

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY HUGH WILLIAM GORDON
FOR JUDICIAL REVIEW

WEATHERUP J

The background.

[1] This is an application for Judicial Review of a decision of the Department of Agriculture and Regional Development made on 13 June 2005 to withhold compensation payable to the applicant further to the slaughter of cattle that had tested positive for bovine tuberculosis. The application involves an issue of statutory interpretation of the Diseases of Animals (Northern Ireland) Order 1981 and the Tuberculosis Control (Northern Ireland) Order 1999. Mr Hutton appeared for the applicant and Mr Maguire for the respondent.

[2] The applicant is a farmer from Keady, County Armagh, who manages four herds of cattle. In December 2002 the respondent carried out tuberculosis testing on the applicant's cattle and 31 animals reacted to the test. The animals were slaughtered under the provisions of the Tuberculosis Control (Northern Ireland) Order 1999. Further testing resulted in 14 animals reacting to the tuberculosis test. These animals were also slaughtered under the 1999 Order.

[3] Further investigations carried out by the respondent resulted in the conviction of the applicant at Armagh Magistrates Court on 10 March 2004 of offences contrary to the Tuberculosis (Examination and Testing) Scheme Order (NI) 1999 which related to the testing of the 14 animals.

[4] There is a statutory compensation scheme for cattle slaughtered under the 1999 Order. By letter dated 21 February 2005 the respondent notified the applicant of a proposal to withhold compensation to the applicant in respect of the slaughter of the 45 cattle, as provided by the provisions of Article 18(6)

of the Diseases of Animals (NI) Order 1981 where there had been a conviction under the Order tending to prejudice the due control of the disease. The notice by the respondent to the applicant led to correspondence between the applicant's solicitors and the respondent. A panel convened by the Department decided that by reason of the convictions of the applicant at Armagh Magistrates Court on 10 March 2004 the compensation in respect of the 45 animals slaughtered would be withheld under Article 18(6) of the 1981 Order. The respondent's decision to that effect was forwarded to the applicant on 13 June 2005. After further correspondence the respondent by letter dated 6 July 2005 confirmed that there was no procedure for appeal of the respondent's decision but that the matter could be subject to judicial review.

The applicant's grounds for Judicial Review.

[5] The applicant's grounds for judicial review are as follows -

(a) The decision communicated to the applicant by letter dated 3 June 2005 and confirmed by way of letter dated 6 July 2005 is unlawful in that the slaughter was not effected under the 1981 Order but was effected under the Tuberculosis Control (NI) Order 1999 and thus the decision-maker had no jurisdiction to proceed under Article 18(6) of the 1981 Order and the decision-maker acted without jurisdiction and acted ultra vires in making the purported decision.

(b) In taking the impugned decision the decision-maker erred in fact and in law in relation to a condition precedent to the exercise of the jurisdiction under Article 18(6) in concluding that the relevant cattle were cattle slaughtered under the 1981 Order and to that extent the decision was erroneous and unreasonable and taken without jurisdiction.

(c) In taking the impugned decisions the decision-maker failed to consider or direct his mind to the question of whether the said cattle were in fact cattle slaughtered under the 1981 Order and to that extent failed to consider a relevant factor in coming to the impugned decision and acted unreasonably.

(d) In taking the impugned decisions the decision-maker acted unreasonably in concluding that the relevant cattle were in fact cattle slaughtered under the 1981 Order and to that extent took into account an irrelevant consideration in coming to the impugned decision and to that extent acted unreasonably.

The Diseases of Animals (Northern Ireland) Order 1981.

[6] The Diseases of Animals (NI) Order 1981 provides at Article 16 under the heading “Slaughter of diseased and suspected animals and poultry” that the functions of the Department in relation to the slaughter of animals and poultry affected or in contact with or suspected of any disease specified in Schedule 2 are set forth in that schedule.

[7] Schedule 2 Part 1 provides for the power to slaughter in relation to specified diseases. This power is to be exercised in some cases by requiring slaughter by the Department and in other cases by giving the Department a discretion as to slaughter and in two case by providing that the Department may by order provide for the slaughter. So for example in relation to cattle plague and pleuro pneumonia it is provided that the Department shall cause to be slaughtered all animals affected with those diseases. Similarly in relation to foot and mouth disease and rabies the Department may cause to be slaughtered an animal affected with those diseases. In the cases of bovine tuberculosis and brucellosis it is provided that the Department may by order provide for the slaughter of animals affected with those diseases. Accordingly paragraph 4 provides in relation to bovine tuberculosis that –

“(1) Subject and according to the provisions of this Order, the Department may by order provide for the slaughter of –

(a) any animal affected with bovine tuberculosis or suspected of being so affected; or

(b) any animal of a susceptible species which is or has been in contact with any animal referred to in paragraph (a), or which appears to the Department to have been in any way exposed to the infection of bovine tuberculosis.

