

The use of ventilation shutdown as a method to kill poultry during a disease outbreak

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This article concerns a judicial review claim brought by the RSPCA challenging the lawfulness of the government's decision to permit use of inhumane methods of killing animals during outbreaks of disease. The claim was dismissed by the High Court in October 2008. The Court's judgment is reported as R (on the application of Royal Society for the Prevention of Cruelty to Animals) v Secretary of State for the Environment, Food and Rural Affairs [2008] EWHC 2321 (Admin); [2009] 1 CMLR 387; (2008) Times, 16 October.

Introduction

European legislation lays down methods for killing animals in the event of disease outbreak, which are implemented in England by the Welfare of Animals (Slaughter or Killing) Regulations 1995 (WASK). The Directive on the protection of animals at the time of slaughter or killing (the 'Directive') specifies particular methods that may be used to kill poultry and criteria which the Secretary of State must ensure are met in relation to other killing methods he or she permits to be used. These criteria are to spare the birds any avoidable excitement, pain or suffering during killing and in particular to ensure that, if the

method does not cause immediate death, appropriate measures are taken to kill the animals as soon as possible and before they regain consciousness.

Following an outbreak of avian flu (strain H5N1) in Norfolk on 26th February 2006, amendments to WASK were laid before Parliament on 28 April 2006, without prior consultation, to enter into force on 29 April (the "2006 Regulations"). The minister's decision was subsequently debated in the House of Commons Standing Committee on Delegated Legislation on 29 June 2006 when it was approved by a vote. The 2006 Regulations allowed a new method of killing, termed 'ventilation shutdown' (VSD) and defined as "*the cessation of natural or mechanical ventilation of air in a building in which birds are housed with or without any action taken to raise the air temperature in the building*". At its simplest then, no action would be required other than to switch off any mechanical ventilation in the shed.

This action was taken due to specific problems that became apparent to DEFRA during disease control activities in the Norfolk outbreak. The cull was initially delayed due to insufficient poultry workers presenting themselves to

catch birds and transfer them to a unit for gassing or to undertake another permitted method of killing. The only method which avoids the need for catchers is 'whole house gassing' (introducing a gas mixture into the entire poultry house). An argon/carbon dioxide gas mix can be used in whole house gassing as an alternative method to VSD. However, DEFRA considered that insufficient supplies of gas mixtures would be available to deal with a large-scale outbreak of a highly pathogenic disease.

Animal welfare implications of VSD

The RSPCA considers VSD a particularly inhumane method of killing animals because it has a high potential to cause substantial suffering over an indefinitely long period to birds, with death occurring in an uncertain manner. The aim of VSD is to cause death by hyperthermia (over heating) rather than suffocation. Little research has been done on VSD, other than some theoretical modelling of the consequences of using it by the Royal Veterinary College. This work suggested that death would occur after

approximately 45 minutes provided the birds were mature, slaughter-weight broilers closely packed in a sealed shed on a hot day or where supplementary heat could be added.

In reality, a wide range of conditions exist on farms. With younger or more mobile birds, colder climatic conditions, leaky or open-sided sheds, death would not take place within the estimated time period or might not take place at all. Within a

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shed, conditions such as temperature and humidity vary. Some birds might remain alive and some might drift in and out of consciousness, depending on where they are in the shed. The simple effect of a proportion of birds dying would be to reduce the temperature in the shed and also the chances of death for remaining birds. Poultry workers would then be required to enter the sheds, find survivors amongst the carcasses and kill them by neck dislocation before bagging the carcasses.

Whole house gassing is a more humane and predictable method of killing birds, particularly if inert gasses such as nitrogen or argon are used since birds do not detect their presence at high concentrations. Clearly, though, this method carries additional cost, resources and planning.

It was common ground between RSPCA and DEFRA that VSD is not a humane method of killing. DEFRA has identified its hierarchy of priorities in the event of a disease outbreak as:

- 1 the protection of human health and life;
- 2 swift and effective disease control; and
- 3 animal welfare.

This hierarchy was not challenged by the RSPCA.

