Neutral Citation Number: [2017] EWCA Civ 431

Case No: C1/2015/2372

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION, ADMINISTRATIVE COURT
The Hon Mr Justice Simon
[2015] EWHC 1896 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/06/2017

Before:

LORD JUSTICE JACKSON
LADY JUSTICE RAFFERTY
and
LORD JUSTICE KITCHIN

- -

Between:

The Queen on the Application of the Association of Independent Meat Suppliers & Anor	**Appellants**
- and -	
The Food Standards Agency	**Respondent**

- -
- -

Stephen Hockman QC and David Hercock (instructed by SAS Daniels LLP)
for the Appellants
Sir Alan Dashwood QC and Adam Heppinstall (instructed by FSA Legal) for the Respondent

Hearing date: 16 May 2017

- -

Approved Judgment

Lord Justice Kitchin:

Introduction

1. This is an appeal against the judgment of Mr Justice Simon (as he then was) which he gave on 2 July 2015 ([2015] EWHC 1896 (Admin)) and his consequential order dismissing the appellants' claim for judicial review. The claim concerns the way in which the respondent (the "FSA"), as the regulator of the meat industry, carries out official controls in slaughterhouses.

2. Following the slaughter of an animal, an Official Veterinarian ("OV") engaged by the FSA must decide whether to apply a health mark to the carcase, so indicating that there are no grounds for declaring the meat to be unfit for human consumption. A decision by the OV not to apply a health mark means that the carcase must be treated as an animal by-product. The critical question on this appeal is whether the operator of the slaughterhouse has a right to challenge an adverse decision of this kind.

3. The first appellant ("AIMS") acts on behalf of its members who operate some 150 slaughterhouses in this jurisdiction. The second appellant ("Cleveland") is a member of AIMS and operates a slaughterhouse in Stockton-on-Tees.

4. In September 2014, Cleveland purchased a bull at Darlington Farmer's Auction Mart for about £1,400. Shortly afterwards, the OV at Cleveland's premises carried out an ante-mortem inspection of the animal and certified it as fit for slaughter. The animal was duly slaughtered and its carcase, denoted carcase 77, was then subjected to a post-mortem examination by the OV, supported by an Official Auxiliary ("OA"), known in the United Kingdom as a Meat Hygiene Inspector ("MHI"). It was found that the offal of the carcase contained three abscesses and this led the MHI and the OV to suspect that the animal had been suffering from pyaemia, a kind of septicaemia. The OV therefore refused to apply a health mark and declared the carcase unfit for human consumption, so rendering it worthless.

5. Cleveland did not agree with this decision. Its managing director accepted that apparently healthy animals may sometimes prove on post-mortem examination to be diseased. But it was his experience that pyaemic animals tended to be underweight and show signs of being unwell whereas this animal was, in his words, fighting fit. Since he did not accept the OV's decision, he sought to challenge it.

6. The FSA was not prepared to engage in a dispute about the correctness of the OV's decision, however. It took the view that there was no right to appeal against or challenge a decision of an OV as to the fitness of meat for human consumption.

7. This was a matter of considerable concern to AIMS. It recognised that the operator of a slaughterhouse would often accept an adverse decision of an OV but maintained that there were occasions, of which this was one, where the operator had good grounds for contesting the decision, and that it had a right to do so. Cleveland and AIMS therefore began these proceedings for judicial review.

8. The appellants developed their case before the judge in the following way. They argued first, that, in circumstances where a slaughterhouse operator did not agree with a decision of an OV not to apply a health mark, the FSA was required to follow the

statutory procedure in s.9 of the Food Safety Act 1990 ("the 1990 Act") and take the matter before a justice of the peace for a decision as to whether the meat should be condemned.

9. Secondly, if and insofar as there was any doubt about whether the statutory procedure in s.9 of the 1990 Act applied, that ambiguity should be resolved in favour of the slaughterhouse operator having regard to the references to rights of appeal in Regulation (EC) No. 882/2004 of the European Parliament and of the Council ("Regulation 882/2004"), and the rights to peaceful enjoyment of property and possessions set out in Article 1 of Protocol 1 ("A1/P1") of the European Convention on Human Rights ("the ECHR") and Article 17 of the Charter of Fundamental Rights of the European Union ("the EU Charter").