(2) An order under sub-paragraph (1) may provide for the slaughter of any animal under that sub-paragraph to be made subject to such conditions as may be prescribed by or under the order.”

[8] Part II of Schedule 2 provides for compensation in respect of the slaughter of animals and poultry. Provision is made for compensation arrangements in respect of each of the diseases for which there is power to

slaughter under Part 1. Except for those cases where the power to slaughter arises by order made by the Department the compensation is stated to be the market value or a proportion thereof. In respect of bovine tuberculosis and brucellosis the compensation provisions are to be provided for in the departmental order. Accordingly paragraph 4 provides in relation to bovine tuberculosis that "The compensation in all or any cases shall be such as is provided in the relevant order".

[9] The order of the Department made under the 1981 Order in relation to bovine tuberculosis is the Tuberculosis Control (Northern Ireland) Order 1999 as amended. There are additional powers to make orders granted to the Department by the 1981 Order so that the Tuberculosis Control Order is stated to be made in exercise of the powers conferred by Articles 5(1), 10(6), 16(1), 19, 44 and 60(1) as well as paragraph 4 of Part I and paragraph 4 of Part II of Schedule 2.

[10] Article 18 of the 1981 Order contains "General provisions relative to slaughter and compensation" that extend to animals liable to slaughter "under this Order". The Department has power to reserve for observation and treatment an animal liable to be slaughtered; the carcass of a slaughtered animal belongs to the Department; any excess from the sale of the carcass is payable to the owner; the animal may be buried on any ground owned or occupied by the owner; insurers of the slaughtered animal may deduct the compensation from the insurance payment. Article 18(6)(a) contains the provision relied on by the respondent in the present case -

(6) Notwithstanding anything in this Order, the Department may withhold, either wholly or partially, compensation or other payment in respect of an animal or bird slaughtered under this Order at its direction where, in the judgment of the Department-

(a) the owner or the person having charge of the animal or bird has been guilty of an offence against this Order tending to prejudice the due control of the disease necessitating the slaughter; or

(b) the animal or bird, being an imported animal or bird, was diseased at the time of its landing or, before or while being brought from any member State, exposed to the infection of disease; or

(c) the bird was hatched from an imported egg which carried disease or infection at the time of landing or came from the same source as eggs found to carry disease or infection.

The Tuberculosis Control Order (Northern Ireland) 1999.

[11] Under the powers provided in the 1981 Order the Department made the Tuberculosis Control Order (NI) Order 1999. Under the heading "Power

to Slaughter” the amended form of Article 10(1) provides that “.....the Department shall slaughter or cause to be slaughtered any reactor.....” Under the succeeding paragraphs of Article 10 provision is made for notices in relation to slaughter to be served on the keeper of the animal and restrictions imposed further to service of such notice.

[12] Under the heading “Valuation and compensation” Article 11(1) provides that “Where the Department slaughter or causes an animal to be slaughtered under Article 10(1) the compensation payable by the Department for the animal shall be the market value of the animal.” In the succeeding paragraphs of Article 11 provision is made for the determination of market value.

[13] None of the general provisions relating to compensation as set out in Article 18 of the 1981 Order appears in the 1999 Order.

[14] It is common case that the applicant’s animals were slaughtered under Article 10(1) of the Tuberculosis Control Order (NI) 1999. The applicant contends that the right to compensation arises under the 1999 Order, and as that Order contains no provision whereby the Department may withhold compensation where an owner has been guilty of an offence tending to prejudice the due control of disease necessitating the slaughter, the respondent had no power to withhold compensation from the applicant. The respondent contends that the 1999 Order must be read with the 1981 Order so that Article 18(6) applies whereby the respondent has power to withhold the compensation where the applicant is guilty of an offence tending to prejudice the due control of the disease necessitating the slaughter.

“An act or thing done under a statutory provision”

[15] The respondent relies on section 11(10) of the Interpretation Act (NI) 1954 which provides that:

“A reference in an enactment to any power exercisable, statutory instrument or statutory document made, or issued or act or thing done under a statutory provision shall include a reference to a power exercisable, a statutory instrument or statutory document made, or issued or act or thing done by virtue of that provision or of any statutory instrument or statutory document made or issued under or by virtue of that provision.”

For present purposes the “enactment” is the 1981 Order, the “act or thing done” is the slaughter, the “statutory provision” is the 1981 Order and the

“statutory instrument” is the 1999 Order. Accordingly section 11(10) for present purposes reads:

“A reference in an enactment to any ... act or thing done under a statutory provision shall include a reference to ... [an] act or thing done by virtue of ... any statutory instrument ... made or issued under or by virtue of that provision.”

