53. Mr Wyn Buick, a Veterinary Officer with Defra, replied on 27 January 2005, indicating that 70% of inconclusive results re-tested negative: but stating that "it remains a legal requirement that declared reactors to the Tuberculin Test are slaughtered." That reflected Defra's general stance to which I have already referred (see Paragraph 48 above).

54. However, the Community remained concerned, and wrote to Defra on 8 February 2005, explaining that in their view slaughter would infringe their freedom of worship and

would be a desecration of the Community's place of worship: and again, through solicitors, on 21 February 2005 explaining that Defra did not have a duty to slaughter, but rather a discretion under the relevant statutory scheme, and inviting Defra to exercise its discretion to consider alternatives to slaughter. The letter again said that the bullock had been isolated from the rest of the herd, would not enter the food chain, and that if Shambo tested positive, the Community would take any other precautionary measures reasonable required. The Community asked Defra to exercise its discretion "in what are very exceptional circumstances", and to enter into a discussion in order to reach agreement to avoid slaughter.

55. No reply was received to that letter. However Shambo tested negative to a skin test on 26 April 2005 (confirmed by a letter from the State Veterinary Service, an agent for Defra, on 6 May 2005), and no further action was taken. The restriction order was duly revoked.

56. The next routine tests were performed earlier this year. On 22 February 2007 Shambo was again found to be an inconclusive result to a skin test. The rest of the animals were again all non-reactors. Defra issued a notice prohibiting movement of bovine animals in respect of all of the Community's animals: but, on 1 March, the movement restrictions were limited simply to Shambo. Pending retest, Shambo was ordered to remain isolated from the rest of the herd.

57. Mr Louis Webb of the ARK Veterinary Group had been advising the Community on veterinary matters. Brother Michael discussed the test result and its possible consequences with Mr Webb, and wrote to him on 8 March asking for advice as to what the Community could do in terms of steps to maintain public health in the event prior to retest and after that test should it prove positive. Brother Michael said:

"We are keen to take appropriate, proportionate measures to protect both animal and public health."

58. Mr Webb responded on 27 March, confirming the following:

- (i) All Community animals other than Shambo had tested negative.
- (ii) Shambo was in good health and showed no signs or symptoms of bTB.
- (iii) If Shambo did have tuberculosis, it was more likely to be in his gut rather than his lungs.
- (iv) A number of steps should be taken to ensure that, if he did have the disease, Shambo could not infect other animals or humans, namely he should remain tethered; he should not have any direct contact with other animals or wildlife; only authorised persons should enter his shed; and standard biosecurity measures should be strictly adhered to, in particular washing down protective clothing of waterproof overalls, boots, gloves and tools with approved disinfectant.
- (v) In the event that Shambo retest proved positive, the following further steps should be taken, namely he should be isolated in a separate building and from contact with other animals and wildlife; his building should be cleaned and disinfected regularly; the area should be secured in order to avoid contact with members of the public; and any symptoms should be treated appropriately.

59. Solicitors for the Community wrote to Defra on 3 April setting out Mr Webb's advice, explaining the measures they were putting in place in order to follow that advice and minimise the risk of any infection, and asking Defra to exercise its discretion not to slaughter.

60. Animal Health responded on 10 April, indicating that "there is always a possibility that the animal may pass the skin [re]test", but if he was found to be a reactor to the test then "current policy requires a [bTB] reactor to be valued and slaughtered without delay". That reflected the mandatory nature of slaughter referred to in the general Defra literature. However, the letter did conclude:

“With regard to the issues you have raised on legal provision and the possibility of ministerial discretion I have forwarded your letter to the TB Department of the Office of the Chief Veterinary Officer at the Welsh Assembly Government in Cardiff. They will reply to you directly”.

The Community’s solicitors wrote to the CVO on 13 and 27 April seeking to discuss the issues raised, and particularly asking for a discussion and a reply to the Community’s proposals for an alternative to slaughter: but received no response.

61. On 24 April, Shambo was retested and was found to be a reactor. On 30 April, Animal Health wrote to the Community requiring Shambo to be isolated, and stating that “arrangements for valuation and slaughter will be carried out as soon as possible”. A slaughter notice under Paragraph 14 of the 2006 Order was issued on 2 May, then corrected by a further slaughter notice dated 3 May 2007. That notice was issued by an inspector in the Office of the CVO, i.e. a member of Dr Glossop’s staff. It is of course the decision to issue that notice that is the first decision which the Community seek to challenge in these proceedings.

62. The day after the slaughter notice was issued, on 4 May, the Head of the TB Team in the Office of the CVO wrote to Community’s solicitors responding the various outstanding letters, as follows:

“2. As [the letter of 3 May] states, policy normally requires that a TB reactor should be valued and slaughtered without delay.

....

6. ... UK and European Union policy is to seek the eradication of TB.

7. Your client’s proposals for dealing with the bullock if it tested positive, as detailed in your letter of 3 April 2007, have been considered carefully. Whilst it is noted that you client is willing to take steps including isolating the infected bullock, the NAW [i.e. the National Assembly of Wales] considers that the continued presence of the TB reactor would pose an unacceptable risk to public health, and indeed, the interests of others, in both the immediate area and the rest of Wales.

8. In reaching this conclusion, we have had regard to the following factors:

(a) there is no known scientifically accepted treatment for TB in bovines

which is effective and practical;

(b) even if kept in isolation, the presence of the bullock on your client's premises would result in public health risks to humans and to other bovines and animals, including wildlife on the holding, and would increase the risk of the disease spreading;

(c) livestock farmers in South West Wales, where your client's holding is located, are in a bovine TB hotspot area;

(d) the discretion to reserve TB reactors for observation and treatment, is usually exercised in the very limited cases of controlled experimental trials. Further to the carrying out of such trials, the animals are usually slaughtered.

9. In summary, we consider that the bullock should be slaughtered to minimise the risk to humans, other animals and the economic interests of the owners of the other animals.

10. Furthermore, NAW does not consider that your client's proposals would be in the interests of the bullock. [BTB] is a chronic debilitating disease and it would be unacceptable simply to allow symptoms to progress which would cause prolonged suffering before an eventual death.

11. We do not necessarily accept that the removal and slaughter of the bullock by Animal Health Inspectors would inevitably involve an infringement of the first limb of Article 9 ECHR. However, if the first limb of Article 9 is engaged, lawful limitations may be imposed restricting the right to manifest religion, as reflected in the second limb of Article 9. These limitations include those necessary for the protection of public health and the rights and freedoms of others. We are of the view that the slaughter of the bullock in the present circumstances would be a proportionate response in pursuance of a legitimate aim. Accordingly, any interference you're your client's Article 9 right would be lawful."

