Compounding this concern, both the ECtHR and the ECJ have in recent years upheld policies that have disproportionately adversely affected Muslims and other religious minorities, for example, prohibitions on religious dress at work and in the public sphere.[11] It is understandable that some will regard the ECJ's permissive stance towards non-stun slaughter bans as just one further example of Europe's human rights regime not taking religious discrimination seriously. This highlights a challenging terrain for animal lawyers who situate animal protection within a broader framework of social justice.[12]

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ian, 24 February 2021) https://www.theguardian.com/environment/2021/feb/24/cattle-stranded-at-sea-for-two-months-are-likely-dead-or-suffering-hell?CMP=share_btn_tw.

11 See e.g. **S.A.S v France**, Application no. 43824/11; **Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV** Case C-157/15; **Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA** Case C-188/15.

12 Joe Wills, 'The Troubling Case of Non-Stun Slaughter: A Comment on the Opinion of Advocate General Hogan in **Centraal Israëlitisch Consistorie van België and Others**. (**UK Centre for Animal Law**, 18 September, 2020) https://www.alaw.org.uk/2020/09/the-troubling-case-of-non-stun-slaughter-a-comment-on-the-opinion-of-advocate-general-hogan-in-centraal-israelitisch-consistorie-van-belgie-and-others/

Case Comment: *Lubrizol and others v European Chemicals Agency*

Facts

These were 14 joined appeals brought by companies manufacturing chemicals known as ZDDP, which are used in hydraulic fluids.

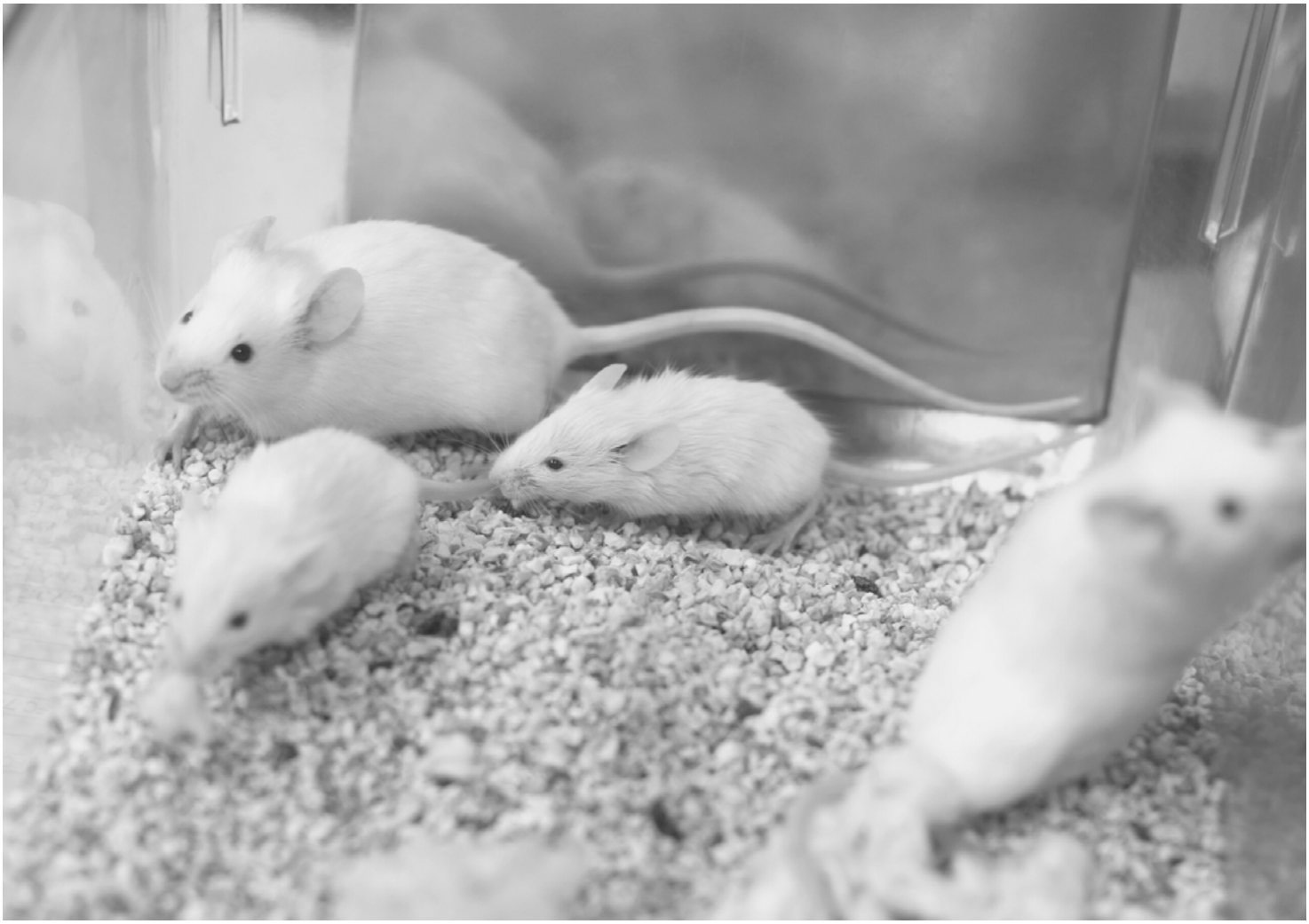
The European Chemicals Agency (ECHA) is the principal regulator of chemical safety in the European Union under Regulation (EC) No 1907/2006 (known as 'REACH'). Under REACH, companies wishing to manufacture in or import into the EU chemicals ('substances') in quantities over one tonne a year have to register them with ECHA.

