

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

AN APPLICATION BY PHILEM KING
FOR JUDICIAL REVIEW

WEATHERUP J

The Common Organisation of the Beef Market.

[1] This is an application for judicial review of a decision of the Department of Agriculture and Rural Development ("the respondent") dated 27 June 2006 rejecting the applicant's appeal against a reduction of the Suckler Cow Premium payable to the applicant. Mr Coyle appeared for the applicant and Mr McLaughlin for the respondent.

[2] The applicant farms in Castlewellan, County Down. The applicant claimed from the respondent a subsidy under the Suckler Cow Premium Scheme for the maintenance of a herd of cattle for beef production. In 2003 one condition of the subsidy was that the number of heifers included in the claim must not be less than 5% nor more than 40% of the total number of cattle. The applicant's quota for subsidy for 2003 was 209 cattle. The applicant claimed the subsidy for 209 cattle, being 198 cows and 11 heifers, the latter being above the minimum 5% of the total. The gross value of the subsidy was some £42,000.

[3] It was a further condition of the scheme that the applicant retained all the cattle that were the subject of the claim for a 6 month retention period from 5 December 2003, being the date of the claim, to 5 June 2004. However if any of the 209 cattle ceased to be eligible during the retention period those cattle might be replaced by alternative eligible cattle, provided the applicant gave notice to the respondent. Thus if any of the cattle that were the subject of

the claim for subsidy were sold or died during the retention period the applicant could replace such cattle on notice to the respondent and the subsidy would be unaffected. Similarly, if a heifer calved during the retention period, that could affect a producer's compliance with the 5% heifer minimum throughout the retention period and if due notice was not given to the respondent of a replacement for the calved heifer the producer may suffer a reduction in subsidy.

[4] During the retention period three of the applicant's heifers included in the claim of 5 December 2003 produced calves and thereby ceased to be eligible under the scheme. The applicant failed to give the requisite notice to the respondent of the replacement of the calved heifers. One other heifer had been taken out of the herd. Accordingly the applicant's percentage of heifers included in the claim fell to 7 and was therefore below the minimum 5%. As a result, in September 2004, the applicant's subsidy was reduced to 7 heifers and 142 cows, which amounted to a reduction of approximately £13,000. It transpired that 198 other producers had their subsidy reduced in similar circumstances.

[5] An appeals procedure is prescribed by the Farm Subsidies (Review of Decisions) Regulations (Northern Ireland) 2001 (No 391). The 2001 Regulations provide as a first stage for a review by the respondent and as a second stage for a further review by the respondent's appeals branch. The applicant's first and second stage appeals were rejected. The third stage appeal involves review by an independent panel which reports their findings and recommendations to the respondent. The panel recommended that the applicant should not suffer a reduction in subsidy but the respondent refused to accept that recommendation and rejected the applicant's appeal on 27 June 2006.

The Grounds for Judicial review

[6] The applicant's grounds for judicial review may be summarised as follows -

(1) The decision of 27 June 2006, in failing to adopt the recommendations of the panel which was independent of the department, failed to take into account all relevant information and apply the regulations properly.

(2) Failure to give a full and reasoned analysis of the department's decision.

- (3) Failure to take into account that notification post-dated the applicant's claim and lacked clarity and the return forms did not reflect the need to notify the department.
- (4) The decision to refuse the appeal and the failure to award the applicant an ex gratia payment were irrational.
- (5) Imposition of a disproportionate penalty contrary to Article 1 of the First Protocol of the European Convention.

The EC Regulations

[7] The Suckler Cow Premium Scheme is based on European Regulations. Council Regulation (EC) 1254/1999 on the common organisation of the market in beef and veal (as amended by Council Regulation (EC) 1512/2001) provides in Article 6 -

“(1) A producer keeping suckler cows on his holding may qualify, on application, for a premium for maintaining suckler cows (suckler cow premium). It shall be granted in the form of an annual premium per calendar year and per producer within limits of individual ceilings.

(2) The suckler cow premium shall be granted to any producer -

(a) not supplying milk or milk products from his farm for 12 months from the day on which the application is lodged

provided that he keeps, for at least six consecutive months from the day on which the application is lodged a number of suckler cows at least equal to 60% and of heifers at most equal to 40% of the number for which the premium is requested.

