Neutral Citation Number: [2011] EWHC 956 (Admin)

Case No: CO/9035/2010

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/04/2011

Before:

THE HONOURABLE MR. JUSTICE McCOMBE

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Between:

THE QUEEN **On the application of** **K and AC Jackson & Son**	**Claimants**
- and -	
Department for the Environment, Food and Rural Affairs	**Defendant**

- -
- -

Daniel STILITZ QC (instructed by **Barker Gotelee**) for the **Claimants**
Julie ANDERSON (instructed by **DEFRA Law & Corporate Services**) for the **Defendant**

Hearing dates: 17th/18th March 2011 & 28th/29th March 2011

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Approved Judgment

The Honourable Mr. Justice McCombe:

(A)Introduction

1. This is an application for judicial review of a decision by the defendant ("DEFRA"), said in the Claim Form to have been made on "29.7.10", to direct the slaughter of a pedigree bull owned by the claimants ("Jacksons") and called "Hallmark Boxster" ("Boxster"). The decision was taken as a result of a positive bovine tuberculosis test said to have been obtained from a blood sample or samples taken from the animal at Jacksons' farm on 7 April 2010. The decisions are perhaps more fully described as being communicated to Jacksons by notices of intended slaughter, given on 13 April and 29 July 2010, under paragraph 4 of the Tuberculosis (England) Order 2007, an Order made under powers contained in the Animal Health Act 1981. Jacksons apply for orders quashing those notices and mandatory orders for re-testing. Permission to apply for review was given by an order of Mr Rabinder Singh QC (sitting as a Deputy Judge of this court) on 27 January 2011.

2. The grounds of the application are (i) that DEFRA relied on a bovine tuberculosis ("bTB") test produced on the basis of a sample taken in a manner not compliant with its own operating procedure; (ii) it failed to follow its own policy of re-testing when the initial test had not been carried out properly; and (iii) it interfered with Jacksons' right to peaceful enjoyment of their possessions under Article 1 of the First Protocol of the European Convention on Human Rights, in that it determined upon the slaughter of Boxster "without proper, and self-imposed, procedural safeguards to check that the interference with that right was justified".

3. Jacksons' complaint in short is that, when samples of blood were taken from Boxster for the purpose of testing for bTB, two separate samples were pooled/mixed together by the sampling technician to achieve the required quantity of blood for the laboratory, contrary to the practice indicated by the operating manual of DEFRA's relevant agency, "Animal Health", which states, "…Please do not decant from one tube to another in the field because of contamination problems". A review of DEFRA's testing policy of July 2009 (updated in September 2009) further states that, "standing policy is to re-test animals only when there is evidence that any diagnostic test has not been carried out properly". Jacksons contend, therefore, that the mixture of Boxster's samples in the field constitutes "evidence that the diagnostic test has not been carried out properly" (within the meaning of this document) and that DEFRA's refusal to re-test amounted, therefore, to a breach of its policy, rendering flawed the decision to issue the notices.

4. There are various legal issues arising in the case to which I will turn hereafter. However, underlying the whole matter is a dispute of fact as to whether there was any mixing of samples from Boxster at all. On giving permission to apply, Mr Rabinder Singh QC made an order giving permission to the parties to cross-examine witnesses of fact only, such cross-examination to be confined to the question of what happened on 7 April 2010 when blood samples were obtained from animals at Jacksons' farm. The order identified the witnesses concerned. The order seems to have been made at the time without significant opposition from DEFRA. The order was never appealed. It seems to me that that was the moment at which objection to the principle of the hearing of oral evidence ought to have been taken and fully argued.

5. At the opening of the hearing, however, Miss Anderson for DEFRA objected that the hearing of evidence was immaterial to the outcome of the case and should not, therefore, proceed. I heard short submissions on the point from both counsel, Mr Stilitz QC for the Jacksons contending that the factual dispute went to underlying procedural irregularity and was at the heart of the dispute; the breach of procedure, he said, undermined the basis of DEFRA's decisions.

6. In the end, in a short judgment given on the first morning of the hearing, the majority of the witnesses having attended, I decided to allow the cross-examination to proceed and decided that I would resolve the issue of fact, without prejudice to either party's contentions as to the consequences of any such finding and to whether the finding had any bearing upon the proper outcome of the claim.

7. It was decided at that stage that, having heard the evidence and the parties' submissions on the factual issue, I should announce my decision on the matter giving my full reasons for that decision in the final judgment after hearing all the arguments on the other points arising. Both parties agreed to this course. The factual issue, therefore, is the first matter to be dealt with in this judgment. My decision (set out in paragraph 8 immediately below) was communicated to the parties on 25 March 2011 in anticipation of the resumed hearing on 28 March.

(B) The Factual Issue – were Boxster's samples mixed?

8. My finding is that Boxster's samples were mixed on site. My reasons are as follows.

9. The witnesses who gave evidence on this issue were Mrs Catherine McNeil, (the daughter of Mr Kendall Jackson and Mrs Anita Jackson, the owners of the farm – "Mr Jackson" and "Mrs Jackson" respectively), Mr and Mrs Jackson themselves, Mr Melvin Burrows and Mr John Davison, on behalf of Jacksons, and H.K and S.T., on behalf of DEFRA.

10. Jacksons' witnesses gave evidence that the scene at the farm was this. In preparation for the testing, Boxster was halter-tied at the "bottom" end of the yard, close to the crush pen where most of the other animals were to be tested later that day. Immediately next to Boxster was another cow, his constant companion, "Katherine" or "Katie", a fellow show animal. A third animal, called "Nectarine", say Jacksons' witnesses, was tethered at a little distance from the other two on the other side of the "crush pen" from them. They say that she was tied there because she was an old, quiet cow and they did not wish her to be knocked around in the crush pen. A further four animals, they say, were tethered at the "top" of the yard.

11. The positioning of these animals, according to these witnesses is depicted on a plan exhibited to the second witness statement of Mrs McNeil, a copy of which is annexed to this judgment. A confusing feature of the evidence was that what the witnesses called the "top" of the yard is shown at the *bottom* of this plan and vice versa.

12. Jacksons' witnesses say that Boxster and Katie, which are pedigree show animals, had been kept in isolation from the rest of their herd after initial positive bTB tests had resulted in March 2010. Jacksons wished to establish that isolation status for those animals to DEFRA's satisfaction. Mr Burrows gave evidence that he helped Mr Jackson and Mrs McNeil to prepare the crush area on the morning in question; then he

and Mr Jackson went to the isolation pen to fetch Boxster and Katie and duly tethered them to the positions indicated on the plan. Jacksons' evidence is that the four other animals tethered at the other end of the yard included Vi (a large cow) and Vinnie, a bull.

