

Judicial Communications Office

15 December 2022

COURT DELIVERS DECISION ON THE CHALLENGE TO THE INSTRUCTION OF THE MINISTER OF AGRICULTURE, ENVIRONMENT AND RURAL AFFAIRS TO CEASE OCR CHECKS

Summary of Judgment

Mr Justice Colton, sitting today in the High Court in Belfast granted an application for judicial review by Edward Rooney, an anonymised individual JR181(3) and Belfast City Council in respect of their challenge to a written instruction issued by the Minister of Agriculture, Environment and Rural Affairs to his Department on 2 February 2022 to cease all checks relating to animals and various agri-food goods moving from Great Britain (“GB”) into Northern Ireland (“NI”) by 00.01 on Thursday 3 February 2022. These checks, referred to as the Official Control Regulations (EU 2017/625) checks (“OCR checks”), had been performed by the Department of Agriculture, Environment and Rural Affairs (“DAERA”) since 1 January 2021 in order to comply with the UK’s legal obligations arising from its withdrawal from the European Union. The court quashed the Minister’s instruction and declared that it was unlawful and of no effect.

Background

The background and chronology of events leading up to the Minister’s instruction has been set out in detail in the court’s judgment at paragraphs [8] to [40].

The court previously granted leave to Mr Rooney and JR181(3) along with interim relief suspending the effect of the Minister’s instruction on the basis of the principles set out in the well-known authority of *American Cyanamid Company* [1975] AC 396 on 4 February 2022. An undertaking confirming that the instruction would not be acted upon was provided by the respondent prior to that point.

An application for leave to challenge the Minister’s instruction was subsequently made by Belfast City Council and was granted on 21 March 2022.

On 29 March 2022 Derry City and Strabane District Council were granted permission to participate as a Notice Party.

Grounds

The applicants challenged the Minister’s decision on the following grounds:

(1) Illegality - it was submitted that the impugned decision was unlawful due to breaches of the following statutory requirements:

- (i) The Official Control Regulations (Regulation 2017/625 (“the OCR”)) read with Article 5(4) and Annex 2 of the Protocol on Ireland/Northern Ireland (“the Protocol”) and section 7A of the European Union (Withdrawal) Act 2018 (“the 2018 Act”).
- (ii) Section 28A of the Northern Ireland Act 1998 (“the 1998 Act”) as read with parts 1.4(cd)-(ce) of the Ministerial Code.
- (iii) Belfast City Council also argued that the decision was a misuse of the Minister’s power of “direction and control” under Article 4(1) of the Departments (Northern Ireland) Order 1999, as read with the OCR.

(2) Material considerations – Belfast City Council submitted that the impugned decision was vitiated by the Minister having failed to take into account the following material facts and considerations:

- (i) The logistical challenges that the Minister’s decision has had, and will have, for Belfast City Council which is one of the number of authorities that has statutory duties under the OCR and is the local council in Northern Ireland with responsibility for effecting checks at Belfast port.
- (ii) The Minister’s decision potentially meant that Belfast City Council would act in breach of the Protocol by default and be subject to *Francovich* damages claims under, inter alia, Article 13(2) of the Protocol as read with Articles 2(a)(ii) and (iv) of the Withdrawal Agreement and section 7A of the 2018 Act.

Is there a public law decision open to challenge?

It was argued on behalf of the Minister that the instruction in question did not actually take effect either inside or outside DAERA. It was submitted that the instruction under challenge was in effect an “intra-departmental activity that did not take effect even within the Department.” The judge found there was no merit in this argument as it was clear from an affidavit submitted by Mr Anthony Harbinson, the Permanent Secretary and Accounting Officer within DAERA at the relevant time, that notwithstanding his reservations, he considered himself obliged to comply with the Minister’s instruction.

The judge held that the nature of the instruction could not be clearer, it was to have immediate effect. Counsel for the Minister also confirmed to the court on 4 February 2022 that the Department regarded the instruction as a lawful order which would be complied with (subject to the original undertaking provided to the court on 3 February 2022). The judge therefore found that it was the actions of the applicants in

bringing these proceedings and the interim relief which was granted by the court on 4 February 2022 which prevented the instruction from being implemented.

Standing?

Applying the relevant legal principles, the court was satisfied that all applicants had sufficient standing to bring their applications.

Mr Rooney set out in his affidavit that he is a victim of the troubles having been kidnapped by the provisional IRA in the early 80's and was later shot by paramilitaries for assisting police. He explained he is a strong supporter of the Peace Process and the Good Friday Agreement. JR181(3) indicated that he is also a strong supporter of the Good Friday Agreement, the subsequent peace process and the rule of law. JR181(3) has also been involved in a challenge to a decision by a predecessor of the Minister in terms of actions at the port in Larne.