It was proposed that the slaughter would take place in the week commencing 21 May.

63. On 9 May Mr Webb again examined Shambo. He found that Shambo was "in excellent condition and showed no clinical evidence of the disease". The evidence before me was that he remains in that clinically good and asymptomatic condition.

64. On 11 May 2007 the Community's solicitors wrote to the CVO's Office after a visit from the CVO and Head of the TB Team in her Office (who had suggested certain additional biosecurity and isolation measures, which the Community were putting in

place urgently). The Community asked for a meeting to discuss “whatever steps may be necessary to meet legitimate concerns about public health”. The Government responded on 15 May, stating that the notice of intention to slaughter was still in place. The Government was “carefully considering all relevant factors”, but at that stage refused the request for a meeting. On 16 May the CVO sent the Community a letter reminding them of the biosecurity measures they should have in place.

65. On 23 May the Community’s solicitors wrote, setting out the regime that had been put in place in order to ensure that any risk was minimised. Those measures were stated to comply with all advice received from and requirements of Mr Webb, relevant government publications, the CVO and her Office and from Article 15 of the Order. The letter described the following regime:

- “1. The animal in question is a bullock and obviously therefore the drinking of milk is not an issue. Moreover, in accordance with Food Hygiene (Wales) Regulations 2006, no milk or milk products from any other bovine in the herd is sold to or consumed by members of the public.
2. There is no question of this bullock entering the food chain or being traded, or even of leaving the Monastery. This bullock is not part of the national herd at all.
3. The bullock is regularly checked for signs of any cuts or abrasions. There are no such signs, and even if there were they would be treated immediately.
4. We have been advised that if it is proved that our bullock does have TB, all indications are that it is more likely to be in his gut than his lungs making it unlikely that he would spread infection by breathing. If there were any risk of infection it would be from direct physical contact or faeces. In order to address that concern, the bullock has been completely isolated from all animals.
5. The isolation area incorporates a buffer zone in front of the bullock’s pen. This area is kept gated and securely locked. Only authorised members of the Community are permitted into this area. Members of the public and media are not permitted into this area preventing any possibility of close contact with the bullock. Only the members of the Community allocated to directly caring for the bullock are then permitted to handle him and enter his pen for husbandry purposes. The personnel involved in the husbandry of the bullock have no contact with any other animals susceptible to contracting bovine TB.
6. The barred gates providing access to the isolation area allow plentiful ventilation to the bullock’s pen. Ventilation is assisted by an electric fan creating a

constant change of air in the area minimising the risk of airborne infection building up. A barrier of clear rigid plastic sheeting has been fixed at the bottom of the barred gates to minimise access of wildlife into the area.

7. Feed for the bullock is stored in the isolation area in closed containers preventing access to all wildlife.

8. A strict cleansing and disinfection regime has been instituted in accordance with the notes appended to notice BT5 and the advice received from Assembly officials and Animal Health staff:

(a) The building in which the bullock has been isolated is cleaned and disinfected regularly.

(b) Persons entering the pen wear disposable gloves, Wellingtons and waterproof overalls which are then cleaned and sprayed with an approved disinfectant (FAM 30, manufactured by Evans livestock protection, dilution rate 1:20) in the isolation buffer zone.

(c) All utensils and tools used in the husbandry of the bullock are likewise cleaned and sprayed with disinfectant.

(d) The set of utensils, tools and protective clothing used in the pen of the bullock is not used elsewhere and remains in the isolation area when not in use.

(e) The pen of the bullock has been constructed in such a way so as to prevent any contamination to the fabric of the building.

(f) Sawdust is used under the bedding of straw to absorb urine from the bullock.

(g) Manure, bedding and damp sawdust is removed regularly from the pen placed in sealed bags and immediately taken to an area from which the public and other farm animals are excluded. It is then sprayed/ saturated with an approved disinfectant, FAM 30, at the appropriate dilution rate. It is then covered with a layer of manure from non reactor animals to prevent any wildlife having access.

(h) This manure and soiled bedding will remain in situ inaccessible to the public and farm animals for at least 3 weeks. It will not be spread on pasture land. No manure is removed from the premises.

(i) Bags and disposable gloves used in the removal of bedding etc are disinfected before being double wrapped in sealed bags and disposed of.

(j) Particular regard has been paid to the instructions accompanying the disinfectant.

9. Measures have been put in place to prevent any potentially infected bovine kept on the premises from infecting any bovine on adjoining premises. These measures include rotational management of pasture to ensure nose to nose contact with animals on neighbouring land is not possible. Where necessary, double fencing has been erected.

10. Similarly, other species of animal on the premises susceptible to contracting bovine TB are prevented from contacting each other. They have separately fenced enclosed pasture to which animals of a different species have no access. Different personnel are responsible for the husbandry of the different species groups.

11. Feed is stored in secure containers inaccessible to wildlife.

12. The management, handling and grazing of animals was comprehensively discussed with and reviewed by Animal Health Officer Karen Manely and Veterinary Officer Judy Williams on their visits 10 May 2007 and 21 May 2007. On the 21 May visit Judy Williams viewed the different groups of animals, their enclosures and grazing and expressed her opinion that adequate separation between species was and had been in place and that adequate measures were in place to prevent possible risk of contact with neighbouring cattle.”

66. In the same letter, the Community asked for information as regards, in particular, other circumstances in which the Government had exercised its discretion not to slaughter but to observe and treat, or to give permission for treatment and vaccination; the Government’s policy in circumstances where zoo animals and racehorses react positively to skin tests; any statistical evidence as to the reliability of skin tests; what biosecurity and public health tests the Government usually requires farmers and others to take once a reactor has been found; whether there are any further reasonable and proportionate biosecurity measures the Government considered that the Community should take; and which person had been considering whether to exercise the discretion under the Act, both at the time of the original slaughter notice and subsequently. The Community also asked that the animal be tested again using the IFN- γ test detailed in “Dealing with Bovine TB in your Herd” (see Paragraph 36 above), antibody tests and sample tests to detect the presence of *M Bovis*.

67. Tuberculin skin tests were performed on the rest of the Community’s stock on 4 and 5 June 2007. On 11 June, an isolation notice was served in relation to seven animals. That notice required the animals to be isolated in buildings or in fields in accordance with

the attached recommendations, “to reduce any possibility of the spread of disease within your herd pending the retest of the herd in approximately eight weeks time”. No reasons were given at the time for the selection of those seven animals: but in a subsequent letter of 25 June from the Government’s Director of Legal Services, it was explained that the order applied to two animals which “may have tested positive for TB” and five others “who may have tested inconclusive”. This somewhat tentative wording reflects the fact that two animals were identified as reactors and five as inconclusive reactors only when the results were read under “severe interpretation”, an interpretation of results usually reserved to circumstances in which another member of the herd has been shown to have had bTB disease and not merely infection (see Paragraph 39 above).