13. In contrast, DEFRA's witnesses say that *three* animals only were tethered at the "top" of the yard, two bulls (Vinnie and Boxster) and a cow, the cow being Nectarine, not Katie. H.K says that they were told that these three animals were calm and that blood could be taken from them without needing to put them through the "crush". She says that the animals were introduced to her as "Nectarine", "Vinnie" and Boxster". She says that it was not possible to get round the front of these animals to read the ear tags, while the samples were taken, and that therefore their names were used initially on the sample record sheet, adding the precise identification codes later for the two animals that she says were tested at that stage, namely Nectarine and Boxster.

14. DEFRA's witnesses say that H.K first took blood from Nectarine. She then moved on to Vinnie who immediately jumped sideways when the needle was inserted. This damaged the equipment and caused them to abandon Vinnie's test for the moment. She says that they then moved to Boxster and obtained a single full sample on the first attempt. H.K pinpoints this test by reference to a remark that she said was made by Mrs McNeil at the time about Boxster having had a grass reaction at a show, causing one of his eyes to close.

15. Jacksons' witnesses say that the sampling process was quite different. I have already mentioned the differences between them and DEFRA as to the positions in which the various animals were tethered. Mr Jackson says that when the technician (H.K) started to take the sample from Boxster she did so at arm's length and seemed scared of him; Boxster was uneasy, "bawling out" and was moving about. The syringe dropped to the floor and was discarded. She then asked her assistant (S.T.) to bring another syringe. S.T. came round from her position on the other side of the crush pen but failed to bring a new syringe, apparently not having heard H.K's initial request. S.T. then went back to get the new syringe that was required. Mr Jackson says that he then made a light hearted remark about this not boding well for getting through the tests that day.

16. Mr Jackson says that, when the new syringe was obtained and inserted, only a half tube of blood was obtained; another was called up and a further half tube of blood was extracted. At that stage, says Mr Jackson, H.K mixed the two samples, saying as she did so, "You haven't seen me doing this. I could get into trouble". Mr Jackson says that, for their part, they were happy for her to do this to avoid the need for Boxster to be jabbed a fourth time.

17. H.K does accept that some mixing of samples did occur in this way during the course of the day, but is adamant that it was in relation to other animals, but not Boxster. Mr Jackson agrees that mixing did occur with other animals, but insists that Boxster's samples were also mixed. H.K says that it was when the mixing occurred with the other animals that she said "something along the lines "*this is not best practice but we need to do it to get the blood*"".

18. The evidence given by Mr Jackson, in his statement at the start of the proceedings, is supported by the evidence of Mrs McNeil, Mrs Jackson and Mr Davison, who all say

that they were present when the testing of Boxster was carried out. Mr Jackson identified Boxster as having been tethered at the side of the crush before knowing that the positioning of the animals would be in issue.

19. All these witnesses were invited by Miss Anderson in cross-examination to annotate copies of Mrs McNeil's plan to show where each was standing when the test was carried out, allowing of course for some movement and the obvious fact (as it was put by one of these) that they were not "statues". Each witness annotated his or her copy plan in essentially similar form. It was not seriously put to them that they were being deliberately untruthful in this. DEFRA's case is that their accounts are tainted by an "orthodoxy" that has arisen between all of them as to what happened on the day since the dispute arose.

20. Jacksons say that they did not report the incidents of mixing as they did not wish to get the technicians into trouble. Further, they say that they did not appreciate that a formal procedural flaw might have occurred or that it might be of significance in the testing process until they attended a meeting, addressed by Miss Clare Taylor of "Animal Health" (H.K and S.T.'s superior manager), on 2 June 2010 at Selby. They say that they were told of the potential problem on that occasion by a Mr Alan Hall, Boxster's breeder, and by a representative of the National Farmers' Union. Initially at the time of testing (and in spite of Mrs. Keighley's remark), they had simply been relieved for the sake of the animals that the testing procedure had been completed pragmatically without the need for further testing of Boxster.

21. On the following day, Miss Clare Taylor spoke to H.K about the testing procedures at Jacksons' farm in a "loudspeaker" telephone call, in the presence of S.T.. Miss Clare Taylor's note of that conversation in her diary was this:

> "Spoke to Helen and Sophie. Remember order of testing: tied up bulls (1st Bandaged tails with local because sensitive skin and to injections) with cow. Tested one bull fine, definitely no mixing of blood tubes with this bull. Easy to tell. Second bull could not get blood from (kicked) so moved. Tested other stock then moved bull to the crush. Admitted did mix tubes, but young stock definitely not this bull.
>
> Paperwork backs up order of testing
>
> Asked them to record what happened (in writing)"

Another note, also said to be by Miss Clare Taylor, records H.K saying she "cannot remember what happened down at the crush".

22. As can be seen, Miss Clare Taylor asked both technicians to record what happened in writing. H.K's undated written note was as follows:

> "On arriving at the farm tethered up at the fence at the top of the sheds was 3 Blonde cattle. 1 cow and 2 Bulls. Both Bulls had bandages wrapped round the base of the tails. I took a 1 full blood tube sample from the cow (now know as Nectarine) first, then I tried the 1st bull, after inserting the needle into the tail the

> bull jumped sideways and the needle and tube came out of the tail therefore losing the vacuum of the tube. I then decided this bull needed better restraining and said I needed it taking down to the cattle crush before trying again. I then proceeded onto taking a blood sample from the 2nd bull (now known as Boxster) getting the full blood tube sample on the 1st attempt. Whilst we were sampling the 3 cattle Mr Jackson was moving cattle out of the side pen round into the cattle crush and penning area. Then Sophie and I went down to the cattle crush area starting on the other cattle. The 1st Bull was walked down to the crush penning area later and 1 sample taken when the bull was restrained at back of gate. All the rest of the cattle was tested in the cattle crush."

S.T.'s note, dated 03/06/10 is this:

> "Helen and I arrived on farm to find 2 blonde bulls and a blonde cow tethered to the side of the barn.
>
> Both bulls had a bandage wrapped around the base of their tails. Kate explained she had administered a form of anaesthetic via cream to the tail to numb the injection due to the sensitive nature of the bulls.
>
> Helen commenced blood testing the cow first (now known as Nectarine) and successfully got a full tube of blood at first attempt. Helen then moved onto the 1st bull (now known as Vinnie), but as she inserted the needle, he jumped sideways, in turn bending the needle and causing it to withdraw from the skin, therefore loosing the vacuum. Due to the animal's reaction to the injection it was immediately decided, and agreed by all present (myself, Helen & Kate) to get the blood sample when the animal was in a crush, properly restrained. It was then pointed out by Kate that the crush was located at the bottom end of the barns and the bull would have to be walked down for testing. Therefore Helen moved onto the final bull (now known as Boxster) and successfully got a full tube of blood at the first attempt, whilst Vinnie stood next to them.
>
> During this time, Ken & his son were in the process of moving other cattle into the race and crush area at the bottom end of the barns in preparation for sampling, so Helen blood sampled these cattle first before walking the bull down for testing. Once the bull was restrained in the penning area, Helen successfully got a full tube of blood in one attempt.
>
> Sampling of the rest of the cattle then commenced.[1]"

[1] I was given later what was said to be a copy of a further note said to have been made by S.T. on 3 June 2010, but this was not adduced in the evidence.

