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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY DAMIEN McCOOEY FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS OF THE DEPARTMENT FOR AGRICULTURE, THE ENVIRONMENT AND RURAL AFFAIRS

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Séamas MacGiollaCheara (instructed by McNamee McDonnell, Solicitors) for the Applicant
Laura Curran (instructed by the Departmental Solicitor's Office) for the proposed Respondent

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SCOFFIELD J ***(corrected transcript of ruling given orally)***

Introduction

[1] This is an application for leave to apply for judicial review on the part of Damien McCooey, a farmer and the keeper of a herd of cattle, from Keady in County Armagh. The background to the application involves a series of tests carried out on the applicant's herd in order to test for bovine tuberculosis (bTB).

[2] Mr MacGiollaCheara appeared for the applicant; and Ms Curran appeared for the proposed respondent. I am grateful to both counsel for their helpful submissions.

Brief factual background

[3] Intradermal (or 'skin') tests were carried out in December 2022 and 116 out of 453 animals in the applicant's herd tested positive. However, the respondent, the Department for Agriculture, the Environment and Rural Affairs (DAERA) ("the Department") followed this up with a gamma interferon (or 'blood') test in early January 2023. It did so because of atypical results in the initial test results which had

given rise to concerns about the accuracy or reliability of those results, particularly in light of a history of some previous atypical results in the testing of the applicant's herd. Of the 116 animals previously having tested positive, only 52 tested positive again. Those animals were slaughtered, and the applicant was provided with compensation; but this left some 64 animals who were classified as 'TB status unknown' and subject to restrictions until further testing.

[4] The applicant originally brought these proceedings at the start of April 2023 to complain about the situation in which he found himself in. At that point he raised a number of complaints, including (i) that it was not open to the Department to use the blood tests which they had used (although that issue is no longer pursued); and (ii) that he had been given no reasons for the second round of testing (although that later changed, when further information was disclosed in the course of these proceedings). In fact, in light of further expected testing, which in due course occurred, the proceedings were adjourned – by consent of both parties – for several months, in order to see if matters between them could be resolved. That involved further testing in both April and July 2023.

[5] To a large extent that has resulted in the situation which the applicant was complaining about – namely that he was left to feed and house 'status unknown' animals which had previously tested positive – being resolved: that is because *all* of the 116 animals which originally tested positive in the December 2022 blood tests have now died. Most of these were slaughtered under the TB scheme, with the applicant receiving compensation for the animals; although a small number have simply died. In any event, there is now no longer any *live* dispute between the parties as to what should happen to the original cohort of animals whose treatment gave rise to these proceedings.

The applicant's case

[6] That begs the question as to what utility these proceedings can now have: they relate to a period in the first half of last year when the applicant had a number of animals 'in limbo', which has now come to an end. Mr MacGiollaCheara accepts that the primary relief now available would be declaratory in nature, although damages might be available if the applicant were to succeed on a Convention ground. In summary, the applicant seeks confirmation that, in late 2022 and early 2023, it was not open to the Department to act as it did by supplanting the results of the first round of testing with those from the second round of testing.

[7] In the applicant's submission, the Department's decision-making at this time was legally flawed; and it ought to have culled any animal which tested positive in either of the testing rounds. There were three grounds advanced by the applicant in his skeleton argument and pressed in Mr MacGiollaCheara's oral submissions: (1) legitimate expectation; (2) procedural fairness; (3) breach of article 8 ECHR. I propose to deal with each of these in turn, briefly.

Legitimate expectation

[8] As to the applicant's argument on legitimate expectation, this is said to be grounded on the terms of the Department's bTB Eradication Strategy and, in particular, what is described as the Department's "publicly stated promise to eradicate bTB." From this, the applicant draws an inference that the Department has committed to do everything it can to eradicate bTB which, in the circumstances of this case, is to be taken as a commitment to "err on the side of caution" and "remove any animals that *may* have bTB."