68. In relation to the slaughter of Shambo, the 25 June letter was also a “minded to” letter, i.e. it indicated that the Minister for SRD was “minded to accept the health need, and continue with the arrangements for slaughter of the affected animal”. The letter set out the background and indicated that the Minister “has considered very carefully all the representations made by the Community”, including those made at a meeting of members of the Community and Government officials on 20 June. In relation to the human rights issues raised by the Community, it continued:

“8. It is unclear whether the freedoms protected by Article 9(1), in particular the freedom to manifest religious beliefs, are applicable in this case. In particular, it is not necessarily the case that requiring the Community to hand over the bullock in these circumstances would constitute an infringement of the freedoms protected by Article 9(1), including the freedom to manifest religious beliefs.

9. However, if slaughter of the affected animal, and the making arrangements for the slaughter of the affected animal, and requiring the Community to hand over the affected animal for that purpose constitutes an infringement within Article 9(1), those arrangements would have to be assessed in the light of Article 9(2) ECHR. Any such limitation on the exercise of rights guaranteed by Article 9(1) may only be permitted under Article 9(2) if it is prescribed by law and necessary for the protection of [public order, health and morals, or for the protection of the rights and freedoms of others]. The Welsh Assembly Government have proceeded on the basis that a course of action involving the slaughter of the bullock should only take place if that satisfied the requirements of Article 9(2).”

69. With regard to the surveillance and slaughter policy, it said:

“13. As a consequence of the surveillance programme, bovines testing positive for TB are normally removed from the premises and slaughtered. Slaughter in such circumstances is central to the TB control programme for two reasons:

(a) Firstly, it eliminates the possibility that the infected bovine may infect further cattle or humans; and

(b) Secondly, post mortem examination of reactors is crucial when assessing the disease situation within the herd and establishing the appropriate testing regime (i.e. frequency and interpretation) to ensure elimination of infection. Where an animal is confirmed as having TB, that is relevant to the reading and assessment of test results of other animals.

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

70. The letter finally turned to “the present case”:

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

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

17. Furthermore, this matter has become urgent in the light of the test results received on 11 June, as communicated to the Community on 15 June. Those results, when read under “severe interpretation” (i.e. confirmation of the presence of TB in the bullock) identify 2 further animals as reactors and 5 animals as inconclusive

reactors. It has become extremely important that the presence or absence of TB in the bullock should be confirmed very soon, so as to determine what steps are required in relation to the remainder of the herd.

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

71. On 28 June, the Community’s solicitors noted that they had still not received the information requested on 23 May (see Paragraph 65 above), and made further representations to the Government. There was little new in those representations - the points made had been made in previous correspondence - but the letter stressed the following:

(i) The Government had not undertaken the assessment it is required to undertake under Article 9(1) of the ECHR of the significance of slaughtering Shambo as a restriction on the Claimant’s freedom to manifest its religion.

(ii) The only reasons the Government had given for slaughtering Shambo ((a) only slaughter will result in elimination of risk, and (b) only slaughter will result in a post mortem)) were not only unsupported by evidence, but also failed entirely to engage in the balancing exercise the Government was obliged to undertake in order to assess whether slaughter is a proportionate means of safeguarding public health.

(iii) The Government’s failure to consider the proportionality of slaughter was consistent with its approach right up until the slaughter notice was issued, namely that the Government was applying an automatic policy of slaughtering all reactors to the skin test, and was in effect still doing so while paying lip service to having a discretion not to slaughter.

(iv) That automatic slaughter policy might be appropriate in the “normal circumstances” of commercial cattle (which must be certified as officially TB free, where cattle are milked and their milk sold, where their meat is consumed and

traded, where cattle are herded together, traded, and hold a clear commercial value). However, the Government had failed to address the differences in this case, in which the risk of transmission was far lower than in the case of normal cattle and where the Community were willing to go to abnormal lengths in order to meet the public health concerns.

(v) The Government does not in any event implement an automatic slaughter policy for other unusual cases, for example where zoo animals react positively to skin tests, where humans react positively to skin tests, or where animals are kept alive for experimentation and monitoring.

(vi) The Community also set out its proposal for further testing, treatment, and a biosecurity regime.

72. On 29 June, the Government notified the Community that a decision would not after all be taken on that day, but was “now likely to be taken early next week”.

73. On 3 July, the Government wrote to the Community confirming its decision to proceed with slaughter. It did so in more or less the same terms as the “minded to” letter of 25 June (see Paragraph 68 and following above), but stressed that the Minister was:

“deeply conscious of the importance of this issue to the Community at Skanda Vale, and to the wider Hindu community generally. The Minister is fully mindful of the religious beliefs of the Community. The Minister has carefully considered all the representations made by and on behalf of the Community.... The Minister has considered the matter carefully. Her decision was not reached lightly. The representations made by the Community were fully considered...”.

However, it said:

“The Minister is also conscious of the need to protect animal and public health. For the reasons summarised in this letter, the Minister has decided that she should exercise her discretion to cause the bullock to be slaughtered....

The Minister has accepted the veterinary and health advice, and has decided to exercise her discretion and cause the bullock to be slaughtered. The reasons for her

decision are summarised in this letter.”

Those reasons (including the approach to Article 9) were as set out in the minded to letter. The evidence was that this decision was taken by the Minister herself, of course (as the letter indicates) on the basis of the veterinary and health advice she had received, from the CVO and CMO (Dr Glossop Statement 10 July 2007, Paragraph 65: and Hugh Brodie Statement 10 July 2007, Paragraph 5).

74. The decision of the Minister not to exercise her discretion to prevent the slaughter notice being acted upon is of course the second decision which the Community challenge in these proceedings.

Grounds of Challenge: Article 9

75. The primary ground of challenge by the Community is that the decisions of the Government to slaughter Shambo were made in breach of Article 9 of the Convention, the text of which is set out above (see Paragraph 3).

76. The Convention protects a number of rights regarded as fundamental: but the right to freedom of thought, conscience and religion has particular importance. With freedom of expression, the importance of the right to religious freedom is stressed in the body of the Human Rights Act 1998 which gives effect to the Convention in domestic law.