[16] The reference in Article 18(6) of the 1981 Order to slaughter “under this Order” therefore includes slaughter under any statutory instrument made under the 1981 Order. The 1999 Order was so made and therefore slaughter under the 1981 Order includes slaughter under the 1999 Order.

“Unless a contrary intention appears in the [1981 Order]”

[17] Mr Hutton for the applicant relies on section 2(1) of the 1954 Act which provides that “Every provision of this Act shall extend and apply to every enactment, whether passed or made before or after the passing of this Act, unless a contrary intention appears in this Act or in the enactment.” Accordingly the application of section 11(10) in the present case to the effect that slaughter under the 1981 Order includes slaughter under the 1999 Order is subject to a contrary intention appearing in the 1981 Order.

[18] Bennion on Statutory Interpretation (4th Edition) at page 142 under the heading “Things done under an Act” states that “anything done in reliance on a power conferred by, or other provision contained in, an Act, is said to be done “under” the Act or pursuant to, or in pursuance of, the Act.” Bennion refers to R v Robinson [1993] 1 WLR 168 where the Court of Appeal held that the true construction of Section 31(1) of the Criminal Justice Act 1991, which provided a definition of “sexual offence” as meaning an offence “under” specified statutes (which included the Sexual Offences Act 1956), included an offence under the Criminal Attempts Act 1981 although that was not a specified statute. Having considered the legislative context Lord Taylor stated at page 171 F that the offence under the 1981 Act was to be “properly regarded as an offence ‘under’ the Sexual Offences Act 1956” and was thus within the definition of “sexual offence” under the 1991 Act. This is described by Bennion as an “obviously strained construction”.

[19] The applicant relies on R v Cuthbertson [1980] 2 All ER 401 where the House of Lords considered the power of forfeiture under the Misuse of Drugs Act 1971 which applied to a person convicted of an offence “under” the 1971 Act. It was held that this did not apply to a conviction for a conspiracy to commit an offence under the Act. Lord Diplock having considered the structure of the Act found that its provisions contained a comprehensive list of all offences, substantive or inchoate, which were included in offences

“under” the Act and that no express provision was to be found in the Act in respect of conspiracy to contravene a provision of the Act.

[20] The applicant relies on two particular factors that applied in *R v Cuthbertson*. The first is that the interpretation of the legislation must be based on the intention of parliament as ascertained from the words of the statute and not by any preconception about Parliament’s intention to achieve a laudable objective and secondly that a penal provision requires a strict interpretation. Lord Diplock stated -

“This is a pure question of construction of section 27 read in the context of the Act of which it forms a part. The question should not be approached with any preconception that Parliament must have intended the section to be used as a means of stripping professional drug traffickers, such as the appellants, of the whole of their ill-gotten gains, however laudable such a consummation might appear to be. Parliament’s intention must be ascertained from the actual words which Parliament itself approved as expressing its intention when it passed the Act in the terms in which it reached the statute book.”

Of the argument that an agreement to supply a controlled drug owes its criminal character to the 1971 Act, and in that loose sense was capable of falling within “an offence under this Act” Lord Diplock stated -

“The fact that this case involves a penal provision is in itself a reason for hesitating before ascribing to phrases used in it any meaning broader than that they would ordinarily bear; and, in the instant case, the whole structure of the Act in my opinion points conclusively in the opposite direction. Wherever an offence is created by the Act itself this is done expressly. “

[21] This leads the applicant to the principle against doubtful penalisation as set out in Bennion on Statutory Interpretation at page 705 that “It is a principle of legal policy that a person should not be penalised except under clear law.” Accordingly the court should strive to avoid adopting a construction which penalises a person where the legislators intention to do so is doubtful or penalises him or her in a way which was not made clear.

[22] The approach to statutory interpretation was recently stated by Lord Bingham in *R (Quinntavalle) v Secretary of State* [2003] 2 AC 687 at paragraph 8 as follows –

“ The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every contingency which may possibly arise. It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.”

The structure and context of the 1981 Order.

[23] By Article 2(1) of the 1981 Order “order of the Department” means an order made by the Department under the 1981 Order. The applicant contends that the wording of the 1981 Order repeatedly distinguishes between “the 1981 Order” and “an order of the Department”. Accordingly the applicant contends that where Article 18(6) refers to slaughter “under this Order” that is intended to refer to slaughter under 1981 Order and not to slaughter under an order of the Department. Article 46 of the 1981 Order (among others) provides examples of the applicant’s point by adopting the wording “the provisions of this Order or of an order of the Department” or “this Order or an order of the Department” in relation to general powers of inspectors. Accordingly the applicant contends that had Article 18(6) of the 1981 Order been intended to include an order of the Department such as the Tuberculosis Control (NI) Order 1999 it would have referred to slaughter “under this Order or an order of the Department”.