23. The sample testing sheets made up at Jacksons' farm on 7 April 2010 are in evidence, exhibited to H.K's statement. At the start they record the samples taken from "Necturine" (sic), Boxster and an animal tagged as "127144 100181", which is in fact "Katie". The barcodes for the sample tubes for these three animals end in the figures, "1051", "1053" and "1055". Missing from the sequence are 1052 and 1054. DEFRA's case is that Katie was tested in the crush after the testing of Nectarine and Boxster and the falied testing of Vinnie.

24. Jacksons' case, of course, is that (without them having had any prior sight of the sample sheets before disclosure of documents during the proceedings) this reflects precisely what they say happened on 7 April. Nectarine was tested, without incident, followed by Boxster. There was then the loss of the first tube which fell to the floor. The second was half-filled (1053), a third (1054) was half-filled and the contents of the two were mixed with the contents of 1053. 1054 was then discarded.

25. DEFRA says that the sheet fits its evidence also. Nectarine was tested (1051). An attempt was made to test Vinnie which failed and the tube was discarded (1052). Then Boxster was tested (1053). The missing tube 1054 is then explained by H.K having a spare tube (1054) in her pocket during the testing. It was put to H.K that sampling procedures indicated that the tubes were supposed to be used in sequence[2]. She said that it was not something that they stick to and it was "not true that we have to do it". She said of the missing tube 1054,

> "I could have had it in my pocket. I am behind the animal. If I miss, I have it (the spare) to hand. I can put the new tube straight back on. I have one in my pocket for this. I must have had it".

She acknowledged that this feature was not in her contemporaneous note, although I noted that in Miss Clare Taylor's undated note on page 317 of the documents, appearing immediately after the note about H.K not remembering what happened at the crush, the following appears, attributed to "Helen" (viz. H.K):

> "Def.[initiely] had some spares in pocket when went down to the crush. May have discarded at end of day? Or may have jumped in crush?? Unknown".

26. I am satisfied that the account given by Jacksons' witnesses is to be preferred to that given by H.K and S.T..

27. First, in the absence of deliberate dishonesty on the part of Jacksons' witnesses, and none is alleged, it seems to me to be impossible to find that all of them were mistaken on the simple point about where the animals in issue, all well known to them, were tethered for the testing process and where they themselves were at the important moments. All these witnesses were well acquainted with their animals and can hardly have been mistaken as to which was placed where. This was also a significant day for theses witnesses; their herd had never been tested in this way before. On the other hand, neither H.K nor Mr Sophie Taylor had any previous acquaintance with any of Jacksons' animals and had carried out testing procedures on many other farms. The

[2] See the Appendix to this judgment.

possibility of them being mistaken about a simple matter, such as the positioning of the animals and where the staff were standing, is far more likely.

28. Secondly, it seems to me inconsistent with all the evidence that H.K should have been told, as she says in her statement, that all three of the animals tethered together at the top of the yard were calm and unlikely to pose problems if one of them had in fact been Vinnie. It is common ground that Vinnie was known to all not to like needles and that H.K was informed of this.

29. Thirdly, the positioning of the animals as Jacksons contend is supported by other features. Boxster and Katie were being kept deliberately segregated from the rest of the herd and Jacksons would have been, and were in fact, anxious to demonstrate that, particularly in the presence of DEFRA representatives. It also seems likely that Katie, Boxster's constant companion, would be tested with him and at the same time so that the two animals could then be removed together back to the isolation pen, as Jacksons say they were. It seems odd that Katie would be left to be tested separately from Boxster, in the crush and with other animals, as DEFRA's witnesses would have it.

30. Thirdly, Mr Jackson also gave cogent evidence that it was very unwise to tether together, during testing, two mature bulls, one of which (Vinnie) was notoriously unhappy with needles. That evidence made obvious common sense.

31. Fourthly, the account now given by DEFRA's witnesses is inconsistent with the first account given to Miss Clare Taylor on 3 June 2010 and noted by her in her diary. The note indicates that it was the *second* bull that caused difficulties while the first caused no problems. Now the witnesses say that the first bull tested was Vinnie and that it was he who played up. Further, that note makes no mention of names whereas the evidence now is that the technicians knew the names of the animals from the outset. This is not what their own written reports to Miss Clare Taylor reflect: H.K speaks of the cow "(now known as Necturine [sic])" and the second bull ("now known as Boxster"); S.T.'s written note also refers to the animals as being "now known as…" etc. The sample sheets indicate that Nectarine and Boxster must have been identified on site, but not Vinnie or apparently Katie. The names do not seem to have impressed themselves on the technician's minds by the time of their initial reports.[3]

32. Fifthly, S.T. was, I thought, an unreliable witness in her account of how her own note of the events had been compiled. It was put to her that from her position at the time she could not have seen what happened when Boxster was tested. She said that while she could not see the needle inserted, she could "see the action"; she could see him move but could not see blood going into the tube. She assumed that when the needle was inserted the bull jumped. She could not see the needle inserted or withdrawn or the vacuum in the tube being lost.

33. She went on to say that she did not discuss what happened with H.K before giving her own account; she was, she said, merely setting out normal testing procedure. She was then reminded of Miss Clare Taylor's note of 3 June 2010 and acknowledged that she

[3] I refused an application by DEFRA to adduce further written and oral evidence from Miss Clare Taylor as to the circumstances in which her note was compiled. This was for two reasons. First, this went beyond the confines of the order made for cross-examination of witnesses. Secondly, and more importantly, it seemed to me to be unfair to permit DEFRA to attempt to retrieve in this manner a weakness in its own witness's evidence exposed in cross-examination on the previous day.

had been sitting in Miss Clare Taylor's office, listening on the loudspeaker phone, when H.K was questioned about the matter on that day. She then said that not all aspects of the incident had been covered in that conversation which was only brief. She continued to insist that she had not heard H.K's account before compiling her own note, notwithstanding the shared telephone conversation on 3 June. I do not accept her evidence on this point.