Compatibility with EU legislation and international standards

The RSPCA argued that the 2006 Regulations which introduced VSD are incompatible with and *ultra vires* the Directive and incompatible with Community law requirements as to proportionality and legal certainty.

In particular the RSPCA argued that the 2006 Regulations were incompatible with Annex E of the Directive, which stipulates that:

“If methods are used which do not cause immediate death...appropriate measures are taken to kill the animals as soon as possible, and in any event before they regain consciousness; and nothing more is done to the animals before it has been ascertained that they are dead”.

The RSPCA argued that the Directive was prescriptive in restricting the type of killing methods that may be used for disease control purposes to those that either cause immediate death or rapid loss of consciousness which persists until death. VSD, it was argued, met neither of these criteria – as it is unlikely in the majority of

cases that birds will be rendered rapidly unconscious prior to death or at all. In addition, if they do become unconscious rapidly, it is unlikely that all birds in a shed will *remain* unconscious until death.

Furthermore, VSD may not cause the death of all birds. As such, another killing method would be required or else birds would be left to die of starvation or, if infected, the disease. Applying a second method, it was argued, is inconsistent with the stricture that nothing more is done to the animals before they are ascertained dead.

In addition, the RSPCA argued that VSD is incompatible with the requirement contained in Article 3 of the Directive that animals be “spared any avoidable excitement, pain or suffering during...killing” since it exceeds by a significant margin the period of suffering which is likely to result from other killing methods. The 2006 Regulations require that “no person shall kill birds using [VSD] except on the written authority of the Secretary of State who must be satisfied in the individual circumstances that any other method of killing...is impracticable”. It does not follow from this, however, that the Secretary of State will only permit the use of VSD where it is the only remaining option or, of the alternatives, the most humane.

Nor are there specific requirements set out in the 2006 Regulations as to the manner in which VSD may be deployed. For example, there is no requirement for action to be taken to raise the temperature within the building to a certain level within a particular time period.

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On the issue of whether VSD could be viewed as a method of last resort, the RSPCA submitted that since it would cause death in only a limited range of conditions, requiring other methods to be used in addition to it, it is not a sensible or suitable fallback method.

DEFRA maintained that they were obliged under Decision 2006/416/EC to bring all poultry inside where there is an outbreak of highly pathogenic avian influenza and kill all poultry without delay to avoid the risk of avian influenza being spread. They stated that they would only use VSD in circumstances where avian influenza presented a significant threat to public health or where resources were significantly stretched. The level of priority given to contingency planning for a potential pandemic from a disease such as avian flu is second only to a terrorist attack. DEFRA emphasised the need to construe the legislative requirements in the context of disease control; as such the safety of human life should take precedence over animal welfare.

DEFRA argued that there were sufficient safeguards built into the 2006 Regulations, namely that the Minister's written authority is required, on the basis that he or she is satisfied that in the circumstances any other method of killing is impracticable.

The scientific evidence on the use of VSD

Three scientific bodies have expressed an opinion on VSD.

The Farm Animal Welfare Council, an independent advisory body established by government, wrote to

DEFRA in September 2006 approving the use of VSD as a method of last resort subject to checks suggested by FAWC being carried out prior to its use.

In a 2008 report, the European Food Safety Authority Panel (EFSA) on Animal Health and Welfare (the independent scientific adviser to the European Commission on risk assessment) specifically identified VSD as a method that should not be used for killing birds with avian influenza and stated that:

“... [VSD] has been suggested as an emergency method of killing birds with AI. It is known that in hot weather when ventilation failure occurs with birds close to slaughter weight that high mortality through suffocation and heat stress can occur rapidly, especially in large, well-insulated buildings. However, for younger birds, breeders, caged layers, etc especially in cooler weather or in older buildings, anecdotal evidence suggests that death may be less rapid, and hence more traumatic, with no guarantee of a rapid complete kill.”

