The reality gap lives on: the case of *R (Compassion in World Farming Limited) v Secretary of State for the Environment, Food and Rural Affairs*[7]

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This is the latest case in which the English courts have had to consider the yawning gap between the consensus that animals should not be caused to suffer unnecessarily, and the continued existence of systems of intensive farming that unavoidably have a detrimental impact on animal welfare when compared with alternative non-intensive methods. The case concerned the compatibility of the intensive farming of broiler chickens with the Welfare of Farmed Animals (England) Regulations 2000[8] (the "Regulations"), which implement Council Directive 98/58/EC[9] (the "Directive").

Approximately 44 billion broiler chickens are reared worldwide each year. Broiler chickens can be divided into two groups. The first group is ordinary broilers that are reared for their meat ("meat broilers"). The other group is the breeding flock ("breeder broilers"), whose role is to produce chicks. The case concerned the restricted feeding regime to which both male and female *breeder* broilers are subjected. The need for their feed consumption to be severely restricted arises from the reduction that selective breeding has achieved in the time it takes for a chicken to reach its 2 kg slaughter weight. That time has been halved over the last 30 years, with a broiler chicken now going from hatching to slaughter weight in just six weeks. Chickens of such fast-growing genotypes are vulnerable to a range of serious ailments because their legs, hearts and lungs do not develop quickly enough to support their massive muscle growth.

In the case of breeder broilers their rapid growth presents a serious welfare dilemma. Since broilers do not reach sexual maturity until between 18 and 24 weeks after hatching, breeder broilers must be kept alive for at least three times as long as the time it takes a meat broiler to reach slaughter weight. If female breeder broilers were permitted to feed *ad libitum*, their welfare would be seriously undermined by heart problems and lameness. In addition, their commercial utility would be undermined by high mortality rates, and because egg production and hatchability would be poor. In an attempt to reduce such problems, breeder broilers, for the first 20 weeks of their lives, are fed one half or less of what meat broilers are given to eat (sometimes as little as 20%). While this is partially effective in reducing the incidence of health and welfare problems arising from their growing too quickly, the restrictive feeding regime itself presents a serious welfare concern because (as the Government accepted by the time of the Court of Appeal hearing) scientific studies have demonstrated that the feed restrictions result in the birds experiencing "chronic hunger"[10] to the detriment of their welfare.

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[7] [2004] EWCA Civ 1009.
[8] SI 2000/1870.
[9] Council Directive 98/58/EC of 20 July 1988 concerning the protection of animals kept for farming purposes, OJ L 221, 8.8.1998, p.23.

[10] Mench, J. A., "Broiler Breeders: Feed Restriction and Welfare", *World Poultry Science Journal*, March 2002: "Broiler breeders are truly caught in a welfare dilemma, because the management practices that are necessary to ensure health and reproductive competence may also result in the reduction of other aspects of welfare … Broiler breeders show evidence of physiological stress as well as increased incidence of abnormal behaviours, and are also chronically hungry.".

The only way to avoid this welfare dilemma is to avoid rearing birds of certain fast-growing genotypes, and to instead use birds of genotypes which would not require that the breeding flock be subjected to a restrictive feeding regime that resulted in birds being chronically hungry. Essentially, the contention of the claimant animal welfare organisation was that the law required the adoption of that course.

The Directive

The Directive laid down minimum standards for the protection of animals kept for farming purposes. Article 10 requires Member States to bring into force national measures to implement the Directive by 31 December 1999, though they are free to maintain or apply stricter standards.

Article 4 provides:

"Member States shall ensure that the conditions under which animals (other than fish, reptiles or amphibians) are bred or kept, having regard to their species and to their degree of development, adaptation and domestication, and to their physiological and ethological needs in accordance with established experience and scientific knowledge, comply with the provisions set out in the Annex."