In the United Kingdom the obligation to keep a minimum number of heifers is not applicable in 2002 and is limited to 5% in 2003.

A producer applying for less than 14 suckler cow premium shall be exempt from the application of the

condition regarding the maximum number of heifers.”

[8] Commission Regulation (EC) 2419/2001, laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes, provides at Article 37 for “replacement” of cattle –

“(1) Bovine animals present on the holding shall only be regarded as determined if they are identified in the aid application. However, suckler cows or heifers in respect of which aid is claimed in accordance with Article 6(2) or 10(1) of EC 1254/1999 and dairy cows in respect of which aid is claimed in accordance with Article 13(4) of that Regulation may be replaced during the retention period within the limits provided for in those Articles without the loss of the right to payment of the aid applied for.

(2) Replacements pursuant to paragraph 1 shall occur within 20 days following the event necessitating the replacement and shall be entered in the register not less than three days after the date of replacement. The competent authority to which the aid application was submitted shall be informed within ten working days after the replacement.”

[9] The EC Regulations provide for the imposition of reductions and exclusions in the event of non compliance with the requirements of the scheme.

[10] The relevant domestic regulations are the Suckler Cow Premium Regulations (Northern Ireland) 2001 (No 362). The Regulations lay down implementing measures for the Suckler Cow Premium Scheme.

The Documentation relating to the Scheme.

[11] The applicant relied on the respondent’s documentation to explain the operation of the scheme. The relevant documentation comprised the Claim Form, Notes for Guidance, the replacement notification form and various letters. The applicant contends that the respondent’s documentation did not explain the necessity for replacement heifers to be notified to the department in the event that a claimed heifer calved during the retention period.

[12] The Claim Form, under the heading “Important Information”, set out certain bullet points, which included the exhortation to read the Notes for

Guidance and the statement, "Please note that any heifers which you are claiming for must not exceed 40% of your claim. Please note that there is a new 5% minimum heifer requirement for claims of 14 or more animals."

[13] The respondent issued Notes for Guidance on the Suckler Cow Premium Scheme 2003. Under the heading "Main Changes to 2003" the guidance stated –

"Heifer Percentage.

For the 2003 scheme year, the number of heifers included in your claim, and retained throughout the retention period, must include a minimum of 5% and not exceed 40% of the total number claimed (see section 9.2, on page 10 of these notes). You are exempt from the minimum heifer requirements if you are claiming premium for less than 14 cattle."

Under the heading "Points to Remember" the guidance stated –

"Replacements.

All replacement animals must be notified to Orchard House, Grants and Subsidies (Payments) Branch in writing, within 10 working days of the date of replacement. If you fail to comply with this rule, the replacement animals will be deducted from your claim (see Section 15 paragraphs 15.1 to 15.11 on page 12 and 13 of these notes)."

[14] Section 15 of the guidance had the title "Loss of claimed animals" and commenced - "You are reminded of the changes to the rules on notification of cattle losses and replacements. (See more detailed rules at Section 16 page 14 of these notes)". Section 16 had the title "Replacement cattle" and commenced – "You may replace cattle claimed for in the current scheme with other eligible cattle, provided that the number of heifers making up your claim still satisfies the 5% minimum (if appropriate) and does not exceed 40% of the total cattle claimed." Section 17 provided for "Penalties" and commenced with the statement that the respondent was required to implement the EC Regulations and that failure to comply with the rules of the scheme would result in the loss of some, or all, of the premium.

[15] In addition the respondent sent to producers a letter described as a "Dear Producer Letter" explaining the scheme. The first "Dear Producer Letter" (DPL1) was used up to the beginning of July 2003 and stated that if during the retention period the producer was replacing a claimed animal this

replacement had to be notified in writing within 10 days of the date of replacement. A notification pro forma was included with DPL1. The pro forma referred to cattle that had been sold or died. It did not refer expressly to the replacement of heifers that had calved.

[16] A second "Dear Producer Letter" (DPL2) was issued from the beginning of July 2003. DPL2 included the following bullet point -

"Also in respect of notifying replacement animals, you are advised to consider the new 5% minimum heifer requirement (see Section 9.2 of the SCPS 2003 Notes for Guidance). When claiming on 14 animals or more particular attention should be paid to maintaining the 5% heifer ratio throughout the retention period, e.g. if a heifer calves during the retention and the ratio drops below 5% then a heifer replacement must be notified in order to satisfy this particular requirement."