Section 13(1)(a) provides:

“If a court’s determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right of freedom of thought, conscience and religion, it must have particular regard to the importance of that right”.

This enhancement of the right has been recognised by the House of Lords: see Williamson v Secretary of State for Education and Employment [2005] UKHL 16, [2005] 2 AC 246 (“Williamson”) at Paragraph 19, per Lord Nicholls.

77. However, the importance of the right to respect for religious and other beliefs is often neglected. As Lord Nicholls said in Williamson (at Paragraph 15):

“Religious and other beliefs and convictions are part of the humanity of every individual. They are an integral part of his personality and individuality. In a civilised society individuals respect each other’s beliefs. This enables them to live in harmony. This is one of the hallmarks of a civilised society. Unhappily, all too often this hallmark has been noticeable by its absence.

With very great respect, I agree.

78. Article 9(1) provides absolute protection from state interference with an individual’s thoughts, conscience or beliefs. The state is absolutely prohibited from interfering with thoughts and beliefs. However, the provision also protects the “manifestation” of beliefs, which is bound up with the very existence of religious or philosophical conviction. In Dahlab v Switzerland (App No 42393/98, 15 February 2001), the European Court of Human Rights, referring to its previous case law, said that:

“...freedom of thought, conscience and religion, as enshrined by Article 9 of the Convention, represents one of the foundations of a ‘democratic society’ within the meaning of the Convention. In its religious dimension, it is one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. While religious freedom is primarily a matter of individual conscience, it also implies freedom to manifest one’s religion. Bearing witness in words and deeds is bound up with the existence of religious convictions.”

79. However, because of the potential impact of such “manifestation” on others, this right is not absolute but limited by the second limb of Article 9. Therefore, in short, you can, thankfully, think and believe what you like: but, where your thoughts and beliefs are manifest in actions, then the state can, in some circumstances, interfere.

80. That gives rise to two issues in this case, namely (i) is the manifestation of the Community’s beliefs as relevant in this case sufficient to engage Article 9 at all?: and (ii) if so, what is the correct approach by the state to interference with such a right? I will

deal with these in turn.

81. Williamson concerned parents and teachers at independent schools who for religious reasons believed in corporal punishment. At Paragraph 23, Lord Nicholls considered the criteria for the manifestation of beliefs that are sufficient to engage Article 9:

“[W]hen questions of “manifestation” arise, as they usually do in this type of case, a belief must satisfy some modest, objective minimum requirements. These threshold requirements are implicit in Article 9 of the [Convention] and comparable guarantees in other human rights instruments. The belief must be consistent with basic standards of human dignity or integrity. Manifestation of a religious belief, for instance, which involved subjecting others to torture or inhuman punishment would not qualify for protection. The belief must relate to matters more than merely trivial. It must possess an adequate degree of seriousness and importance. As has been said, it must be a belief in a fundamental problem. With religious belief this requisite is readily satisfied. The belief must also be coherent in the sense of being intelligible and capable of being understood. But, again, too much should not be expected in this regard. Typically, religion involves belief in the supernatural. It is not always susceptible to lucid explanation or, less still, rational justification. The language used is often the language of allegory, symbol or metaphor. Depending on the subject matter, individuals cannot always be expected to express themselves with cogency or precision. Nor are an individual’s beliefs fixed and static. The beliefs of every individual are prone to change over his lifetime. Overall, these threshold requirements should not be set at a level which would deprive minority beliefs of the protection they are intended to have under the Convention.”

Therefore, the beliefs to be protected have a modest threshold.

82. The criteria for protection of the manifestations of belief were dealt with by Lord Nicholls in Paragraphs 32-33:

“32. ... [I]n deciding whether the claimants’ conduct constitutes manifesting a belief in practice for the purposes of Article 9 one must first identify the nature and scope of the belief. If, as here, the belief takes the form of a perceived obligation to act in a specific way, then, in principle, doing that act pursuant to that belief is a manifestation of that belief in practice. In such cases the act is “intimately linked” to the belief, in the Strasbourg phraseology.... This is so whether the perceived obligation is of a religious, ethical or social character. If this were not so, and if acting pursuant to such a perceived obligation did not suffice to constitute

manifestation of that belief in practice, it would be difficult to see what in principle suffices to constitute manifestation of such belief in practice....

33. That is not to say that a perceived obligation is a prerequisite to manifestation of a belief in practice. It is not.... I am only concerned to identify what, in principle, is sufficient to constitute manifestation in a case where the belief is one of perceived obligation.”

83. In this case, the Government have been reluctant to admit that Article 9 was or is engaged. In their correspondence, they have declined to accept that Article 9 is engaged at all. For example, rather than accepting engagement, in both the decision letter of 3 July and the earlier minded to letter of 25 June, the Government merely indicated that it had made its decision as if Article 9 were engaged, i.e. it had assumed that Article 9(1) was engaged and had gone on to determine whether there were sufficient grounds under Article 9(2) to justify the alleged interference. The submission that Article 9 was not engaged was pursued in Paragraph 40 of the skeleton argument of Mr Lewis, whose submissions reflected the stance the Government had taken in correspondence:

“The removal of an animal by [the Government] for slaughter by inspectors by [the Government] (as opposed to any requirement that the Community itself slaughter the affected animal) is not necessarily accepted to be an infringement. An unwillingness to see appointed officials exercise their statutory power to remove an animal for slaughter (which can be done in pursuance of a warrant - thereby not requiring any active co-operation by any member of the Community at all) whilst it may be motivated by religious purposes, is not necessarily a manifestation of religious freedom... If the Court determines that the decision is justifiable under Article 9(2) in any event, it will not need to determine this issue.”

84. I am therefore urged by the Government to consider the issue of justification under Article 9(2), without deciding whether Article 9 is engaged at all. This is clearly how the Government approached their own decision-making. I shall return to the appropriateness of this way of dealing with the human rights issue that arises in this case in due course (see Paragraph 103(vii) below).

85. However, with respect to Mr Lewis and the Government decision-makers, in my judgment it is clear beyond any doubt that Article 9 was and is engaged, for these reasons.

(i) In Paragraphs 13-17 above I deal with the beliefs of the Community. These are well- and long-established, both generally and within the Community itself. Whilst not falling within the usual Western traditions, they are coherent beliefs sincerely and deeply held by many people, both in the United Kingdom and elsewhere in the world. They are religious beliefs, relating as they do to the nature of God, and the relationship between God and man. They would pass - and clearly and comfortably pass - a threshold considerably higher than that set by Williamson.