The Annex referred to is organised under a number of headings, such as staffing, inspection, freedom of movement, accommodation, and breeding procedures. One such heading is "Feed, water and other substances", under which paragraphs 14 and 15 provide as follows:

"14. Animals must be fed a wholesome diet which is *appropriate* to their age and species and which is *fed to them in sufficient quantity to maintain them in good health and satisfy their nutritional needs*…

15. All animals must have access to feed *at intervals appropriate to their physiological needs*." [emphasis added]

In addition, paragraph 21 (the final paragraph) provides:

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

The domestic implementing Regulations reproduce in Schedule 1 the scheme and layout of the Annex, albeit with certain amendments designed to maintain a higher domestic standard. Regulation 3(2) places a burden on owners and keepers of animals to "*take all reasonable steps* to ensure that the conditions under which the animals are bred or kept comply with the requirements set out in Schedule 1." [emphasis added]

The claim brought by Compassion in World Farming (CIWF)

CIWF sought judicial review of both the Secretary of State's implementing Regulations and her refusal to adopt a policy of prosecuting farmers under those Regulations for subjecting breeding broilers to the restricted feeding regime. The judicial review application was first heard by Newman J in the High Court,[11] where CIWF argued two grounds:

(1) *The "reasonable steps" derogation:* The Directive should be read as imposing an obligation on Member States to achieve the *end result* of ensuring that the prescribed minimum standards were met, and not merely as requiring Member States to regulate the *conduct* of keepers by requiring them to take *'all reasonable steps'*

[11] [2003] EWHC 2850 (Admin).

to achieve that result, as the Regulations had done.

(2) *The "chronic hunger" violation:* The restricted feeding regime applied to breeder broilers did not comply with paragraphs 14 and 15 of the Annex to the Directive (which had been transposed into the domestic Regulations as paragraphs 22 and 24 of Schedule 1). Alternatively, the regime breached paragraph 22 of Schedule 1 which went further than the Directive, providing that animals had to be fed in sufficient quantity "*to promote a positive state of wellbeing*". Accordingly, the Department for the Environment, Food and Rural Affairs, by refusing to adopt a policy of prosecuting keepers of breeder broilers who subjected them to feeding practices that led to their experiencing "chronic hunger", was failing to enforce the Regulations.

Newman J's judgment

Newman J rejected both of CIWF's grounds of challenge. In relation to the first ground, the judge noted that Article 249 of the Treaty establishing the European Community allowed Member States a "choice of form and methods" when implementing directives. The Annex to the Directive incorporated concepts the application of which depended on scientific value judgments, e.g. "appropriate care" (paragraph 4), "suitable accommodation" (paragraph 4), "appropriate steps to safeguard health and wellbeing" (paragraph 13) and, of particular relevance to the present case, a "wholesome diet" (paragraph 14) and feeding at "appropriate" intervals (paragraph 15). The lack of certainty intrinsic within those concepts would give rise to particular difficulty if they were treated as obligations imposing strict liability.[12] By subjecting keepers to a "reasonable steps", rather than an absolute, obligation, the UK had taken sufficient action that was apt and likely to give rise to substantial compliance with the standards set out in the Annex to the Directive. Accordingly, the UK had acted within its margin of discretion to properly transpose the Directive.

Newman J also rejected the second ground of challenge. All animals kept by humans were subjected to a feeding regime of one form or another and, at certain times, those animals may be described as "hungry". Hunger was a natural physiological state that motivated eating. Although the literature provided some support for the proposition that the feed restrictions resulted in the birds being "chronically stressed", the assessment of stress in birds was scientifically problematic and it could not be shown that the breeder broilers were "starving".

It was not enough for the claimant to argue that the feed restrictions resulted in breeder broilers being left "chronically hungry", "very hungry" or that, from time to time, they exhibited distress. *Intensive farming in connection with chickens was not of itself unlawful, and the need to achieve a balance in connection with the health of breeder broilers was an attendant aspect of intensive farming systems.* The period of feed restrictions was limited and directed to a particular need, and the facts that breeder broilers on restricted feeding regimes were able to gain weight and that their essential bodily functions were not compromised were significant factors in counteracting the suggestion that they were being kept sufficiently hungry to compromise their wellbeing.

[12] Reference was made to the common law's reluctance to impose strict liability in respect of criminal offences: see *Sweet v Parsley* [1970] AC 132, 148-150, *per* Lord Reid.

The Court of Appeal's judgment

CIWF appealed to the Court of Appeal, though before that Court only the second ground for review ("chronic hunger") was pursued. In so doing, CIWF focused on the final words of paragraph 22 (which were not derived from the Directive), requiring that animals be fed sufficient food "to promote a positive state of wellbeing". That constituted a distinct requirement that was not met by the restrictive feeding regime.