34. It was pointed out to her further that her note said that, owing to Vinnie's reaction, it had been decided to get his sample "when the animal was in a crush" whereas Mr Jackson's evidence was that Vinnie was too large for the crush. She then said, as H.K had said in her note, that Vinnie was tested "behind a gate in the penning area". None of this was satisfactory and conflicted with other evidence.

35. This aspect of DEFRA's case brought me to the conclusion that it was in the case of DEFRA's witnesses, rather than that of Jacksons' witnesses, that a received "orthodoxy" had crept into the accounts, impairing the reliability of the evidence given.

36. Sixthly, I prefer the inference drawn from the sampling sheets advanced by Mr Stilitz to that which Miss Anderson invites, namely that the missing 1054 vial is to be accounted for in the manner contended for by the Jacksons. The contrary explanation of the missing tube having been in H.K's pocket appears to have been speculation after the event, unsupported by her own and S.T.'s contemporaneous accounts.

37. While the technicians' attitudes to recommended procedures seems clearly to have been casual and while this part of the written procedures may have been referable to a period before bar coding, it seems odd that spares for the pocket should be taken from the middle of a sequence, thus needlessly interrupting it contrary to the instructions, rather than from some remote part of the collection where the sequence would not be impaired.

38. Miss Anderson argued that the laboratory testing of Boxster's sample revealed no contamination which she submitted would have been inevitable if the scientific evidence adduced by Jacksons is correct. However, it is disputed whether contamination would in fact have been detected by the controls. That dispute is not amenable to resolution on the evidence available, particularly in the absence of cross-examination of the scientists. Neither party asked for such cross-examination at any stage. It was not apparently suggested at the time cross-examination was ordered by Mr Rabinder Singh QC, nor indeed was it suggested before me on the first day of the hearing, when the matter was briefly re-argued, that this scientific evidence could be conclusive for or against a finding of mixing in the field. I, therefore, regard this aspect as neutral as the evidence presently stands.

39. For these reasons, I make the finding set out in paragraph 8 above.

(C) Judicial Review

40. As already mentioned, Jacksons' case is that the mixing of Boxster's blood samples on 7 April 2010 contravened DEFRA's established practice as to how the sampling process should be carried out, giving rise to "evidence that [a..] diagnostic test has not

been carried out properly" and requiring DEFRA to engage its "standard policy" to re-test.

41. The relevant "policies" relied upon by Jacksons appear in two places, first in paragraph 8 of "Animal Health's" Operating Manual, and secondly in paragraph 104 of a DEFRA document entitled "Gamma Interferon diagnostic blood test for bovine tuberculosis. A Review of the GB Gamma Interferon testing policy for tuberculosis in cattle" (July 2009, updated September 2009). The extracts relied upon are set out in full in the Appendix to this judgment. I have summarised the salient features above.

42. In *R (on the application of High Burrow Organic Farming Partnership) v Secretary of State* [2008] EWHC 953 (Admin) Mitting J summarised the evidence from DEFRA in that case, as to the effect of paragraph 104, in the following terms:

> "…if there is reason to doubt that the test has been properly carried out then without, in such a case, re-testing, it [viz. DEFRA] will not consider the cattle to be infected with tuberculosis."

43. Mr Stilitz QC for Jacksons submits that, in the circumstances, the case falls within the principle considered by the Court of Appeal in *Nadarajah v Secretary of State* [2005] EWCA Civ 1363. In that case, Laws LJ (with whom Thomas LJ and Nelson J agreed) said,

> "68. …Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so. What is the principle behind this proposition? It is not far to seek. It is said to be grounded in fairness, and no doubt in general terms that is so. I would prefer to express it more broadly as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public. In my judgment this is a legal standard which, although not found in terms in the European Convention on Human Rights, takes its place alongside such rights as fair trial and no punishment without law. That being so there is every reason to articulate the limits of this requirement – to describe what may count as good reason to depart from it – as we have come to articulate the limits of other constitutional principles overtly found in terms in the European Convention. Accordingly a public body's promise or practice as to future conduct may only be denied, and thus the standard that I have expressed may only be departed from, in circumstances where to do so is in the public body's legal duty, or is otherwise, to use a now familiar vocabulary, a proportionate response (of which the court is the judge, or the last judge) having regard to a legitimate aim pursued by the public body in the public interest. The principle of good administration requires public authorities to be held to their promises would be undermined if the law did not insist

> that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances.
>
> 69. This approach makes no distinction between procedural and substantive expectations. Nor should it. The dichotomy between procedure and substance has nothing to say about the reach of the duty of good administration. Of course there will be cases where the public body justifiably concludes that its statutory duty (it will be statutory in nearly every case) requires it to override an expectation of substantive benefit which it has itself generated. So also there will be cases where a procedural benefit may be overridden. The difference between the two is not a matter of principle. Statutory duty may perhaps more often dictate the frustration of a substantive expectation. Otherwise the question in either case will be whether denial of the expectation is in the circumstances proportionate to a legitimate aim pursued. Proportionality will be judged, as it is generally to be judged, by the respective force of the competing interests in the case. Thus where the representation relied upon amounts to an unambiguous promise; where there is detrimental reliance; where a promise is made to an individual or specific group; these are instances where denial of the expectation is likely to be harder to justify as a proportionate measure… On the other hand where the government decision maker is concerned to raise wide ranging or "macro-political" issues of policy, the expectation's enforcement in the courts will encounter a steeper climb. All these considerations, whatever their direction, are pointers not rules. The balance between an individual's fair treatment in the particular circumstances, and the vindication of other ends having a proper claim on the public interest (which is the essential dilemma posed by legitimate expectation) is not precisely calculable, its measurement not exact…"

44. In his dissenting judgment in *Lumba (previously referred to as WL) & anor v Secretary of State* [2011] UKSC 12, Lord Phillips described this passage as "pellucidly" setting out the development of the law of "legitimate expectation". It did not appear that any other of their lordships or Lady Hale disagreed with that description.[4]

45. In her skeleton argument (written before the decision in *Lumba* was known), Miss Anderson submitted that the law had developed since the statements in *Nadarajah*. She submitted that a mere failure to follow policy was "not enough to show unlawfulness, causation is required and here it is plain that if the policy was applied the outcome would have been the same in all the circumstances". Reference was made to *R (SK) (Zimbabwe) v SSHD* [2008] EWCA Civ 1204 and *R (WL) (Congo) v SSHD* [2010] EWCA Civ 111 (the Court of Appeal case that went on to the Supreme Court (supra)) and *R (Amam) v SSHD* [2010] EWCA Civ 1140. She did not develop this

[4] The Supreme Court decision was handed down during the adjournment of the hearing of the present case before me.

submission in oral argument, no doubt because by then the "causation" test had been rejected by the Supreme Court in *WL/Lumba.*

46. It is unfortunate, for the sake of completeness of our understanding of the law, that the decision in the *SK* case in the Supreme Court is not yet available. My information is that it awaits further submissions from the parties following the decision in *Lumba*. I feel uneasy in speculating as to what will emerge in that decision from the straws in the wind provided by remarks in the judgments in *Lumba*: e.g. paragraphs 29-30 and 61 (Lord Dyson), paragraphs 186-187 (Lord Walker), paragraph 196 (Lady Hale), paragraph 248 (Lord Kerr) and paragraphs 346 and 352 (Lord Brown). Of course, in so far as they are not inconsistent with *Lumba*, I am bound by the Court of Appeal's decisions in *SK* and *Amam*, which, however, were not cited to me in oral argument.