The court found that Belfast City Council had a particular and individual interest in the issue under challenge. The Minister's instruction, if implemented, could have a clear and obvious impact on the Council's role as one of the designated authorities for checks coming into Belfast port.

The judge held that the issue at the heart of these proceedings which alleges a Minister's unlawful refusal to carry out his statutory obligations is a matter of significant public importance. The court stated, "the potency of the public interest content in this case is high."

Is the Minister under a legal obligation under EU and/or domestic law?

A new point was raised on behalf of the Minister during the course of written submissions lodged in respect of the substantive hearing of this matter that, "the traditional understanding" that under the Protocol checks were required of animals and plants on goods coming from GB into NI was, in fact, incorrect. It was submitted that on a proper analysis of the legal position the customs responsibilities were those of the UK Custom Authorities, including HMRC and not those of the Minister or DAERA. The respondent's submission was based on the interpretation of the OCR (see paragraph [134] to [144] of the court's judgment).

As a result of this line of argument the judge directed that His Majesty's Government should be put on notice of these proceedings and invited to intervene if deemed appropriate, which they did in the form of the Department for Environment, Food and Rural Affairs ("DEFRA").

It was argued on behalf of the applicants that the officers in DAERA had been carrying out checks under the direction of the Minister for the previous 13 months, since 1 January 2021, prior to the Minister's instruction and the Minister accepted in a previous paper to the Executive Ministers that the Northern Ireland Protocol

imposed duties on him in domestic law to carry out SPS checks to ensure alignment with EU SPS Rules including the OCR. The court found that to then argue at the substantive hearing that that direction to conduct such checks was unlawful was, “a remarkable departure from the evidence that had hitherto been relied upon.” There was nothing before the court, to include any affidavit, to explain this change in position.

The court found that the OCR must be interpreted in accordance with EU law. This is as a result of Article 4(1) of the Withdrawal Agreement 2019 and Article 13(2) of the Northern Ireland Protocol which have domestic effect under section 7A of the 2018 Act.

The court’s duty to interpret national law in accordance with the United Kingdom’s treaty obligations is well-recognised and longstanding – see *Salomon v Commissioners of Customs and Excise* [1967] 2 QB 116. The court also referred to *Bayfine UK v Revenue and Customs Commissioners* [2012] 1 WLR 1630 highlighting a number of points made in that judgment to include (i) that a Treaty must be given a purposive interpretation, (ii) a strictly literal approach to interpretation is not appropriate in construing legislation which gives effect to or incorporates an international treaty, (iii) in accordance with Article 31(1) of the Vienna Convention a treaty should be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose, (iv) the court also referred to the remainder of Article 31 of the Vienna Convention which sets out the applicable rules of interpretation when a court is construing an international treaty which are relevant in this instance.

The court also referred to other relevant principles of interpretation to include the validation principle which states that treaties are to be interpreted with reference to their declared objects and purposes and that particular provisions should be interpreted to give the fullest effect consistent with the normal sense of the words and with other parts of the text.

The court found that the way in which the European Regulations have been legislated for in NI is such that the OCR should be read so that the checks in dispute should be carried out at ports in NI. It is at that point that union territory is entered for the purposes of the withdrawal agreement. The UK is not to be treated as a unitary state for the purposes of OCR checks coming from GB into NI. This textual analysis was found to be entirely consistent with the purpose, intention and objective of the Protocol itself. The court found that the Minister and DAERA are therefore under a legal statutory obligation to implement the checks on goods entering NI from GB in accordance with the requirements of the Protocol. This was found to be consistent with the ordinary meaning to be given to the terms of section 7A of the 2018 Act, the Protocol and the OCR in their context and in the light of their object and purpose, with the recitals of the Protocol expressly acknowledging that there will be checks at the ports and airports of NI.

Was Executive agreement required for the implementation/continuation of checks under OCR?

The court found that this was the point of substance at the heart of the Minister's decision and the subsequent judicial review challenges. The Minister contended that he required retrospective Executive agreement for the implementation of checks under the OCR and its approval for the continuation of such checks. The absence of such approval was the basis for the instruction which is challenged in these proceedings.

The court found that the answer to this question was "no" because the requirement to carry out the OCR checks is a statutory obligation imposed on the Minister which arises from section 7A of the 2018 Act which gives domestic legal effect to the Protocol. The obligation to carry out OCR checks existed prior to the end of the transition period. Under domestic law, DAERA have the legal responsibility for complying with the OCR. After the transition period as the competent authority DAERA have responsibility for carrying out the additional checks required by the Protocol.

The court also found that this has been accepted as the clear legal position by the Minister since at least May 2020 when he appointed the former DAERA Permanent Secretary, Dr Denis McMahon as Senior Responsible Owner for the SPS Operational Delivery Programme in anticipation of the checks that would be required at the end of the transition period. The Minister's understanding of the legal position was also confirmed in written answers provided to Patsy McGlone MLA in September and October 2020.