CIWF criticised the judge for approaching the case on the basis that it was a given that intensive farming of chickens of the selectively bred genotypes now being used had to be accepted. Paragraph 29 of Schedule 1 to the Regulations (which materially replicated paragraph 21 of the Annex to the Directive) provided that "[n]o animal shall be kept for farming purposes unless it can reasonably be expected, on the basis of its genotype or phenotype, that it can be kept without detrimental effect on its health or welfare". In any event, the claimants contended that the judge had been wrong to balance the commercial interests of intensive farming against the minimum standards specified by the Regulations and the Directive.

The Court of Appeal dismissed the appeal. Giving a judgment with which the other members of the Court agreed, May LJ held[13] that, provided that breeder broilers were fed so that their diet was wholesome and appropriate to their age and species and sufficient to maintain them in good health and satisfy their nutritional needs (as had been found by Newman J to be the case[14]), there would be no contravention of the last eight words of paragraph 22 if they were for part of their lives persistently hungry.

Like Newman J, May LJ effectively took it as a given that the legislation allowed the intensive farming of chickens of fast-growing genotypes. Paragraph 22, he held, was concerned with the feeding of animals which owners or keepers happened to be rearing, irrespective of their genotype. CIWF's objection based on paragraph 29 of Schedule 1 was brushed aside without detailed consideration.[15]

May LJ, having thus refused to consider the possibility that the rearing of fast-growing genotypes was not permitted by the legislation, then inevitably went on to find that the restricted feeding regime was not incompatible with paragraph 22 since a balance had to be arrived at between mutually incompatible welfare concerns. The promotion of an animal's "wellbeing" required a balancing of factors which may conflict, and the last eight words of paragraph 22 of Schedule 1 imposed no discrete strict obligation. The obligation was *"to take all reasonable steps"* and *"to promote"*. Performing the balance in itself met the requirements imposed by those words.

In a seemingly reluctant concurrence, Sedley LJ accepted that "the behavioural evidence show[ed] that breeders [were] distressed by the low level of feeding to which they [were] confined for their first 20 weeks, and that this on its face [was] inimical to their wellbeing". However, the selection of genotypes was "beyond the reach of the measures at issue" in the appeal. Accordingly, while agreeing with May LJ "[f]or the present", Sedley LJ concluded that it might "nevertheless be for consideration whether, if the ingredients of an offence [were] otherwise present, the use of a genotype which

[13] Court of Appeal's judgment, paragraph 49.
[14] Newman J's judgment, paragraph 60.

[15] May LJ asserted that CIWF had abandoned reliance on that paragraph before the High Court, and should not be permitted to resurrect it before the Court of Appeal.

ma[de] suffering unavoidable [would] afford a defence".[16]

Commentary

What will be of greatest significance in this case to those with an interest in animal welfare law generally is the way that the High Court and Court of Appeal approached the issues. Rather than look at the strict minimum welfare requirements set out in the Directive and the domestic Regulations, before then determining whether or not the feeding regime was compatible with those requirements, the two Courts regarded the potential reach of the legislation as going no wider than requiring a balance to be struck between the welfare consequences of adopting different alternative feedings regimes *within the existing intensive farming system.*

May LJ's judgment was particularly unsatisfactory in that he completely failed to engage with paragraph 29 of the Regulations, which is plainly directed at preventing the keeping of animals which, by reason of their genotypes, cannot be farmed without detriment to their welfare. Developments in selective breeding and genetic engineering should not be allowed to erode the minimum welfare standards laid down by European Community law.

The author believes that a principled approach would require a simple two-stage test. First, what are the minimum standards imposed by the legislation? Second, is the system of husbandry, practice or technique that is at issue in the case consistent with *all* of those minimum standards? Where the legislation has set out minimum standards that cannot be achieved within an existing system of intensive animal husbandry, or by the use of a particular selectively bred or artificially engineered genotype, it is the system or the use of that genotype, and not the standards, that should give way. Legislatures would then have to face up to the fact that that the existing systems and practices violate the very minimum standards that have been laid down.

Whilst this approach would, in this case, have outlawed an existing agricultural practice with a pronounced impact on the broiler industry, is this not a situation where it is incumbent on the courts to "let justice be done, though the skies may fall"[17]?

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[16] Court of Appeal's judgment, paragraphs 56-58.

[17] "We must not regard political consequences, however formidable they may be. If rebellion was the certain consequence, we are bound to say, "*Justicia fiat, ruat coelum*" " – William Murray, Lord Mansfield (1705-1793).