(ii) These beliefs hold the sanctity of life as an imperative: and that belief is manifested in the temple bull which (a) has a particularly high spiritual value, and (b) symbolically epitomises their belief that all life has within it a spark of divinity. The spiritual value of this bull is particularly high, and comparable to that of a human. As the result of these beliefs, the Community sincerely and firmly consider themselves under an obligation to preserve the life of this bullock: and under a duty to take all reasonable action - including expending all reasonable cost - on preserving that life. The “reasonableness” of such action and such costs are of course informed by the Community’s beliefs. On the evidence, there can be no doubt as to the sincerity and firmness with which that obligation is perceived.

(iii) This perceived obligation to act in this way is intimately linked to their belief system, which has as a fundamental foundation the belief that there is a spark of divinity within each living creature and consequently there is a strong belief in the sanctity of life. Given that the temple bull epitomises this belief, the slaughter of that animal would be particularly sacrilegious, a particularly grave desecration of the Community’s temple, and a very gross affront to their beliefs. It would, in the words of Brother Michael, “undermine the spiritual power of the Temples painstakingly established over 35 years of disciplined religious observance” (First Statement 6 July 2007, Paragraph 15).

(iv) In these circumstances, the proposed slaughter of this temple bull would be a patent and gross interference with the manifestation of their beliefs by the

Community.

86. Although Mr Lewis raised the issue of engagement of Article 9 in his skeleton argument, he did not pursue it in his oral submissions. He was right not to do so. In my judgment, the issues involved in the slaughter of this bullock - including the decisions relating to that slaughter that are the subject of this application - very clearly engage Article 9. The Government's grudging manner and reluctance to accept this are, in my view, unfortunate: particularly as their failure to accept that Article 9 was engaged at all at least compounded the difficulties in performing the balancing exercise between public health issues and the effect their proposed steps would have upon the right of the Community to manifest their beliefs. That is something to which I shall return (see Paragraph 103(vii) and following below).

87. Therefore, as Article 9 is engaged and the decisions sought to be challenged pose a gross interference with the Community's right to manifest their religious beliefs, the final issue is whether such interference is justified in relation to the requirements of Article 9 (2). Such interference must not only be prescribed by law - not an issue in this case, because slaughter is prescribed by the 1981 Act and 2006 Order - but also be "necessary in a democratic society in pursuit of a legitimate aim". For an interference to satisfy this requirement, it must fulfil a pressing social need and must be proportionate to the legitimate aim relied upon.

88. The legitimate aims of government that might override the right of religious freedom are spelled out in Article 9(2). As a legitimate aim, the Government rely upon "the protection of public... health", which includes the health of animals as well as of humans (App No 1068/61, X v Netherlands 5 YB 278 (1962)). In making a decision that will or may interfere with the right to manifest religious beliefs, the relevant arm of government must, in the round, balance the importance of the legitimate aim being pursued (including the extent to which that aim will be compromised if the religious beliefs are manifested at the adherents wish) against the importance of the religious beliefs being compromised (including the extent to which those beliefs will be compromised).

89. In this case, I have already indicated the particular weight to be given to the right to religious freedom under Article 9 and I have identified the extent to which the Community's right to manifest their religious beliefs would be compromised by the slaughter of their temple bullock. On the opposite side of the balance, there is no doubt that public health (including the health of animals, particularly in rural areas) is potentially a matter of great concern and the objective of maintaining public health carries great weight in the balancing exercise (see, e.g., R (Eastside Cheese Co, R A Duckett & Co Ltd) v Secretary of State for Health [1999] EuLR 968, CA, "Eastside Cheese"). Furthermore, the statutory provisions have given the power to decide which animals that evidence bTB infection should be slaughtered to the Government, in the form of the Minister for SDR. In making any decision, that Minister personally (or any individual decision-maker to whom the decision might be delegated) has the benefit of advice from the CVO and her Office, and the CMO and his Office. Given this scheme, and the difficulties involved in assessing the weight to be given to complex public health issues, it comes as no surprise that the Courts have said that:

“... on public health issues which require the evaluation of complex scientific evidence, the national court may and should be slow to interfere with a decision which a responsible decision-maker has reached after consultation with its expert advisers” (Eastside Cheese, at page 987G, per Lord Woolf CJ delivering the judgment of the Court).

That call for caution is, with respect, well-made.

90. However, in making any decision, the Government must act lawfully. The Community claim that the Government failed to act lawfully in making either decision (i.e. the decision to issue the slaughter notice on 3 May 2007, and the decision to proceed with that slaughter on 3 July 2007) on two substantive interlinked grounds:

- (i) The Government failed properly to approach the balancing exercise required by Article 9(2). In particular, having failed to make any decision in relation to engagement under Article 9(1), they had no ability properly to make the balance

required by Article 9(2): they defined the legitimate objective too narrowly and “in a self-serving” manner: and, looked at in the round, neither decision-maker (but particularly the decision-maker in respect of the issue of the 3 May slaughter notice) properly addressed his or her mind to the balance required to be performed by Article 9(2).

(ii) The Government have failed to discharge the burden of showing that slaughter (as opposed to some other means of pursuing the legitimate objective that may be less intrusive to the rights of the Community) is necessary.

91. Both of these grounds concern the question whether the proposed interference with the Community’s rights to manifest their religious beliefs is proportionate to the legitimate aim being pursued. With regard to the issue of proportionality:

(i) The three stage test for ascertaining whether an interference with a right is excessive was laid down in De Freitas v Permanent Secretary for Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69, as follows. The Court should ask itself

“whether: (i) the legitimate objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.”

Although the reference in this passage is to “legislative objectives”, this test applies to any government act, rule or decision (R (Daly) v Secretary of State for the Home Department [2001] UKHL 26, [2001] 2 AC 532 (“Daly”) at Paragraph 27 per Lord Steyn).

(ii) The Court’s role in assessing whether the means are proportionate is not limited to the traditional grounds of judicial review: the doctrine of proportionality may require the reviewing court to assess the balance which the decision-maker has struck: including whether the decision-maker has given the correct weight to

interests and considerations. Whether interference is really proportionate requires a high intensity of review, with the domestic court making a judgment (an evaluation) by reference to the circumstances at the relevant time and not being restricted to looking for procedural errors (Daly at Paragraph 37 per Lord Steyn: and R (SB) v The Governors of Denbigh School [2006] UKHL 15, [2007] 1 AC 100 (“SB”) at Paragraph 30 per Lord Bingham of Cornhill).