47. Clearly, so far as the tort of false imprisonment is concerned, the majority of the Supreme Court in *Lumba* has rejected the "causation" test. On the other hand, *SK* decided that, in the face of a public law challenge to the lawfulness of detention, it was necessary to construe the statutory power in order to determine whether the breaches alleged and found rendered the particular detention unlawful. It was held that, on a proper construction of the statutory power, a failure to review the claimant's detention, as required by the Detention Centre Rules and the Home Office's Operations Enforcement Manual, did not have that effect in that case. However, Laws LJ said that other public remedies might be available, e.g. a declaration that the Secretary of State had unlawfully failed to comply with the Rules and the Manual: see paragraph 25 of the judgment, penultimate sentence.

48. A parallel in the present case might be that, if Boxster had been slaughtered, before proceedings were brought, pursuant to the wide statutory power contained in section 32 of the 1981 Act, that slaughter might not have been unlawful in such a manner as to render DEFRA liable in damages for wrongful interference with goods. However, that is not to say that, before that stage, Jacksons cannot say, as they do, that they are entitled to judicial review and an appropriate discretionary remedy for any public law wrong that may be established. I regard it as highly unlikely that, in giving his judgment in *SK*, Laws LJ intended to cast any doubt upon the general principles of the law of legitimate expectation which he had so carefully analysed in *Nadarajah* in order, as he put it himself, to "move the law's development a little further down the road…" (paragraph 67 of the judgment in that case).

49. Turning to *Amam's* case, it seems that the Court of Appeal had some difficulty in applying the "causation" test emerging from its own decision in *WL* on the one hand and the somewhat different approach adopted in *SK* on the other hand to the facts of this third case: see Maurice Kay LJ's comment at the beginning of paragraph 91. It seems to me that, in one formulation or another, the court in that case adopted a "causation" approach to a case of allegedly wrongful immigration detention - the rather narrow issue which ultimately came before the Supreme Court in *Lumba*: see per Black LJ, paragraph 52. I do not think that the decision undermines the more general statement of principle enunciated in *Nadarajah*.

50. With respect, therefore, I consider that what Laws LJ had to say in *Nadarajah* (although *obiter*) identifies, for the present, the principles underlying our law of "legitimate expectation", or perhaps I should say, "good administration" which has to be applied here.

51. I turn to the legal consequences of my factual decision.

52. Mr Stilitz submitted that the question of the potential mixing of Boxster's samples was an issue of disputed fact as to the procedural history of the case which fell to be resolved by the court. If, as has occurred, the issue was decided in his clients' favour then a relevant breach of their "legitimate expectation" would be established. He referred to a number of cases where the court had inquired into the underlying procedural facts leading to the decisions of public bodies: *R v Bank of England, ex p. Mellstrom* [1995] CLC 232, per Schiemann J (as he then was) at 238E-240B; *R v Glamorgan CC, ex p B* [1995] ELR 168, per Harrison J at p. 173G-H and *R v Chief Constable of W Midlands Police, ex p. Caroll* (1995) 7 Admin LR 45, per McCowan LJ at 50A-D and 53G-H.

53. Initially, I shared the concerns expressed by Miss Anderson, on behalf of DEFRA, about the application of those cases to a case such as the present. They were all cases in which there were allegations of breaches of the principles of natural justice in the procedures to be applied by disciplinary decision makers or (in one case) by a tribunal. Here we are working in a rather different context. This is a case in which DEFRA has decided to exercise a statutory power, contained in Section 32 of the Animal Health Act 1981, to cause an animal to be slaughtered. The question that arises is whether the potential breach of a standing instruction given to DEFRA's technicians as to the conduct of sampling procedures designed to inform the decision-maker as to whether or not the power should be exercised, renders unlawful the decision taken. That is not, to my mind, a question of quite the same type as those arising in the cases cited by Mr Stilitz. But, I see the analogy.

54. As I indicated to the parties before embarking upon the fact finding exercise, which I felt compelled to undertake in the context of the unusual procedural history of the case to date, I do not consider that my own finding of fact, set out above, is necessarily determinative of the question whether the decision-maker's actions either on 13 April 2010, or later when faced with the dispute that had arisen with Jacksons, can properly be impeached on judicial review. When the decision to issue the first notice was made on 13 April 2010 all that was known was that a sample attributable to the animal in question had tested positive in the laboratory for bTB. A decision was made to cause the animal to be slaughtered. At that moment, there could be no conceivable challenge to the lawfulness of the decision taken. Can the lawfulness of that decision be undermined by either (a) a subsequent doubt raised as to the observance of normal sampling procedures, or (b) by my own determination of what actually occurred?

55. Miss Anderson submits that, in the absence of a challenge to the factual investigation conducted by the decision maker when the dispute arose, it is too late for Jacksons to try to impugn the initial decision on the facts that was made at that time, even though the court has reached a different conclusion on the issue after the event.

56. In Miss Anderson's submission, DEFRA investigated Jacksons' allegations as soon as they were made on 2 June 2010. Miss Clare Taylor heard their complaints and, on the following day, asked the two technicians, H.K and S.T., for their accounts; she accepted what the technicians said in preference to what she had been told by Jacksons. Miss Anderson submits that it was open for Miss Clare Taylor to do this

and it is nothing to the point that the court takes a different view of what actually occurred on the farm on 7 April 2010.

57. As Mr Stilitz recognises, it is rarely appropriate for the Administrative Court to enter into questions of primary fact, but he submitted that where there is a procedural challenge and there is a stark dispute of fact as to the procedure actually adopted, there is no alternative but for the court to resolve the issue of fact in order to adjudicate upon the challenge. It is clear, moreover, that there is no inherent limitation on the part of the court against resolving factual disputes on judicial review: see *Judicial Review Handbook* 4th Edition (2004) 17.3.5 p. 340, and generally section 17.3 of that work.