They must provide a significant amount of data relating to the potentially hazardous nature of the substances. The precise nature of the data depends on the tonnage at which a substance is marketed in the EU (there are bands between one and 10 tones, 10 and 100 tonnes, 100 and 1000 tonnes and over 1000 tonnes). At Annex IX and X levels, registrants have to make a testing proposal if they wish to use animals. That applied here. ECHA can run a compliance check at all tonnages.

Many of the 'endpoints', as they are called, involve animal tests. However, there is a key principle under REACH that animal tests must only be carried out as a last resort and registrants have a duty to provide equivalent data via non-animal approaches (or approaches which involve fewer animals or less suffering than the stipulated test).

One of these approaches is known as read-across: where the registered substance has a similar chemical structure to another substance and is expected to have a similar toxicological profile, one can read across data from the other substance to the registered substance and thereby avoid having to carry out another animal test. Animal protection organisations believe that ECHA places the similarity bar too high.

The animal tests in the present appeal were (i) a subchronic toxicity study (90 days) in rats; and



(ii) a pre-natal developmental study in either rats or rabbits. The first study could involve around 1400 animals and the second around 11,200 (with a further 37,000 animals in additional tests which could be indicated by the initial studies). Considerable suffering was to be expected given the nature of the tests and the substances the animals would be forced to ingest over considerable periods.

The history of the present appeals was long and complicated. In essence, however, the lead registrants in the ZDDP group argued that they should be allowed to carry out the animal tests on four of the substances and then read across the results to nine of the others (the final substance was in a special category). They made testing proposals accordingly.

ECHA disagreed. Hence the appeal to the Board of Appeal which is attached to ECHA. The companies complained about the process ECHA had undertaken, its assessment of the read-across and the fact that ECHA had only addressed its decisions to the lead registrants, not also the other registrants of the substances who assented in the testing proposals.

Advocates for Animals' client Cruelty Free Europe was given permission to intervene in the appeal.

Held

The Board of Appeal allowed all the appeals (save with regard to the final substance).

The Board rejected most of the companies' arguments. In particular, it said that ECHA had not followed an unfair process and had not prematurely moved from informal discussions to the formal parts of the process. ECHA had been entitled to reject the read-across based on its scientific assessment.

However, the Board decided that the decisions should indeed have been addressed to all the registrants. The other registrants had been deprived of the benefit of Article 53, which sets out data and cost-sharing rules.

Under Article 93(3) of REACH, the Board of Appeal, if it allows an appeal, can either remit the case to ECHA (with guidance about how it should approach its reassessment) or make a decision afresh. The Board will only remit a case if there is doubt about the eventual outcome.

In the present case, the Board said that the outcome might have been different had the other registrants had a chance of contributing to the assessment of the substances.

Commentary

In one sense, this was a standard Board of Appeal decision, in that it accorded ECHA considerable deference in its assessment of the read-across and the testing strategy the ZDDP group had proposed.

The decision to remit is interesting, however. Having ruled firmly that ECHA was entitled to reject the read-across, it might be thought unlikely that the other registrants could have achieved a different outcome. In addition, the Board only said that ECHA's decision should have been addressed to all registrants, not its draft decision and it is therefore not obvious what the other registrants could have contributed.

As it is, all the registrants now have another opportunity of improving the read-across argument, and thereby avoid at least some animal tests. The Board may have been influenced by the recent decision of the Court of Justice of the European Union in *Federal Republic of Germany v Esso Raffinage and others C-471/18 P* (21 January 2021) (Esso Raffinage), in which Advocates for Animals also acted. The Court emphasised that the last resort principle had to be applied even after ECHA had made a decision that a registrant must carry out animal tests.

The Board rejected CFE's argument that Article 77(2)(j) of REACH, which requires ECHA to 'provid[e] advice and assistance to manufacturers and importers registering a substance … ', imposed a duty on the Agency to provide assistance at all stages, in particular so as to avoid unnecessary animal tests. The Board said that the wording indicated that the duty to assist was limited to providing technical assistance for the submission of registration dossiers.

With respect, this is a misreading of Article 77(2)(j) and out of step with the CJEU's ruling in Esso Raffinage. Registration is not simply a one-off process and there seems no policy reason why ECHA's duty should be limited in this way.

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