(iii) The balancing exercise is one which must be tackled, despite the obvious difficulties of balancing very different interests and considerations, e.g. the rights of those with religious beliefs to manifest those beliefs on the one hand, and the interests of public health on the other (SB at Paragraph 30 per Lord Bingham). It is an exercise which must be performed by the original decision-maker and, in appropriate cases, by the Court when assessing whether the means proposed by the decision-maker are proportional.

(iv) As I have already indicated, in making such a balance, the objective of maintaining public health (including the health of animals) carries great weight (Eastside Cheese, see Paragraph 89 above: and Cha’are Shalom Ve Tsedek v France [2000] ECHR 351 at Paragraph 84). Nevertheless, this objective is not determinative or paramount. Where there are public health issues, the balancing exercise nevertheless has to be performed, giving those public health concerns appropriate weight.

(v) The burden of proof in showing that the means proposed are proportional and therefore in accordance with the requirements of Article 9(2) falls upon the Government.

92. Before returning to the issue of proportionality in this case, I must deal with some outstanding issues on the evidence.

93. Whilst the legitimate aim relied upon by the Government in this case is “public health”, in this case what particular public health objective is the Government pursuing?

The maintenance and improvement of public health is no doubt a good thing in the abstract: but the identification of the particular public health objective is important, because the strength of the objective being pursued is an important and often decisive factor in the balance being made, particularly where there is a margin of appreciation.

94. The Government's letter of the 4 May 2007 (which set out the reasons for the issue of the slaughter notice the previous day: see Paragraph 62 above) states: "UK and European Union policy is to seek the eradication of [bTB]". Furthermore, Dr Glossop in her evidence alluded to the "policy for eliminating infection from the population (i.e. herd, area, country)" (Statement 10 July 2007, Paragraph 23, quoted at Paragraph 46 above). However, the eradication of bTB was not the public health objective referred to in either the previous or subsequent correspondence (including the 3 May 2007 decision letter) or otherwise in the evidence.

95. The correspondence and evidence sets out a consistent stance in respect of the public health objectives taken into account by the relevant decision-makers (and those experts advising them) which are two-fold namely;

- (i) The total elimination of the risk of transmission of bTB from any bovine which has a positive reaction test:

- (ii) The provision of data (i.e. confirmation of the presence of active bTB in the animal) which is important to determining the appropriate management regime for the rest of the herd.

It is the Government's case that these are imperatives, so far as public health is concerned.

96. Further, it is their case that:

- (i) The risk of transmission of bTB from an animal can only be totally eliminated by its slaughter and disposal.

(ii) The only way in which the presence of active bTB in an asymptomatic animal can be proved is by post mortem examination and/or culture tests following the animal's death.

97. The Government's defence to this claim is therefore very simply put. It is a imperative public health objective that the risk of transmission of bTB is entirely eliminated from any bovine which positively reacts to a tuberculin test. That elimination can only occur if the animal is slaughtered. Therefore, any animal which has a positive test result must be slaughtered, in pursuit of a legitimate public health ground. A similar case is put in respect of the need to slaughter to enable post mortem tests to be conducted on the carcass. This logical train no doubt explains why, in Government literature and correspondence, they say that any animal which test positive must be slaughtered. It is inevitable.

98. However, this logical train is fundamentally flawed.

99. Mr Anderson for the Community submitted that the Government had defined the legitimate objective too narrowly to be a proper public interest objective for the purposes of Article 9(2). I agree. The objective must be defined in terms of, and must operate at the level of, **public** health: and cannot properly be defined by reference to a particular animal or set of circumstances. The elimination of any risk of a particular animal transmitting bTB may be appropriate in the pursuit of some wider public health objective (e.g. the elimination or control of bTB in a particular area), but it cannot be a public health objective in itself. Similarly, an unwavering requirement that positive reactors are slaughtered to ascertain whether they show clinical signs of disease, which might inform disease management of other animals in the same herd (but not animals in a wider scope) cannot be a public health objective. In public health terms, they may be a means but they cannot be ends.

100. If the objective of such decisions is so narrowly framed, then effectively the objective will be coincident with its effect. To define the public interest objective in

terms of a specific animal or set of circumstances simply operates at the wrong level. As explained in Wilson v First County Trust Limited (No 2) [2003] UKHL 40, [2004] 1 AC 816 at Paragraph 61 per Lord Nicholls), what is relevant is the underlying social purpose sought to be achieved by the decision.

101. By failing properly to identify this purpose, no proper balance between competing interests can be made. There is no proper identified public interest to balance against the individual rights of (in this case) the Community. There is no compelling evidence that this was the case - although I shall return to that point - but that objective might be the control or eradication of bTB in South West Wales. That would be a proper public interest objective against which could be balanced the Community's right to manifest their religious beliefs. Such a balance would require consideration of the detrimental impact preserving the bullock's life would or might have on that identified public interest objective: it would require an assessment of the chances of the disease being transmittable (i.e. active) and of it being actually transmitted, to whom (in human terms) and to what (in animal and wildlife terms), and if transmitted what adverse impact would or could that have on the objective. That might be a very difficult balancing exercise on the facts of a particular case depending on the weight of evidence as to the detrimental effect on the objective that eliminating all risk of the bullock transmitting the disease might have: but it is the exercise that would have to be performed.

102. In this case, because the Government defined the relevant objectives other than in terms of a true public interest objective, no such exercise was properly possible - and, certainly, no such exercise was performed by the Government in respect of either challenged decision. Mr Anderson submitted that the objectives used by the Government were "self-serving". I have some sympathy with this submission, because the Government defined the objectives in such specific terms that, once an animal tested positive as a tuberculin reactor, then inevitably that animal must be slaughtered. However, the objectives are not truly self-serving properly defined - because I am sure that what prompts the Government is not the wish to slaughter cattle. They are simply not legitimate public interest objectives. By adopting them, the Government denied themselves the exercise of discretion that the statutory scheme gives them not to

slaughter bovines which test positive. In adopting a legally erroneous approach to the requirements of Article 9 - and particularly in failing properly to identify and give appropriate weight to the public interest objective they were pursuing - the Government effectively eliminated the discretion given to them by Section 31 of the Act: and they have acted unlawfully.

103. This is a question of substance, not form. Although the eradication or control of bTB may be worthwhile objectives for the Government, on the evidence before me I certainly cannot assume that either is their objective or that, latently, either was an underlying objective when they came to consider the relevant decisions in this case.