The last sentence above was the first occasion that the respondent's documentation expressly stated the operation of the 5% minimum heifer requirement in relation to the replacement of calved heifers.

[17] Some producers failed to give notice to the respondent of the replacement of heifers that had calved and became subject to reduction in subsidy. As a result of representations made on behalf of such producers the respondent reviewed the payment of the subsidy for 2003. In total 198 producers were affected by failures to comply with the Regulations in respect of replacement cattle. The respondent took the view that there was a possible lack of clarity in relation to the replacement of calved heifers contained in DPL1 issued to producers up to 18 July 2003 and that ex gratia payments should be made to such producers, being a final total of 71 producers. However the respondent formed the view that there was no such lack of clarity in DPL2 issued to producers from 18 July 2003 and that no ex gratia payments should be made to such producers. The respondent regarded the applicant as being a producer who had received DPL2 after 18 July 2003. Accordingly the applicant had not complied with the Regulations and did not qualify for ex gratia payment.

[18] The applicant states that he was not aware of the change made to the Suckler Cow Premium Scheme in respect of the replacement heifers that had calved until after he was notified by the respondent that he was in default in September 2004. He contends that neither the claim form nor the Notes for Guidance, nor the replacement pro forma mention any new requirement for replacement of heifers that have calved. The applicant was unable to say which, if any, "Dear Producer Letter" he had received.

The Documentation received by the Applicant

[19] The applicant's stage three appeal before the independent panel was concluded after the respondent had agreed to make ex gratia payments to the producers who had received DPL1. The panel conclusion was that –

“The panel considers that by making ex gratia payments the Department acknowledged the inadequacies in the Dear Producer letter and supporting documentation issued to producers. The panel looked at the second Dear Producer letter to see if the Department addressed these inadequacies and considered that it did not do so satisfactorily. The panel noted that while the Department notified the need to replace heifers that calved during retention it did not adequately highlight this in the second Dear Producer letter. The panel noted also that the Department once again issued with the second Dear Producer letter the original Notes for Guidance and the replacement cattle notification pro forma which it considers to be inadequate since it continued not to have a column for notifying calved heifers. The panel recommends that the 3 heifers that calved during retention be accepted for payment which will result in the claim complying with the 5% heifer rule. “

[20] The respondent did not accept the recommendation of the independent panel and decided to reject the applicant's appeal against the reduction in the subsidy. It stated its reasons as follows –

“In arriving at this decision, the Department has taken into account the EC Regulations which are specific with regard to the requirements relating to the minimum heifer percentage and to notification of replacement animals. The Department cannot disregard those legislative requirements and it is clear that you did not meet them.

The Department does not accept the panel's contention that the advice provided failed to adequately convey the scheme requirements regarding the 5% heifer rule. The Notes for Guidance issued to producers clearly advised the requirements relating to the 5% minimum heifer rule and the Dear Producer letter advised specifically that “ . . . if a

heifer calves during retention and the ratio drops below 5% then a heifer replacement must be notified in order to satisfy this particular requirement.”

[21] The respondent examined its computerised message system to establish contacts between the applicant and the respondent. The applicant made contact on 19 August 2003 and 26 August 2003 requesting a 2003 claim form. The applicant’s claim form was printed on 27 August 2003. A reminder letter was sent to the applicant on 2 December 2003. The claim form was submitted on 6 December 2003. The respondent has been unable to identify a precise date when the change over from use of DPL1 to DPL2 occurred but states that in the interests of caution the date of 18 July 2003 was used when determining which producers should receive the ex gratia payment. However as the applicant did not request or obtain a claim form until late August 2003 the respondent is of the view that the strong likelihood is that the applicant received the second “Dear Producer Letter”.

[22] Four relevant letters were issued to producers in 2003. They were DPL1 issued up to July 2003, DPL2 issued from July 2003, a reminder letter in October 2003 and a further reminder letter in December 2003. On the initial hearing date of the application for judicial review the respondent produced a letter purporting to be DPL1 (which it later transpired was the reminder letter of October 2003) and further produced a letter that purported to be the reminder letter of December 2003 (which it later transpired was a copy of a reminder letter used in 2004). The applicant relies on the mistakes made by the respondent in identifying the letters that were issued to producers to challenge the respondent’s assertion of a strong likelihood that the applicant received DPL2.