After the transition period commenced the Minister implemented what he recognised to be his legal obligations and DAERA, in fact, carried out the checks for a period of 13 months prior to his instruction of 2 February 2022. A paper he provided to his fellow Executive Ministers on 25 January 2022 also confirmed his legal obligations.

The court found that despite this the Minister sought to absolve himself from these legal obligations by relying on the provisions of sections 20 and 28A of the 1998 Act. In his paper of 25 January 2022, the Minister stated at paragraph 32 that the decision around the implementation of the Protocol is both significant and controversial and it is also likely that it would be regarded by a court as cross cutting. The Minister stated that in the circumstances he lacked the Ministerial authority to take decisions as to the nature of the implementation of the Protocol. Applying the principles set out by the Court of Appeal in *The Minister for Infrastructure and the Department for Infrastructure and Safe Electricity, A&T Limited and Patrick Woods and the Executive Office* [2022] NICA 61 the court did not consider that the decision to implement the OCR checks under the Protocol required Executive Committee approval.

The court found from this analysis that the Executive Committee had no approval function in the context under scrutiny. The legal position is settled and clear.

The impugned instruction, which was issued when the First Minister's resignation was imminent, was consistent with the strategy outlined by the DUP leader in September 2021. The court held the suggestion that the referral of the matter to the Executive Committee was for the purposes to ensure compliance with the law sits uneasy with the assertion in that speech that DUP Ministers would use their votes at the Executive Committee to frustrate any "additional checks" now or in the future or that if the choice was ultimately between remaining in office or implementing the Protocol in its current form the only option for any unionist Minister would be to cease to hold such office.

The court therefore held that the Minister's instruction was motivated by political rather than legal considerations. When a pre-action protocol letter challenging the legality of the checks was received by the Minister on 21 December 2021 from the Unionist Voice Policy Studies as outlined in paragraph [10] in the written judgment, rather than await legal advice from the DSO which was in train, the Minister, in effect, conceded the relief sought in his direct reply.

The court recognised at paragraph [218] in the written judgment that the Minister and his party colleagues are politically opposed to the Protocol and stated,

"It may well be that for politicians, as the DUP Leader said in September 2021:

"There are no easy answers when the law requires one thing and politics demands something else."

From the court's perspective there is an easy answer and that is that the law must be obeyed. This is dictated inexorably by the rule of law in every case. Any politically motivated decision that is in accordance with the law is unimpeachable. Every such decision which does not satisfy this indelible standard is unsustainable in law and must be set aside as a consequence."

Has the Executive Committee approved the OCR checks in any event?

The judge held that even if he was wrong in his analysis that the implementation of the OCR checks do not require Executive Committee approval, he found that it was clear that the checks were carried out with Executive Committee approval and agreement.

The judge found that it was clear from the minutes of the Executive Committee meeting on 21 May 2020 that there was discussion about "the implementation of the Protocol" and "the need for arrangements to control the entry of agri-food products

into Northern Ireland, but also the need to simplify and minimise such checks.” At that meeting it was agreed that the Minister would take “the lead on this issue” and “would confirm to Whitehall that the necessary work would be taken forward with DEFRA, the Cabinet Office and the NIO to move this forward.” The court held “the necessary work” was the implementation of the Protocol and specifically the arrangements to control the entry of agri-food products into Northern Ireland.

Conclusion

The court concluded:

- (i) The applicants have standing to bring these applications.
- (ii) The impugned decision is a public law one, amenable to judicial review.
- (iii) The Minister and DAERA had at all material times a statutory obligation to implement the checks on OCR goods entering NI from GB under section 7A of the 2018 Act read with the provisions of the Protocol and the OCR.
- (iv) The checks carried out since 1 January 2021 to date are lawful.
- (v) By issuing the instruction on 2 February 2022 the Minister was in breach of his legal obligations set out above.
- (vi) The decision to implement the checks provided for in the legislation referred to at (iii) above did not require Executive Committee agreement under section 20 of the 1998 Act.
- (vii) In the event that Executive Committee agreement was required as a matter of law to implement the OCR checks pursuant to the Protocol, then such agreement was made on 21 May 2020. Those checks could only be stopped as a result of a further agreement of the Executive Committee.

The court made the following orders:

- (a) An order of certiorari quashing the instruction of the Minister given on 2 February 2022 to DAERA to cease all checks that were not in force on 31 December 2020 (the OCR checks).
- (b) A declaration that the instruction was unlawful and of no effect.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the

judgment. The full judgment will be available on the Judiciary NI website (<https://judiciaryni.uk/>).

ENDS

If you have any further enquiries about this or other court related matters please contact:

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