

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY NEVIN FRAZER AND
ROBERT FRAZER FOR JUDICIAL REVIEW

GIRVAN J

[1] This matter comes before the court by way of a judicial review challenge brought by Mr Robert Frazer and Mr Nevin Frazer against the Department of Agriculture and it relates to steps that the Department took in relation to livestock belonging to the Frazers. The matter originated in the carrying out of spot checks on a number of animals belonging to the applicants which were in the process of slaughter to go into the food chain. As a result of the checks that were carried out there was one specimen in one animal which satisfied the Department that there was in that animal the presence of an impermissible amount of a banned substance (which has been conveniently described as substance 17A). It has a much longer and more technical term which is not necessary for me to use. There were other findings in relation to two other samples, but the two other samples were not in themselves sufficient to establish that there had been a breach of the Animal (Products Examination for Residues and Maximum Residues Limits) Regulations 1998 ("the regulations").

[2] The Department having had that negative result in the one sample proceeded to exercise what it considered to be its powers under the Regulations. The effect of the exercise of those powers was that the Department, in a way which has been described by the applicants as heavy handed, went into the applicants' farm premises and gave notice of the restraining of movement of the plaintiffs' herd and requiring the slaughter of a significant number of cattle and indeed in consequence of the steps taken by the Department a significant number of animals were removed for slaughter and 51 were slaughtered on 24 June. The balance of animals slaughtered on 27 June was 95 animals. The rest of the relevant part of the herd, amounting to 117 cattle are currently subject to the Restraint of Movement Direction given by the Department. The way in which the Department went about the matter was on the basis of its legal interpretation of the Regulations. If the matter were

simply looked at on the basis of the Regulations it seems to me that the arguments put forward by the applicant would establish that the Department had not complied with the spirit and intent of the Regulations but the matter is put beyond doubt when the Regulations are construed in the light of the underlying European Directive, that is Council Directive 96/23/EC of 29 April 1996, which was the underlying Directive requiring measures to be taken by state authorities to monitor substances and residues in alive animals and animal products. If one looks at the Directive and the Regulations together it is patently clear that the Department did not comply with the procedural requirements that were set out in the Directive and it seems to me absolutely clear that the 1998 regulations which were made pursuant to the Directive fall to be applied and construed and carried into effect in a way which is consistent with the requirements of the Directive.

[3] Under the terms of the Regulations one matter at the outset is relied on by the applicants as a breach of procedure of importance. This was in relation to the obligation of the Department to provide a sample to the farmers concerned to enable them to carry out analysis on their own part. Another procedural matter relied on by the applicants is that the Department failed to provide the appropriate certification to the farmers of the outcome of the sampling process that had been carried out in relation to the animals that were slaughtered in the first instance. On the question of the farmers' entitlement to have a sample himself, Regulation 16(3) provides that the farmer may on the basis of the contradictory analysis and by notice in writing served on an authorised officer challenge the findings specified in a Primary Analysis Certificate. In this case, as I have indicated, there was no Primary Analysis Certificate furnished and there was no opportunity given to the farmers to carry out an alternative analysis which could have produced a contradictory result. That seems to me to be a procedural error in the approach taken by the Department. The Regulations would have to be implemented in a way which ensured procedural fairness in relation to the farmer in this context and where the steps of the Department are based upon a sample which was adverse to the farmer, fairness would require that the farmer should have the opportunity of an analysis of the material in his own right on his own side so that he would be in a position to present a contradictory case to the Department. So that was one procedural matter which in the argument was not seriously challenged, an error or procedure which went to the heart of the matter at the outset. The subsequent steps taken by the Department in moving as it did was influenced by its reading of Regulation 20 which led it to the conclusion that because there was this one adverse sample the consequence was that the batch, as the Department determined it, was subject to all the powers that it had in relation to ordering detention and ordering slaughter.

[4] The procedures laid down in the Directive contained a set of balanced provisions in relation to sampling in this type of context where there is an ongoing investigation and where there is suspicion of breaches of the Directive and regulations in respect of the banned substances. The Directive contains a fair degree of detail as to the procedural steps that should be taken to ensure fairness in relation to steps taken by the state authorities in this context and those procedural matters

were not complied with. I am afraid the inference that must be drawn from the way in which this matter was dealt with by the Department is that the Department completely lost sight of the Directive in carrying out its powers and approached the matter on simple domestic law on the basis of the Regulations. Even on the Regulations, as I have indicated, as the argument established the actions would not have complied with the Regulations simply construed as free standing domestic legislation. But in a case like this where regulations are made under the European Union agricultural system the Department must have a primary regard to the underlying European context of the regulations and legislation. The whole legislative framework within the country is to be founded in the European Directive in this context. So it was the primary piece of legislation to which regard has to be had. It seems to me for future reference in this type of situation the Department should be careful to ensure that it formulates and frames its actions in a way that is consistent with the underlying European Directive and the Regulations made under it. The consequence of all this is that the court is compelled on the arguments presented and which have not been really challenged by the Department to come to the conclusion that the decisions and actions taken by the Department in this context were contrary to law, contrary to the Directive and not in accordance with the Regulations properly construed and properly to be applied in the light of the Directive. In the result the court must issue a declaration in the terms of paragraph 2(a) and (b) of the Order 53 statement and notice of motion. There will be an order for certiorari quashing the decisions of the Department in this context. This leaves open the question of the compensation of the farmers in respect of the animals that have been slaughtered and in respect of losses that may or may not have been incurred in the context of the remaining 117 animals which are restricted on the farm and have been restricted since the Department took the steps which it did take.

[5] The question of compensation or damages in this context will remain to be determined by the court if the parties cannot themselves reach an agreement in relation to that issue. It has been suggested by Mr Shaw on behalf of the Department that it would be better to leave that for a private action between the applicants and the Department if agreement is not reached. However, there is power vested in the court under the Judicature Act to award damages in a judicial review case. I do not think any advantage would arise from concluding these proceedings and leaving it for the applicants to bring fresh proceedings. The current proceedings are sufficiently framed to allow that question to be determined by this court. There may be issues of fact and questions of evidence on valuations and the court could hear evidence on those issues, if necessary. I hope that can be avoided and that the parties can reach a sensible solution to the dispute. They may want to look at alternative dispute resolution in this context or arbitration in relation to fixing of values or the agreement of independent valuation experts to arrive at a figure to be fixed as the appropriate compensating figure. Those are matters that the parties will have to address between themselves. This court retains seized of the issue and may ultimately have to be the arbiter on the question. That means, accordingly, that the applicants have succeeded in relation to the substantive relief that they have sought in the judicial review.