58. On reviewing the law relating to challenges on the ground of "error of material fact" to be found in Wade & Forsyth on Administrative Law 10th Edition (2009) pp. 232-4, I was alerted again to the judgment of Carnwath LJ in *E v Secretary of State* [2004] EWCA Civ 49 where the conclusion was drawn that,

> "… the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result. Asylum law is undoubtedly such an area. Without seeking to lay down a precise code, the ordinary requirements for finding of unfairness are apparent from the above analysis of *CICB*. First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning."

59. *E* was a case, the report of which was included in the bundle of authorities before the court but which was not cited by Miss Anderson in oral argument. In her skeleton argument she had submitted that,

> "The Defendant submits that this decision is just like any other where factual evaluation has a bearing on the outcome of the decision under challenge. It is well-established that judicial review does not permit mere disagreement with the factual decision reached and account must be taken of the material as it stood before the decision maker. The limited circumstances where an error of fact can be considered as constituting an error of law were laid down by the Court of Appeal in *E* [2004] EWCA Civ 49. The Claimant does not and cannot say that those strict preconditions are met here."

60. One thing that is immediately noticeable from the passage cited from the judgment is that the Court of Appeal was *not* "seeking to lay down a precise code" for challenges on the ground of mistake of fact. Miss Anderson is, I think, wrong therefore to

contend that "strict pre-conditions" apply. It seems clear to me that the touchstone of the court's decision in *E* was that,

> "…the *CICB*[5] case points the way to a separate ground of review, based on the principle of fairness"

(see paragraph 63 of the judgment).

61. I ask myself, therefore, whether it is fair to each party to take into account and/or apply my own finding of fact, in the relatively unusual procedural circumstances of the case. The central issue in the case is not based upon a challenge to an error of material fact at all. It is a challenge of law based upon an allegation of breach of Jacksons' legitimate expectation, founded however upon the antecedent factual premise that, contrary to proper practice, Boxster's samples were mixed in the field. It seems to me that, if a decision can be challenged for error of material fact on the basis contemplated by the case of *E*, it would be strange if the court were compelled in the present circumstances to abide by an initial finding of fact made after what was inevitably a much less stringent inquiry process than has become possible in court.

62. I have heard the evidence and, on the parties' invitation, I have made my decision known to them before hearing further argument. I do not think that the justice of the case, or the requirements of fairness, would be met by proceeding on the false assumption that the samples had not been mixed or that there was some unresolved doubt about it. The case seems to me to be analogous to those considered in *E*'s case where some crucial document was not put before the decision maker at the time of his decision, but later emerges and indicates that the decision maker had proceeded on the basis of a fundamental mistake of fact, e.g. the *CICB* case itself (supra).

63. I conclude, therefore, that Mr Stilitz's submission is correct and that I should assess the legal challenge on the basis of the facts as I have found them to be.

64. The question then arises whether the mixing of Boxster's samples and the failure to conduct a re-test fell foul of the "requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public", (see again per Laws LJ in *Nadarajah* (supra) paragraph 68).

65. DEFRA submits that this is not so for three reasons.

i) First, it is submitted that the instruction to its technicians, appearing in paragraph 8 of the Manual, not to "decant from one tube to another in the field because of contamination problems" is merely exhortation of practice rather than a stipulation of policy than can give rise to any expectation on the part of the public. As to this, DEFRA's evidence is,

> " the requirement to avoid mixing blood is a relatively recent amendment to the Animal Health field guidance. A concern had arisen throughout the summer and autumn of 2009 as to the unusually high proportion of blood samples that were being sent to VLA for interferon-gamma testing which turned out

[5] *R v Criminal Injuries Compensation Board* [1999] 2 AC 330.

> following QA assessment to be of poor quality and unviable so not suitable for testing. The proportion had increased from the normal national average of 5-7% to 19% in December. An interferon-gamma blood test result cannot be reported by the laboratory for unviable blood samples that fail the QA. This requires a further visit to the farm to take a repeat sample, which is wasteful and frustrating to both AH and to farmers. Consequently, I understand that Animal Health and the Veterinary laboratories Agency addressed a range of issues in an attempt to improve best practice guidance as far as possible to minimise the level of re-sampling required. The TB programme was not consulted on the change because it was not considered by AH to be an amendment to policy, just one of a number of best-practice changes aimed at enhancing delivery of the testing programme and minimising costs.
>
> The reason why the pooling of samples from the same animal to make up the required minimum volume of blood is not best practice is that it could theoretically pose the risk of a range of issues that would more likely lead to unviable blood samples being sent for testing, which would fail the laboratory QA procedures. These include the blood samples clotting or cooling too much or mixing and the introduction of contaminants which would cause the samples to fail the control tests and/or overgrow the test cultures. ”
>
> (see paragraphs 35 and 36 of the witness statement of Mr JDE Montague (24 February 2011) filed on behalf of DEFRA).

ii) Secondly, while it is accepted that the statement of the relevant “standing policy” indicates simply that the policy is to “re-test only when there is evidence that any diagnostic test has not been carried out properly”, it is said in the written evidence of Mr Montague that this only applies when the test was carried out “in such a way that the result cannot be considered reliable so should be discarded as invalid”, (see loc. cit. paragraph 17).

iii) Thirdly, it is said that the “re-test” policy only applies to the testing process *in the laboratory* and not to the sampling *in the field*. Thus, it is only when some impropriety in the laboratory process is found that a re-test is carried out and not if the impropriety relates only to the sampling procedures. (Loc. cit. paragraphs 23 and 24)

66. I do not consider that any of these points negatives the application of the “good administration” principle enunciated by Laws LJ in *Nadarajah*. I asked whether there were any authorities dealing with the distinction sought to be drawn by DEFRA between a “policy” (which, according to DEFRA, potentially engages the legitimate expectation doctrine) and “practice/guidance” (which does not). None was produced. In my view, following the principles set out by Laws LJ, the question is simply whether a practice has been adopted or promise issued which ought to be honoured, unless there is good reason not to do so; the source of the promise or practice is not necessarily material.

67. For my part, on the present facts I think that the public might reasonably expect that, to apply principles of good administration, an instruction to staff requiring them not to mix samples, expressly stated as being for the avoidance of possible contamination, would be observed unless good reason to the contrary exists. I do not consider that such expectation should be negatived by the fact that the instruction is prefaced by the word "please", as in this case: see, in this context, paragraph 38 of the judgment in *Nadarajah*; the terms in which a policy is expressed are not conclusive in this area). Most would regard a precaution against contamination as significant even if requested in polite terms and even if not all possible types of contamination can be, nor are, identified in advance in the document. The fact that a claimant is unaware of the existence of the relevant policy or practice is not material: see *R (Rashid) v SSHD* [2005] EWCA Civ 744 at paragraphs 24-25 (per Pill LJ) and paragraph 47 (per Dyson LJ, as he then was).