In May 2005, the World Organisation for Animal Health (OIE), which has over 170 members including all EU member states, agreed standards on the killing of animals for disease control. The standards pre-date VSD and make no reference to it but state:

“When animals are killed for disease control purposes, methods used should result in immediate death or immediate loss of consciousness lasting until death; when loss of consciousness is not immediate,

induction of unconsciousness should be non-aversive and should not cause anxiety”.

Referring to these guidelines, the OIE stated in a press release that controlling avian flu at its animal source does not justify the use of inhumane methods of killing.

European Commission view

Prior to the High Court's judgment being handed down, the European Commission announced a proposal to replace the “traditional prescriptive approach” of the Directive with new legislation to give member states greater flexibility as to the methods they use for mass killing of animals for disease control. This proposal is undergoing scrutiny in

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the Parliament and Council of Ministers and is not expected to be agreed before 2010.

The High Court's judgment

The High Court (Sir Robin Auld, sitting as a High Court judge) dismissed the RSPCA's judicial review claim. The Court's judgment provided important guidance in four areas:

1. Advice and opinion from scientific bodies.

The judge stated that views of scientific bodies should be taken into account by Member States in their implementation of Directives if these views are clearly expressed and apt for the context. However he did not feel that the views of the two relevant

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bodies in this case, EFSA and the OIE, fell into that category. The judge dismissed the advice of the EFSA Scientific Panel as a “somewhat diffident caution against the use of ventilation shutdown”. The OIE guidelines were equally inapplicable as they make no express reference to VSD. The judge viewed the reference to use of non-aversive methods to induce unconsciousness, as admitting the possibility of non-immediate unconsciousness, rather than as advice to use methods that cause unconsciousness without pain such as anaesthetic lethal injection.

2. Establishing a balance between the need to protect human health and safety and the welfare of animals and proportionality

The judge felt that it was difficult for the government to strike a scientifically supported balance between the competing interests due to the lack of data on VSD. He did not feel it was appropriate for the Court to give a view on what more the Government might have done to fulfil

the task entrusted to it to protect the public against the contingency of a serious outbreak of a highly contagious and dangerous disease.

Similarly in relation to the proportionality of the 2006 Regulations, given their purpose of protection of public health and safety, it was not for the Court to evaluate the weight of conflicting expert evidence as to the availability of alternative killing methods.

3. Whether Annex E of the Directive is prescriptive or permissive in effect

The Court dismissed the RSPCA's arguments that the parameters laid down by Annex E of the Directive precluded the use of methods, such as VSD, that are highly unlikely ever to fulfil the criteria of that Annex. He described this as arguing that only methods which could guarantee or ensure the outcome described in Annex E would be permitted. In his view, the Annex E criteria are requirements as to means rather than outcomes. They require that the means used to kill animals are aimed at rapid transition to death and sparing avoidable pain and suffering, rather than ensuring that this will be the case.

4. Certainty

The argument that VSD is too uncertain in its application to implement the requirements of the Directive failed for the reasons described above. The judge rejected the argument that further legislative attempts were needed to prescribe methods to be used in response to a serious outbreak of a potentially widespread and deadly disease, on the basis that this would be counter-productive to achievement of the primary aim of disease control.

Discussion

The RSPCA questioned, prior to and during the litigation, why DEFRA had not done more to, firstly, ensure that whole house gassing could be used during an outbreak of avian influenza and, secondly, develop other more humane methods presently in the research stage to obviate the need to ever use VSD. DEFRA had always maintained that they were committed to increasing their gassing capability so that whole house gassing would be used instead of VSD. As noted above, DEFRA views the threat that a pandemic influenza outbreak poses as second only to terror attacks for the purposes of contingency planning priorities.

During the procedure of the case, DEFRA moved on two important areas. Firstly they drafted administrative guidance and protocols setting out some specific procedures to determine when and how VSD may be used. DEFRA

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agreed to publish this guidance. Secondly, they concluded agreements for the provision of culling teams, gas supplies and equipment.

It is hoped that DEFRA's contingency planning is now sufficiently robust to ensure that ‘last resort’ scenarios requiring the deployment of inhumane methods such as VSD will not be reached.