(i) There is no compelling evidence that the Government has as an objective the elimination of bTB. The only evidence is the one reference of Dr Glossop (in her Statement 10 July 2007, Paragraph 23: see Paragraph 36 above), against which there is her evidence about the objectives she in fact had in mind when advising the Minister in this case (see below). The letter of 4 May referred to above (Paragraph 62) refers to the UK Government and the European Union (and not specifically the Welsh Assembly Government) as having a policy of eradication. In any event, the Government have issued public documents to which I was referred (such as “The Strategy for the Sustainable Control of Bovine TB in Great Britain” (2005)), which stress that the aim is not to eliminate the disease but to control it with measures that are “practical, proportional and sustainable”: the intervention over and above the then-existing controls being “to reduce economic impact for both the tax payer and industry”. The Government have fought shy of a cull to eradicate bTB carried in badgers (see Paragraph 34 above).

(ii) BTB is not a specified disease under Section 31, nor has it been the subject of the Section 32A amendment procedure (see Paragraphs 18-20 above). The Minister has not considered it appropriate to put into place a blanket requirement for the destruction of all bovines which react positively to the tuberculin test.

(iii) In any event, even if there were such a policy of eradication (or alternatively

control) of bTB, the evidence before me is that that policy was not the objective in the mind of either relevant decision-maker when these matters were being considered. Paragraph 24 of the decision letter of 3 July 2007 refers to the Minister for SDR being “satisfied that the public health objectives set out above satisfy the requirements of Article 9(2) and that the slaughter of the animals is necessary to satisfy those aims”. The “public health objectives” referred to there are not the eradication or control of bTB, or indeed anything else other than the two objectives set out in Paragraph 70 above. In that, the final decision letter exactly reflected the minded to letter of 25 June.

(iv) This is unsurprising, because the Minister accepted the veterinary advice of Dr Glossop (see letter 3 July 2007, Paragraph 6). Dr Glossop’s evidence was clear. She regarded the relevant aims as “eradicating the risk of transmission of TB from that (i.e. the positively tested] animal or obtaining the necessary information on post mortem examination to evaluate subsequent tuberculin tests, and to manage the TB breakdown within the herd effectively” (Statement 10 July 2007, Paragraph 62). With regard to the Minister’s decision which led to the 3 July letter, Dr Glossop said (at Paragraphs 103-4):

“103. I advised the Minister that the Community’s proposals to avoid the slaughter of the affected bullock do not meet the public health objectives set out above, i.e. they would not eliminate (as opposed to minimise) the risks of transmission of TB from this animal, nor would they provide the information necessary for the disease management of this herd or contiguous herds.

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

Dr Glossop there precisely identifies the “public health objectives” she had in mind when advising the Minister. She is an eminent veterinary surgeon. Her evidence on this issue was not seriously challenged by any of the considerable veterinary evidence submitted on behalf of the Community. For the purposes of this claim - and on the evidence before me - I am certainly prepared to accept her evidence as to

the efficacy of means to achieve the objectives which she identifies. However, for the reasons I have given above, these are not proper public interest objectives.

(v) In relation to the original decision to issue the slaughter notice, there is no evidence that the decision-maker had in mind a proper public interest objective. He was a member of Dr Glossop's Office and presumably had in mind the same objectives as she. In any event, there is no evidence he had any wider objective in mind.

(vi) Indeed, there is evidence resonant throughout the documents that the Government simply failed to grapple with the required balancing exercise required by Article 9(2) at all. Given the limited nature of the objectives they had in mind - which lacked the appropriate public element - this is perhaps understandable. The failure properly to identify the public interest objective was compounded by an apparent failure also properly to identify and weigh the legitimate interests of the Community insofar as their Article 9 rights were concerned. All decision-makers took the view that Article 9 was not engaged. In relation to the 3 May decision, there is slim evidence indeed that the CVO's Office carefully considered the Article 9 balancing exercise before deciding to issue the slaughter notice. The letter of 4 May in explanation does not suggest they did. The only evidence is the evidence of Dr Glossop (Statement 10 July 2007, Paragraph 57) that her Office "considered the representations made by the [Community] but considered the affected bullock should be slaughtered." That does not suggest that her Office understood the serious nature of the proposed invasion of the Community's right to manifest their beliefs. The letter of 3 July refers to the Minister taking account of the Community's beliefs, but does not suggest that, in making the decision, she did not think other than the imperative that the bullock should not transmit the disease required it to be slaughtered. In that letter, although there are bald references to taking the Community's representations into account, there is a complete absence of evidence that the balancing exercise required by Article 9(2) was done. The reason no doubt was that the Minister considered that the imperative for public health was to avoid any risk of transmission of bTB from Shambo, which (her advice was)

required his slaughter. In terms of any possible balancing exercise, that was overriding and determinative: but for the reasons I have given, it was flawed.

(vii) I have already explained that the decision-makers avoided taking any decision on whether Article 9 was engaged at all, by accepting that it did and moving straight to the Article 9(2) balancing exercise. For the reasons I have given, the Government's approach to Article 9 was flawed in any event. However, the Article 9(2) balancing exercise requires not simply a "tick box" exercise as to whether there are rights being infringed or not, but an assessment of the potential infringement of those rights which have to be appropriately weighted in the balancing exercise. The 3 May decision (explained in the 4 May letter) appears to have regarded the initial decision as to whether Article 9 was engaged as an issue that could be answered only "yes" or "no". Even the 3 July decision letter appears to betray a lack of appropriate awareness that the infringement of rights needs such an assessment, and weighting. I have reservations whether a decision-maker can properly assess such matters on the hypothetical basis advocated by Mr Lewis (and adopted in both the minded to letter of 25 June and the decision letter of 3 July). It is for the decision-maker first to determine whether Article 9 is engaged and, if so, the extent of the infringement of rights that the proposed government action will entail. Only thus will the balancing exercise implicit in "proportionality" be possible. Even if logically possible to move straight to the Article 9(2) exercise on a hypothetical basis, this is fraught with practical difficulties and dangers for the decision-maker. To omit the first step of identifying the beliefs and manifestations of beliefs that engage Article 9 is, at best, extremely unhelpful to the decision-making process: and unlikely to improve neither the quality and cogency of the ultimate decision, nor the confidence of those affected may have in it. At worst, it can lead the decision-maker into error, by drawing his focus away from properly weighting the extent of the invasion of the rights of the individuals to which his decision will give rise.

104. In any event, I am quite satisfied for the reasons I have given that neither decision-maker (in respect of the 3 May slaughter notice or the 3 July confirmation of that

slaughter would proceed) properly conducted the balancing exercise required by Article 9.