68. As for DEFRA's second point, Mr Montague's "coda" to the statement of standing policy, as set out in paragraph 17 of his witness statement, may be what is, in practice, the *attitude* of officials within DEFRA towards re-testing, but that coda does not appear in the document itself. The public statement of standing policy is not qualified in the way that Mr Montague seeks to qualify it. It would, of course, be open to DEFRA to make new policy incorporating the qualification, but it has not done so.

69. Finally, on the third point, the document does not contain any definition of the term "diagnostic test" in paragraph 104 and it seems to me that any natural reading would be that any flaw in the testing process from sampling on the farm to laboratory work would lead to a re-test. That accords too with common sense. Most would think that, if it is shown that any part of this process had not been properly carried out in accordance with good practice, a re-test would follow out of an abundance of caution, particularly where the practice is said to have been adopted to guard against contamination. As a matter of ordinary understanding, it would be taken that such a flaw, whether detected before or after the conclusion of the laboratory testing process, might lead either to a false positive or a false negative result; either would be seen by the reasonable observer as undesirable, and a re-test would be the natural expectation.

70. So far in the argument, therefore, I consider that it is made out that DEFRA has fallen foul of the principle of good administration identified by Laws LJ. However, the argument moves on.

71. DEFRA takes two further points, however. First, it says there is no scientific evidence to show that mixing of samples can lead to a false positive result. Secondly, it is argued that once a positive result has been obtained, legal obligations under EU law and wider policy considerations require the relevant animal to be slaughtered.

72. Addressing the first point, the challenge to the procedures adopted in this case led to an assertion by DEFRA in the summary grounds of defence, dated 14 September 2010 that,

> "There is no scientific evidence that mixing could lead to a false positive result on the gamma interferon test. If the sample has passed the control tests outlined above the reported result is valid."

(See paragraph 36 of the Summary Grounds.) At this stage no scientific evidence was adduced by DEFRA in support of that proposition. It was also asserted that the true issue raised by mixing blood on the farm was that the sample might not be viable for testing at all when it reached the laboratory, not that false results would occur. It was said that,

> "This may occur because the blood could become contaminated (or may be exposed to low ambient temperatures over a period of time sufficiently to adversely affect viability). If contaminants enter, the sample can fail the control tests. No results would be reported where the control tests fail".

(Loc. cit. paragraph 35.)

73. These assertions led to Jacksons producing an expert report from Professor Paul Torgerson of the University of Zurich, designed to counter them. The report was annexed to a Supplementary Witness Statement of Mr Jackson dated "4.10.10".[6] In January 2011, when Jacksons sought a further interim injunction, statements were then produced by DEFRA for the first time from expert scientific witnesses (Mr Cecil McMurray and Mr Martin Vordermeier) to support DEFRA's contentions. Professor Torgerson responded by a statement of 24 January 2011; Mr Vordermeier responded to that by a statement dated 18 February and finally a third statement was produced by Professor Torgerson on 7 March.

74. This material throws up a dispute between distinguished scientists which it was utterly impossible to resolve in the course of this judicial review hearing. Mitting J reached a similar conclusion about the scientific evidence in the *High Burrow* case: paragraph 19. To address the scientific issue fully would have required a far more detailed consideration of the written material than time allowed and would have called for cross-examination of the expert witnesses, for which understandably neither party applied. Each party introduced into their submissions snippets of the scientific material as being designed to make out their respective points on this part of the case, but this could be no substitute to a full examination of the type that I have mentioned.

75. Jacksons desire has always been for Boxster to be re-tested and have offered to meet the cost of so doing. In granting the initial injunction in the proceedings in Jacksons' favour on 24 August 2010, Collins J advanced this as the "sensible course". That was obviously the sensible course then and it is surprising that it was not taken. However, DEFRA's position has always been that a re-test would be futile on scientific grounds. The reaction to the suggestion in the Summary Grounds of Defence was,

> "Any re-test could not eradicate the valid positive gamma interferon test and [DEFRA] would remain under a legal obligation to slaughter [Boxster]. Further, and crucially, a negative test would not show that [Boxster] does not have bTB so he would need to be dealt with on a precautionary basis in any event. Finally, whatever is said and done, it cannot change

[6] The statement must have been made later than this, however, since it accompanied the renewed application for permission to apply for review, following the refusal of such permission on the papers by HH Judge McKenna (sitting as a Deputy Judge of this court) dated 29 October 2010.

> the reality that if [Boxster] has bTB the longer this application goes on the worse the situation becomes for all involved and the wider community and wildlife that are put at risk of this tenacious disease in an area that has historically been relatively free from it."

76. This statement has been expanded and developed as time has passed in both evidence from DEFRA and in written and oral submissions, but the point remains essentially the same. It obviously begs the question whether the initial test was "valid" at all. The "legal obligation" referred to is, I think, the requirement imposed in Article 15 of the relevant EU Directive 78/52/EEC in the following terms:

> "Member states shall ensure that, following a bacteriological, pathological or tuberculin examination, animals in which the presence of tuberculosis has been officially established and those considered by the competent authorities to be infected are slaughtered under official supervision as soon as possible and not later than 30 days after the owner or the person in charge has been officially notified of the results of the tests and of his obligation, under the eradication plan, to slaughter the cattle concerned within that time limit."

This also begs the question of when "the presence of tuberculosis has been *officially established*" (emphasis added). How, one might ask, can one be sure that the test is "valid" and that is the disease established if the relevant test procedures might be flawed?

77. It is common ground between the parties that *no* test for bTB is guaranteed to be accurate to the level of 100%, whether apparently positive or apparently negative. It is further common ground that the effectiveness of the two standard tests (skin and gamma interferon) declines over the time of any potential infection, although the relevant timescale is not identified in the evidence or in the exhibited literature dealing with the subject. The same evidence and literature suggests that as the effectiveness of those tests decline another type of test, an antibody test, becomes more responsive. However, DEFRA is of the view, communicated to me by Miss Anderson on instructions in the absence of evidence on the point, that this test is inherently less likely to be accurate than a test of the other types carried out at an earlier stage of possible infection.