[24] Further the applicant contends that in some instances there is an express link between the 1981 Order and the 1999 Order. Article 12 of the 1981 Order provides for “General provisions as to infected places and areas”. The Department may by order prescribe the cases in which places and areas are to be declared to be infected with a disease. By Article 12(3) of the 1981 Order every such place or area prescribed by the order of the Department shall be an infected place or area for the purposes of the 1981 Order. There is an express cross reference between the 1981 Order and the order of the Department.

[25] Further there are instances of supplementary powers in the 1981 Order and the 1999 Order. Article 10 of the 1981 Order provides for separation of diseased animals and poultry and notice of disease. A veterinary surgeon who suspects an animal is diseased must give notice to the Department or the police. In addition Article 10 enables the Department by order to prescribe and regulate the notice to be given by any person where any disease is suspected. The 1999 Order Article 3 provides for notice of suspected bovine tuberculosis by a veterinary surgeon to the Divisional Veterinary Officer.

[26] The applicant contends that in respect of bovine tuberculosis the 1999 Order provides a separate self-contained scheme for slaughter and compensation. Accordingly the conditions for slaughter and compensation are those found in the 1999 Order and not the 1981 Order. On this approach the general provisions relative to slaughter and compensation in Article 18 of the 1981 Order only apply to those cases where slaughter and compensation are provided for under the 1981 Order ie all cases other than bovine tuberculosis and brucellosis where separate schemes are provided by order of the Department.

[27] The 1981 Order does adopt a number of approaches to the relationship between the 1981 Order and orders of the Department. The heading to Article 12 refers to “General provisions as to infected places and areas” but the general provision are to be introduced by order of the Department rather than in the text of Article 12. Article 13 relates to the destruction of wild life where a disease in the wild life is threatening livestock and the powers are to be exercised by order of the Department. Article 47 of the 1981 Order then grants related powers connected with the destruction of wild life.

[28] Article 18 of the 1981 Order contains other general provisions relative to compensation and slaughter. If the applicant’s approach is correct none of the general provisions applies to bovine tuberculosis or brucellosis by virtue of Article 18 -

- (1) The Department may, notwithstanding anything in this Order, reserve for observation and treatment an animal or bird liable to be

slaughtered under this Order at the direction of the Department but subject to payment of compensation by the Department as in case of actual slaughter.

(2) Where an animal or bird has been slaughtered under this Order at the direction of the Department the carcase shall belong to the Department and shall be buried or sold or otherwise disposed of by or at the direction of -the Department, as the condition of the animal, bird or carcase and other circumstances may require or admit.

(3) If, in any case, the sum received by the Department on sale of a carcase under this Article exceeds the amount paid for compensation to the owner of the animal or bird slaughtered, the Department shall pay that excess to the owner, after deducting reasonable expenses.

(4) Where an animal or bird has been slaughtered under this Order at the direction of the Department, the Department may use for the burial of the carcase any ground in the possession or occupation of the owner of the animal or bird and suitable in that behalf, or any common or unenclosed land.

(5) If the owner of an animal or bird slaughtered under this Order at the direction of the Department has an insurance on the animal or bird, the amount of the compensation awarded to him under this Order may be deducted by the insurers from the amount of the money payable under the insurance before they make any payment in respect of the animal or bird.

[29] The applicant contends that while none of the general provisions of Article 18 applies to bovine tuberculosis, the same provisions may arise expressly or by implication under the 1999 Order. There is no express provision in the 1999 Order for any of the matters set out in Article 18. The applicant accepts that the specific provisions in Article 18(1) in relation to compensation for observation and treatment and Article 18(3) in relation to sale of the carcase and Article 18(5) in relation to insurance could not arise by implication under the 1999 Order.

[30] There are different approaches in the 1981 Order to the connection between the 1981 Order and orders of the department. Article 18 contains general provisions relative to slaughter and compensation. The overall structure of the 1981 Order indicates that it is the parent Order which in respect of bovine tuberculosis provides for the power of slaughter and compensation by order of the Department. Section 11(10) of the Interpretation Act applies so that, subject to any contrary intention, slaughter under the 1999 Order amounts to slaughter under the 1981 Order. Again subject to any contrary intention, if the slaughter under the 1999 Order amounts to slaughter under the 1981 Order, the general powers relative to slaughter and compensation would apply to such slaughter and compensation. I am mindful of all the considerations referred to above. The structure and content of the 1981 Order does not evince a contrary intention. I am satisfied that the

general powers contained in Article 18(6) of the 1981 Order apply to slaughter by reason of bovine tuberculosis under the 1999 order of the Department. The application for Judicial Review is dismissed.