to the cost:benefit assessment required by Section 5(4) of the 1986 Act. The Home Secretary says death is "normally" not considered an adverse effect and is therefore ignored in the cost:benefit assessment

Ground 4: the testing and training of brain-damaged marmosets in small boxes should have been regulated under the 1986 Act on the basis that they clearly experienced distress, which should then have been taken into account in the cost:benefit assessment

Ground 5: the Home Secretary should have consulted the APC under Section 21 of the 1986 Act over guidance he issued about depriving animals of food and water (the Cambridge marmosets, including brain-damaged ones, were denied water for long periods to motivate them to perform tasks and also had their food restricted).

Ground 6: the Home Secretary should take into account the suffering and death of animals used for breeding and other animals not used in experiments when conducting the cost:benefit assessment.

The judge granted permission for grounds 3 and 5. He refused permission for grounds 1/2, 4 and 6.

Grounds 1 and 2 (assessment of suffering and out-of-hours care): the judge held that there was "evidence on which it is arguable that the Chief Inspector erred in reaching his conclusion that the severity limits had been correctly applied". He gave as examples licence 80/1326 which envisaged repetitive seizures that might not be well controlled by drug treatment and licence 80/1249, which envisaged that an animal might suffer persistent epilepsy – he accepted that the animal would already have suffered "a major departure from [its] health" before being killed and that this therefore required a substantial severity limit (rather than the "moderate" one it was given). He also referred to the researchers' Standard Operating Procedure (attached to licence 80/1249), which envisaged that some animals would suffer serious neurological symptoms, including seizures and psychotic behaviour. In relation to Ground 2, the judge said that he did not think it was arguable that the relevant provisions (Sections 6(6) and 10(2) of the 1986 Act) imposed a duty on licensees to have appropriately trained staff on site at all times. However, he described as *"more meritorious"* the argument that the fact that marmosets were left without observation for 15 or 16 hours (longer at weekends and holidays, in fact) shortly after a brain operation made it impossible for the researchers to ensure that a marmoset suffering "substantially" could be immediately killed (as required by Section 10(2)(b)).

However, the judge refused permission for grounds 1 and 2, for the following reasons:

Firstly, that the BUAV had to show, in relation to both grounds, *not* that the CI's conclusions were perverse or legally incorrect, but that the Home Secretary had acted irrationally in accepting the CI's conclusions. Since the CI was scientifically qualified and the Home Secretary was not, that was a difficult threshold for the BUAV to cross. In the opinion of the author (who acted for the BUAV), this approach is clearly wrong; the relevant test should be whether licensing decisions disclosed an error of law, not whether the Home Secretary was reasonable in accepting the advice of the CI. Put another way, if advice to a minister is legally flawed, so must the minister's decision to accept that advice. If the judge were right, it would mean that licensing decisions could, in practice, never be

challenged, because it will be always be virtually impossible to show that the Home Secretary, a layman, acted unreasonably in accepting the advice of his expert inspectors.

Secondly, even in relation to the requirement for immediate euthanasia, Parliament could not have envisaged that each animal would be under constant supervision (a contention not made by the BUAV). Thirdly, that there had been an unreasonable delay in bringing proceedings. To a significant extent the issues related to historical facts (some of which might be in dispute) and also to expert assessment. It might not be easy to apply a finding to different facts and finally, the cost and time involved in a full hearing, given the fact that expert evidence would be involved, were relevant factors.

Ground 3 (death as an adverse effect): the judge accepted that this claim was arguable and granted permission for it to proceed.

Ground 4 (training and testing), Stanley Burnton J. referred to *Notes on shaping animals*, a Cambridge document, indicating that an animal might become miserable or angry when subjected to testing of the sort contemplated and that symptoms included "screaming, trying to get out of the box, defecating". To the inexpert mind, he accepted that such symptoms were indications of "distress" within Section 2(1) of the 1986 Act (only procedures which may cause "pain, suffering, distress or lasting harm" need to be licensed). However, he again said the legal test was whether the Home Secretary was reasonable in accepting the advice of the CI that no distress was foreseeable. In addition, there had again been delay. Finally, the facts were peculiar to these research projects.

Ground 5: the judge accepted that it was arguable that the Home Secretary should have consulted the APC, on the basis that the guidance in questions amended a code of practice. He therefore granted permission to proceed with the claim.

Ground 6 (stock animals): the judge did not consider it arguable that the suffering and death of stock animals should be taken into account in the cost:benefit assessment. Their interests were protected under the provisions dealing with housing and care.

The grounds on which permission was granted will be considered at a full hearing. The BUAV is seeking permission to appeal the judge's decision on grounds 1 and 2.

UK CASE LAW

Nash v Birmingham Crown Court [2005] EWHC 38 (Admin)

This case concerned prosecution under the Protection of Animals Act 1911. Nash was convicted of causing unnecessary suffering to domestic cats by unreasonably omitting to provide them with proper care and attention contrary to Section 1(1)(a) of the said Act. The conviction was upheld by the Crown Court. It held that the information contained within the summons provided the appellant with reasonable information about the nature of the charges. It also held that even if the summons lacked particularity that did not render it defective, but gave a right to require further information about the nature of the charges. On appeal, the High Court held that the information