78. Jacksons' position in the light of all this is that there has been no valid gamma interferon test of Boxster at all: see again paragraph 15 of the judgment in the *High Burrow* case. Thus, they submit, the presence of bTB has not been officially established in Boxster within the meaning of the EU Directive and, therefore, there should be a re-test in any event. It does not follow, Mr Stilitz argues, that a re-test would be pointless. It would have limited reliability, as is always the case with a blood test, but it would still represent the "sensible way forward where the previous blood test should be disregarded due to the lack of integrity in the procedures used". Mr Stilitz urges me to direct DEFRA to take up Professor Torgerson's solution of directing the taking a further skin or blood test; and, if that proves negative, he submits, an antibody test should be tried.

79. Miss Anderson submits that DEFRA, as decision maker, is entitled to adhere to its own scientific advice, even after this passage of time. She also submits, making DEFRA's second additional point summarised in paragraph 71 above, that DEFRA is entitled to abide by its "precautionary approach" to this problem and to direct slaughter in all cases where a proper suspicion of infection is present. This is particularly appropriate, she argues, when one has regard to the extent of the disease in this country, the nature of the disease and the desirability of stamping out new outbreaks at an early stage. In this respect she invokes the endorsement of that "precautionary" approach in the *High Burrow* case and in *R (Surayanda) v Welsh Ministers* [2007] EWCA Civ 893, often known as the "*Shambo"* case after the name of the animal in issue, a "temple bullock" particularly revered by a religious community. Miss Anderson also invokes similar considerations in contending that relief should in any event be refused in this case on discretionary grounds.

80. The background to DEFRA's concerns are fully set out in the judgment of Pill LJ in the *Shambo* case (paragraphs 2-14) which I have had fully in mind. One must be careful, however, to recall what the issues in the two cases were. In *High Burrow* the court was faced with a challenge to the application of the policy at all in the face of a testing which revealed statistically surprising results. In the *Shambo* case the court was concerned with the "clash between the duties of [the Ministers] as an agriculture and health authority and the rights of the members of the Community to practise and manifest their religious beliefs and practices" (Pill LJ, paragraph 15) in accordance with Article 9 of the European Convention. No issue arose in either case as to the validity of the testing procedures adopted in implementing the policy or the consequences of any breaches of such procedures.

81. On this basis, I have considered whether issues of "macro policy" relating to the control of the disease should render too steep the climb to the enforcement of Jacksons' legitimate expectation in this case (paraphrasing Laws LJ in *Nadarajah,* paragraph 69). However, I think that Mr Stilitz is correct in his submission that the "precautionary policy" does not apply in the present case. The policy is to slaughter animals testing positive on either a skin test or a blood test. It does not address the question of what is to happen if the procedures for carrying out the test have not been followed and/or the testing processes are flawed. Mr Stilitz submits, I think rightly, that the "precautionary policy" to slaughter infected animals assumes the integrity of the process by which it has been determined that the animal is indeed infected. I agree with him also that the limited sensitivity of the tests implies that there must be several infected animals in this country and elsewhere whose conditions have not been detected; the consequences envisaged by DEFRA in relation to this one animal, in the unusual circumstances of this case, have not been shown to be as disastrous as the tendency to hyperbole in DEFRA's written materials might suggest.

82. In addition, while I recognise that issues of "macro policy" may come into play even after the making of a decision, that is ultimately found to be flawed, in this case the decisions were taken on a very brief investigation of the facts and the points being taken by DEFRA were (a) that the instructions to technicians were not policy at all and could be disregarded and (b) that, in any event, the breach was immaterial to the validity of the test. No point of "macro policy" was invoked in defence of the decision.

83. I conclude that this application for judicial review should be granted for the reasons set out above. In the circumstances, it is not necessary to address the further argument advanced by Mr Stilitz based upon Article 1 of the First Protocol to the European Convention on Human Rights.

(D) Relief

84. I would propose, therefore, to quash the decisions to issue the statutory notices and the notices themselves (dated 13 April and 29 July 2010). Subject to further argument, I would also consider making an appropriate declaration (in a form to be settled) that the presence of bTB has not been "officially established" in this animal within the meaning of Article 15 of the Directive.

85. I do not consider it to be appropriate to make a mandatory order for re-testing. The question of what are the appropriate steps now is, in my view, a matter for DEFRA, in the light of all that has happened, including the diverging opinions on the science that have come before this court and which it has not been possible to resolve. Obviously, in the light of all that has been discussed in this case, re-testing, by any or all of the means discussed, should be seriously considered as one of the options open and should not be rejected out of hand, as it has been to date, simply because DEFRA's witnesses in this case have argued for the rejection that option. It seems to me that it would be desirable for these reasons that any further decision is made by officials not previously involved with the present case.

Appendix

Animal Health's Operating Manual: Blood Sampling Procedures

"8.1 Blood sampling must be carried out by veterinary or technical staff of Animal Health.

8.2 One full 6-ml green-top (heparin) Vacutainer tube is required from each animal to be tested. Immediately after collection, gently invert the tube eight times to ensure sufficient mixing of blood and heparin.

8.3 VLA have reported that a number of samples have been rejected because insufficient blood was taken or the tubes were incorrectly labelled, or unidentifiable. Please ensure that a full Vacutainer is submitted, and that the tubes are correctly and clearly labelled and are in sequence.

8.4 Sufficient herapin Vacutainers, including spares, should either be labelled before the farm visit or immediately after the blood is taken. The duplicate barcode labels will be attached to the a-IFN testing form. Please do not decant from one tube to another in the field because of contamination problems.

8.5 VLA have reported difficulties in finding animal details on their IT systems due to incomplete animal identification being provided which causes a delay in processing samples/results. Field staff must ensure the full official animal identification is recorded on the TR144 sample submission forms and forms are completed legibly and accurately. Cattle identification requirements vary depending on age. For additional information please refer to the ID Regulations Section".

Gamma interferon diagnostic blood test for bovine tuberculosis. A review of the GB Gamma Interferon testing policy for tuberculosis in cattle. (June 2009, updated September 2009)

"By enhancing the sensitivity of the cattle testing programme, the gIFN test policy is intended to minimise the risk of disease spread by identifying and removing as many infected cattle as quickly as possible. Some stakeholders have indicated that they want government to show greater flexibility and, for example, agree to re-test gamma test positive/skin test negative animals if there is a mis-match between the two groups (i.e. if, in the same herd, the number of gamma test positive cattle is markedly higher than the number of skin test positive animals). After careful consideration, this review has concluded that it would not be appropriate to make such a change. The reasons for this are: …

- standing policy is to re-test animals only when there is evidence that any diagnostic test has not been carried out properly."

Yard layout and cattle locations

/ = Gates (1) = Cattle tied up 1 Nectarine, 2 Boxster, 3 Katie, 4, other Pedigree 5, other Pedigree 6, Vi (big cow) 7, Vinnie

All dividing walls are not permanent and can be moved to accommodate the size of the group.