[23] I am satisfied from the available records that the claim form completed by the applicant was that issued by the respondent to the applicant in late August 2003. Further I am satisfied that by that stage the respondent was circulating DPL2 to producers who applied for claim forms. In view of all the inquiries outlined on behalf of the respondent I am satisfied on the balance of probabilities that the applicant received the second “Dear Producer Letter” with his claim form in August 2003.

The Review of Decisions Regulations

[24] The applicant’s grounds for judicial review will be considered in the light of the finding that the applicant received DPL2 before submitting his claim. The applicant contends that the respondent failed to comply with the Farm Subsidies (Review of Decisions) Regulations (NI) 2001 in two respects, first of all in not following the decision of the panel and secondly in not

providing adequate reasons for its decision. Regulation 12 of the 2001 Regulations deals with third stage appeals as follows -

“(1) Where an application is made under regulation 11, the Department shall appoint such persons as it considers appropriate to review the decision and provide those persons with a copy of -

- (a) the application;
- (b) the decisions under regulations 7 and 10; and
- (c) any document or note of evidence produced or taken in relation to the earlier reviews by the Department.

(2) The persons appointed under this regulation shall review the decision and may -

- (a) consider any document or other evidence produced by the applicant or the Department (whether or not that document or evidence was available at the time of taking the decision under regulation 7 or 10);
- (b) invite the applicant and the Department to provide such further information relevant to the review as the persons appointed consider appropriate; and
- (c) give the applicant and the Department an opportunity to give evidence and to make representations in person or through a representative.

(3) Following their review of the matter the persons appointed shall report to the Department -

- (a) their findings in fact on the matter; and
- (b) their recommendations as to the determination of the application having regard to the law applicable to the facts.

(4) Having considered the matters reported to it under paragraph (3) the Department may -

- (a) confirm its decision;
- (b) amend or alter its decision in any respect which it considers appropriate; or

(c) revoke its decision in its entirety and substitute a new decision.

(5) In coming to its decision in accordance with paragraph (4) the Department shall have regard to the findings and recommendations reported to it by the persons appointed under this regulation but is not bound to follow all or any part of such findings or recommendations.

(6) The Department shall give its decision under this regulation as soon as practicable in writing and where it does not adopt the findings and recommendations reported to it shall set out -

(a) the relevant facts upon which its decision is based;

(b) the reasons for its decision;

(c) its reasons for not following in whole or in part the findings or recommendations of the persons appointed; and

(d) the effect of its decision on the payment or non-payment of subsidy.

(7) Where the Department decides in accordance with paragraph (4)(b) or (c), the fee referred to in regulation 11(3) shall be refunded to the applicant.

(8) The Department may make such payment, by way of fee or reimbursement of expenses, to any of such persons appointed under paragraph (1), as appears to it to be appropriate."

[25] The applicant's first complaint relates to the respondent's failure to follow the panel. The relationship between the panel and the respondent is apparent from Regulations 12 (3), (4) and (5). The panel shall report its "findings" and "recommendations" to the respondent. The respondent shall "have regard to" the panel's findings and recommendations, but is not bound to follow them. The respondent may confirm, amend, alter or revoke and substitute its decision. It is apparent from the Regulations that the respondent was not bound to accept the recommendations of the panel. The decision not to accept the recommendation of the panel was not contrary to the Regulations.

[26] Further the applicant objects that the respondent did not provide adequate reasons for its decision not to follow the recommendations of the panel. Regulation 12(6) provides that where the findings and recommendations of the panel are not adopted the respondent shall provide reasons for its

decision and the reasons for not following the findings and recommendations of the panel. In the written decision the respondent set out the reasons for its decision and the reasons for not following the panel, as set out above. Whether one agrees with the respondent or not it has stated its reasons to be that the second “Dear Producer Letter” conveys to producers the requirement to notify the replacement of a calved heifer. I am satisfied that the statement of reasons provided by the respondent was in compliance with the obligations under the Regulations.

The adequacy of the respondent’s documentation.