[9] I am afraid that I cannot accept that this argument – which was advanced as the principal ground of challenge – has a realistic prospect of success. Case-law has repeatedly established that, in order to found a substantive legitimate expectation, there must be a representation (whether by promise or, more rarely, by practice) which is "clear, unambiguous and devoid of relevant qualification." I accept Ms Curran's submission that the content of the bTB Eradication Strategy ("the bTB Strategy") falls well short of what is required in that regard. It sets out a high-level *aspiration* to eradicate bTB but contains nothing of the clarity or specificity required to commit Departmental officials to a specific operational approach on the facts of this case.

[10] Indeed, the bTB Strategy itself envisages that a second round of blood testing may be used where skin tests give rise to atypical results or where there is a suspicion of fraudulent activity. There is nothing in the document to suggest that, where this situation arises, the Department commits to culling animals which tested positive in the test results which are considered questionable. This is fatal to the applicant's first intended ground of challenge. For a legitimate expectation claim to get off the ground, the applicant would require a much more specific and unqualified representation, to the like of which he simply cannot point in this case. Whether or not the applicant's preferred approach may be more effective as a means of eradicating the disease or is a better approach as a matter of policy, is not a matter for this court. I do not consider his legitimate expectation ground to be arguable in the sense required for the grant of leave.

Procedural fairness

[11] Turning then to the issue of procedural fairness, I was more sympathetic to this aspect of the applicant's case. On analysis, however, I have also concluded that this ground also does not enjoy a realistic prospect of success. I accept Ms Curran's submission that there is no arguable ground arising from a purported failure to identify the decision-maker. The applicant was aware, or could have made himself aware, of who was testing the animals. The restrictions which were placed on his herd were the result of Departmental decision-making. I doubt very much that there would have been any issue with the applicant being told which officials were responsible for those decisions but, even if there was, it was not essential for those officials to be identified for the decisions to be lawful.

[12] The more attractive points were that the applicant should have been given reasons for how the Department was proceeding in early 2023 and/or given an opportunity to make representations. I assume that it is at least arguable that there was an obligation to take these steps on the basis of the impact which the Department's decision-making had on the applicant's business and upon his herd management obligations. However, the applicant *did* have the opportunity to make representations at all stages of the process; and did in fact do so, in due course, through his solicitor.

[13] In this context, there is nothing unfair about a decision to re-test where questionable results are found without first warning the farmer who may be under suspicion for having been responsible for any irregularity. In the present case, atypical findings had been made in pathology reports relating to the applicant's herd in December 2019 and September 2021. I therefore view with considerable scepticism any suggestion that he was completely unsighted as to the reasons for the Department's concern and caution. There is also in my view no unfairness in imposing restrictions on animals which might be positive for TB and then allowing representations *after that* as to why the restrictions (which can be lifted, if appropriate) are inappropriate or unnecessary. The key issue on this part of the case, however, is that the applicant, in the course of these proceedings, has received detailed information about precisely how and why the Department had concerns about the first set of test results and he has not been able (nor indeed does he appear to have seriously attempted) to provide an innocent or convincing explanation as to how these came about.

[14] The applicant's approach has simply been to rely upon the presumption of innocence and the fact that no criminal proceedings have been brought against him. The presumption of innocence is, of course, an important presumption as a matter of criminal law. However, it does not preclude the Department from declining to exercise its statutory power to slaughter animals where the Department is concerned about the reliability of TB test results. As Ms Curran submitted, there may be a variety of reasons why the Department has concluded (if indeed it has reached any such conclusion) that criminal proceedings should not be commenced or should not yet be commenced. That is a separate question from whether the Department is required to slaughter any particular animals.

[15] Turning back then to the question of procedural fairness, reasons have now been spelt out for the Department's actions and the applicant has failed to identify any representations which he could or would have made which would have changed the Department's approach, even assuming he was required to be provided with an additional opportunity in this regard at an earlier stage of the process. For that reason, I do not accept that the applicant has raised an arguable case on this ground with a realistic prospect of success.

Article 8 ECHR

[16] As to the Convention ground, the proposed respondent submits that article 8 ECHR is not even engaged in this case, given that the Department was exercising statutory powers for the prevention of disease in animals, and this had no direct effect upon the applicant or his family. Any effect upon them was indirect and not directed to any interference with their home or private life – but, rather, the applicant's business interests – and/or any such interference did not meet the minimum level of severity required to engage article 8. I accept that argument.