105. That is sufficient to dispose of this case on the basis of the first ground relied upon by the Community (see Paragraph 90(i) above). However, in relation to the second ground, whatever the legitimate public health objectives of the Government might have been (for example, in terms of eradicating or controlling bTB), I would have had grave doubts as to whether the Government would have satisfied me on the evidence that it was proportional to require the slaughter of Shambo. I make these comments cautiously, because of course the Government have not addressed them properly in evidence because of their erroneous focus on the objectives to which I have referred: and any balancing exercise would be dependent upon the precise public health objective identified and evidence as to the extent to which such objective would or might be compromised by allowing the bullock to live. That is precisely the exercise the Government have not done, or sought to do. However:

- (i) The Community have submitted expert evidence that Shambo may not be infected - i.e. it may be a false positive. On the basis of the evidence to which I have already referred, it is very likely that he is infected.
- (ii) However, even if he is carrying *M Bovis*, it is unknown whether he is shedding bacteria, i.e. whether the disease is active and transmittable. Although Dr Glossop does not agree, Mr Taylor considers it is “most unlikely” that Shambo has active bTB (Statement 10 July 2007, Paragraph 29). Although there is no test that can guarantee an animal is not shedding, tests can be done to ascertain whether it is likely he is shedding or not, e.g. regular tests on excreta, urine, nasal secretions and saliva (Paragraph 41).
- (iii) Whether or not the disease is active, animals have been cured of TB. Humans are the most obvious example: but there is evidence from the learned literature that apes and even bovines can be cured using anti-biotics. Treatment of bovines has not generally been attempted, because it is expensive and uncommercial. Any

treatment would therefore be experimental. However, the various experts whose evidence the Community have submitted have some confidence - in admittedly varying degrees - in curing Shambo, relatively untested as the therapy would be in bovines.

(iv) Any period of treatment is likely to be extensive - at least many months. During this time, the Government accept that the risk to humans and animals can be minimised (although not entirely eliminated). They have not considered the extent of the risk, because of their pre-occupation with entirely eliminating, as opposed to minimising, such risk. Mr Lewis accepted that the level of risk (in terms of the possibility that some transmission of the disease will occur, and if so what the consequences of such transmission might be) have simply not been considered by the Government, because of their stance that any risk of an individual animal transmitting the infection must be eliminated by slaughter. However, the risk to humans is particularly small, and bTB in humans is easily treated with anti-biotics if caught early enough (see Paragraphs 35-6 above). The risk to other animals can be minimised, e.g. by isolating the bullock, using badger-proof fencing etc. Mr Taylor is "certain that Shambo can be prevented from becoming a threat to humans or animals" by employing testing, isolation and treatment measures (Statement 6 July 2007, Paragraph 39). Mr Webb considers that the risk can be rendered "negligible" (Statement 6 July, Paragraph 12). Ms Ruth Watkins (a veterinary virologist who gave written evidence for the Community) said that, if properly managed, "there will be almost zero risk of infection..." (First Statement 10 July 2007, Paragraph 17). At the moment, no other animal in the herd has tested positive on the standard interpretation. As I have indicated, none of these means has been properly evaluated by the Government and its expert advisors, because they would not eliminate the risk of transmission and would not give data on the progress of the disease within the bullock that might inform the disease management of the rest of the herd.

106. In any event, although I can and do say that the Government have adopted the wrong approach in this case (and consequently I can and will quash the relevant

decisions), the positive exercise of balancing the rights of the Community to manifest their religious beliefs against legitimate public health objectives is precisely the exercise that the statutory scheme has properly reserved to the Government with the expert advice that it has available to it. Therefore, although I will quash these decisions relating to the proposed imminent slaughter of Shambo, having done so it will not only be in the power of the Government to reconsider this matter - no doubt bearing in mind the comments in relation to their decision-making process in this judgment - but of course, given their obligations under the 1981 Act, they will be obliged to reconsider the public health objectives that underlie behind the surveillance and slaughter policy, and come to a view as to whether, in the reasonable pursuit of those objectives, the slaughter of this animal (or some less intrusive measure) would be proportional given the serious infringement of the Community's rights under Article 9 that slaughter would involve. This judgment does not of course guarantee that, as the Community wish, Shambo will live until he dies a natural death. This judgment merely rules that the decisions of 3 May and 3 July to issue the slaughter notice and to pursue the slaughter under that notice were unlawful and will be quashed. It will not and cannot interfere with the proper exercise in the future of the Government's functions in terms of duties and powers under the 1981 Act and 2006 Order as they may relate to Shambo, or any other animal in the care of the Community.

Other Grounds

107. The Community relied upon two further grounds, which I can deal with shortly given (i) my findings in relation to the primary grounds and (ii) the fact that I find the grounds to lack merit.

108. First, the Community rely upon Article 14 of the Convention because (they submit) Shambo has been unfavourably prejudiced because he has been treated as a commercial bovine and he falls into a different category (i.e. a non-commercial bovine). At best, this ground adds nothing to the Article 9 ground off which it of course feeds, it being a mere re-statement of that ground. Insofar as it is suggested that it had additional life, I accept the submissions of Mr Lewis. Article 14 involves discrimination on prescribed grounds of persons in materially analogous positions. Even if the ground were reformulated to move the focus from Shambo himself to the Community, I do not understand (i) how it is said that the Community have been discriminated against as compared with the commercial owners of bovines who have been tested positive: the Community's complaint is not that they have been treated differently, but that they have been treated the same: and (ii) it is entirely unclear what characteristic of the Community members is said to categorise them in the same group as commercial bovine farmers, and which characteristic marks them out as being the reason for prejudice. This ground as an independent ground fails.

109. Finally, it was suggested in the grounds of claim that the Government proceeded on several material errors of fact, e.g that the tuberculin skin test provided 99.9% accuracy. None of these errors of fact were actively pursued at trial, Mr Anderson (on the evidence, properly) conceding that the proportion of false positives from that reactor test was certainly very small indeed.

Order

110. However, for the reasons given above, I shall grant the Claimant's application for permission to judicially review the decisions of the Government of 3 May 2007 to issue a

slaughter notice in respect of bullock UK 742266 200001, and the decision of 3 July to proceed with the slaughter. I shall further allow the claim, declare those decisions to be unlawful and quash them. I shall hear submissions about the appropriate form of the order.

Postscript

111. Given the very tight timetable set in respect of this obviously urgent matter, I would like to thank the parties and their legal representatives for the manner in which they prepared both evidence and submissions. Without that assistance, my task would have been rendered far more difficult, and it is right that I express my thanks here. Finally, I appreciate that the issues in this case have engendered much public interest and considerable strong feeling. I should also like to thank both parties for the helpful, modest and courteous manner in which they have conducted themselves throughout this application.

His Honour Judge Gary Hickinbottom

16 July 2007