[27] Further the applicant complains about the substance of the respondent’s decision and rejects the adequacy of the notice given by the respondent to the applicant as to the requirements of the Scheme. The applicant thereby rejects the reasons relied on by the respondent for not following the panel and refusing the applicant’s appeal. A key change in the 2003 scheme concerned the replacement of heifers that had calved during the retention period, in addition to the former provision for replacement of cattle that had been sold or had died. Effective replacement required the requisite notice to be given to the respondent within certain time limits. The scheme documentation made it clear that there was a new 5% minimum heifer requirement. This was clear from the claim form. It was also clear from the Notes for Guidance. What was less clear was the manner in which the replacement requirements operated in relation to the minimum 5% heifer requirement. The guidance referred to “loss” of claimed animals and discussed the issue of replacement in terms of loss or sale. The “replacement” section discussed the issue in terms of “death/departure”. The replacement pro forma referred to cattle “sold/died”. DPL1 referred to the guidance but did not deal with the circumstances of replacement animals. It was only in DPL2 that the effect of the minimum 5% heifer requirement was explained in terms that if a heifer calved during retention and the ratio dropped below 5% then a heifer replacement must be notified. The panel considered that the replacement provision for calved heifers was not adequately highlighted and that the second “Dear Producer Letter” was accompanied by the original notes for guidance and the replacement pro forma. The respondent rejected that approach on the basis that the second “Dear Producer Letter” expressly stated the effect of a qualified heifer calving during the retention period.

[28] The panel and the respondent have differed on the effect of DPL2. I have rejected the applicant’s contention that the respondent was not entitled to reach a contrary conclusion under the Regulations or that the respondent did not give adequate reasons for its conclusion. It has not been shown that the respondent failed to take into account a relevant consideration or reached its conclusion on the basis of irrelevant considerations. The respondent’s conclusion that DPL2 provided adequate notice to producers was a conclusion

that the respondent was entitled to reach and while it is clearly a matter on which others may reach a different conclusion it cannot be characterised as irrational. Consequently the respondent's decision to reduce the subsidy payable to the applicant in the circumstances cannot be regarded as irrational.

The applicant's right to property.

[29] The applicant contends that the reduction in subsidy amounts to a disproportionate penalty involving a breach of the applicant's right to property under Article 1 of Protocol 1 of the European Convention. Article 1 of the First Protocol provides -

(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest subject to the conditions provided for by law and by the general principles of international law.

(2) The preceding provisions shall not, however, in any way impair the right of estate to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

[30] Article 1 of the First Protocol comprises three distinct rules. The first rule states the principle of peaceful enjoyment of property. The second rule covers deprivation of possessions and subjects it to certain conditions. The third rule recognises that States are entitled to control the use of property in accordance with the general interest. Any interference with the right to property must be prescribed by law and proportionate. The Court must determine whether a fair balance has been struck between the public interest and the private interests of the applicant.

[31] The applicant claims to have been deprived of his property by the reduction in the subsidy. However the applicant had no right to possession of the subsidy unless he complied with the conditions for payment specified by the scheme. Accordingly I am satisfied that there has been no interference with the applicant's right to enjoyment of possessions. However, if contrary to the above finding, the reduction in the subsidy amounted to an interference with the right to property, such interference was prescribed by law and for the legitimate aim of effecting the good administration of the scheme in the public interest. The applicant contends that the amount of the reduction was disproportionate. The amount of the reduction reflected the minimum 5% heifer requirement under the scheme. I am satisfied that the reduction was within the bounds of discretion which the European and domestic authorities

were entitled to determine for the purposes of the scheme. Accordingly any interference with the applicant's right to property was justified.

The exclusion of the applicant from the ex gratia scheme.

[32] The respondent distinguished between those producers who had received DPL1, who then received the ex gratia payment, and those producers who received DPL2, who were refused the ex gratia payment. As found above, the applicant received DPL2 and thus did not fall under the scope of the ex gratia payment. As found above, the respondent was entitled to distinguish between those producers who received DPL1 and those who received DPL2 and to conclude that, while others may disagree, the recipients of DPL2 should have had sufficient information to give the requisite notice to the respondent for the replacement of heifers calving during the retention period.

[33] I have not been satisfied on any of the applicant's grounds for judicial review and the application is dismissed.