[17] Mr MacGiollaCheara presented the article 8 challenge on two bases: (i) the health risk to the applicant's family of leaving TB-infected animals on the farm; and (ii) the stress which the Department's actions put the applicant under. I am satisfied that the evidence on the first of these bases is insufficient to establish that article 8 is engaged. All that the applicant relies upon is the expression of concern from a vet who conducted a post-mortem examination n an animal which was positive for TB, in circumstances where he (the vet) felt that this should have been brought to his attention in advance of the post-mortem. The applicant accepts that he has no evidence whatsoever in relation to the risk, if any, posed by airborne infection in relation to him or his family by the retention on farm of animals which might have been or were TB reactors.

[18] I also consider that the evidence presented in relation to the purported impact on the applicant's health is insufficient to engage article 8. This amounts to little more than the (unsurprising) averment that the situation in which he found himself gave rise to additional stress and worry. As the proposed respondent submits, that is a natural consequence of a situation where any herd-keeper experiences a TB outbreak or breakdown in their herd, and it is subject to restrictions. This was a situation which the applicant had been facing for some time. The *additional* stress generated by the Department's actions in restricting, rather than slaughtering, the cohort of suspect animals is extremely hard to quantify.

[19] However, even assuming that article 8 was engaged in either of the two respects relied upon by the applicant (ie that the Department's actions represented an interference with the applicant's private or family life), it is plain that the Department's actions in this case were undertaken for legitimate aims in the public interest: first, the eradication or control of disease amongst livestock; but also, secondly, the avoidance of healthy animals being slaughtered, the prevention of fraud, and protection of the public purse.

[20] The financial cost of compensation is such that it is not possible to simply cull every animal to any degree suspected of possibly having TB; to say nothing of the objection in principle to a system which would allow the compensation scheme to be gamed or manipulated by unscrupulous herd-keepers. In circumstances where no test is 100% accurate and the Department is faced with atypical results or suspected anomalies, finely balanced judgments will have to be made – on the basis of

Departmental officials' expert judgment and experience – in respect of which the court will inevitably afford the Department a discretionary area of judgment. I do not consider that there is an arguable case with a realistic prospect of success that, even if article 8 is engaged, the Department's response will be found to have been in violation of Convention rights.

[21] In any event, even if this claim was arguable, the applicant could (and might yet still be able to) mount a civil claim for damages under the Human Rights Act 1998.

Additional matters

[22] Although not advanced in the skeleton argument, or orally, the applicant's pleaded case raises a contention that a number of material considerations were left out of account and/or that the Department's actions were irrational. Having considered the material placed before the court by the proposed respondent in its three detailed letters of response and in its submissions, I am satisfied that there is no arguable case that the considerations relied upon by the applicant (some of which are in themselves contentious) were unlawfully left out of account; or that the Department acted irrationally.

[23] As I have said, no test in this area is 100% accurate, so it was appropriate for the respondent to concede that its approach did give rise to *some* risk that infected animals were left on the farm. However, the Department was placed in a difficult situation where it had compelling evidence of irregularities of some sort. Although other approaches might rationally have been open to it – some of which might in fact have been more detrimental to the applicant, as well as options which were more favourable towards him – the way in which the Department chose to proceed was not outside the range of responses reasonably or lawfully open to it.

[24] In particular, I reject the applicant's submission that the results of the December 2022 skin test were wholly disregarded. Some animals were slaughtered in consequence of those results; and others were placed under restrictions. The failure to slaughter all of the animals which tested positive in December 2022, in light of the information the Department had before it, was not irrational and did not amount to an unlawful leaving out of account of the skin test results. Those results had to be balanced against the other information which the Department had, or which it wished to secure, before determining how to proceed in the public interest.

Conclusion

[25] For those reasons, I dismiss the application for leave to apply for judicial review. Save for a claim for damages, which could be pursued by civil proceedings, I consider the claim to now be academic. The practical issue between the parties has moved on with time and changes in the circumstances. In any event, I do not consider that the applicant has raised an arguable case on the grounds advanced.

[26] I will hear the parties on the issue of costs but provisionally consider that the usual course should follow where an application for leave is dismissed, namely that there should be no order for costs (the proposed respondent having attended voluntarily at the invitation of the court).