10. Thirdly, if the court were to hold that s.9 of the 1990 Act did not apply, then, at the very least, the FSA was required to afford to the slaughterhouse operator a forum to challenge the decision. This right of challenge was founded in Regulation 882/2004 and the procedural guarantees arising from A1/P1 of the ECHR and Article 17 of the EU Charter.

11. The judge dismissed the claim. He held, in summary, that the function of the OV in deciding whether or not to apply a health mark was governed by directly applicable EU legislation in the form of a series of Regulations of the European Parliament and Council, particularly Regulation (EC) No. 854/2004 ("Regulation 854/2004"). Pursuant to this Regulation, the decision was one exclusively for the professional judgment of the OV. Neither under the applicable EU legislation nor under implementing domestic legislation did any mechanism exist for challenging decisions relating to the application of health marks; nor was it legally required, nor was it permissible, that such a mechanism should be created by the court.

12. The appellants now contend that the judge fell into error. They argue, much as they did before the judge, that, in circumstances where a decision of an OV not to apply a health mark is disputed and voluntary surrender of the meat is not forthcoming, the FSA is required to follow the statutory procedure set out in s.9 of the Food Safety Act 1990; alternatively, that the FSA is required to afford to the slaughterhouse operator a right to challenge the decision.

The legal framework

13. The principal rules governing food hygiene are now embodied in a series of EU Regulations which were adopted by the European Parliament and the Council in 2002 and 2004.

Regulation 178/2002

14. Regulation (EC) No. 178/2002 ("Regulation 178/2002"), lays down certain principles and requirements of food law, establishes the European Food Safety Authority and lays down general procedures in matters of food safety. For the purposes of this appeal, I need only refer to the following.

15. Article 3(1) defines "food law" in such a way as to include both EU and national law governing food safety:

> "'food law' means the laws, regulations and administrative provisions governing food in general, and food safety in particular, whether at Community or national level; it covers any stage of production, processing and distribution of food, and also of feed produced for, or fed to, food-producing animals;"

16. Article 14 prohibits the placing on the market of food that is unsafe and reads so far as relevant:

> "1. Food shall not be placed on the market if it is unsafe.
>
> 2. Food shall be deemed to be unsafe if it is considered to be:
>
> (a) injurious to health;
>
> (b) unfit for human consumption."

17. Three further Regulations, known (with one other Regulation) as the "EU Hygiene Regulations", were adopted in 2004.

Regulation 852/2004

18. The first, Regulation (EC) No. 852/2004, lays down general rules for food business operators in relation to the hygiene of foodstuffs and requires such operators carrying out any stage of production, processing and distribution of food after primary production and associated operations to put into place various safety procedures. It is relevant only by way of background and I need say no more about it.

Regulation 853/2004

19. The second, Regulation (EC) No. 853/2004 ("Regulation 853/2004"), lays down specific hygiene rules for food of animal origin. It adopts the definitions in Regulation 178/2002 and, in Article 4, prohibits food business operators from placing products of animal origin on the market unless they have been prepared and handled exclusively in establishments which meet specified food law requirements.

20. Article 5 is of particular importance. It prohibits food business operators from placing on the market a product of animal origin unless it carries a health mark. It reads so far as relevant:

> "1. Food business operators shall not place on the market a product of animal origin handled in an establishment subject to approval in accordance with Article 4(2) unless it has either:
>
> (a) a health mark applied in accordance with Regulation (EC) No 854/2004;"
>
> or

> (b) when that Regulation does not provide for the application of a health mark, an identification mark applied in accordance with Annex II, Section I of this Regulation."

21. The FSA says and I agree, that it is clear from the express terms of this provision that the application of a health mark (or, in appropriates cases, an identification mark) is an official act that must have been carried out before a product is placed on the market. It is a condition precedent, the fulfilment of which is indispensable to render the placing of the meat on the market as lawful.

Regulation 854/2004

22. The third is Regulation 854/2004, to which I have already referred. This lays down specific rules for the organisation of official controls on products of animal origin intended for human consumption. Article 1 addresses the scope of the Regulation and reads in material part:

> "1. This Regulation lays down specific rules for the organisation of official controls on products of animal origin.
>
> 1a. This Regulation shall apply in addition to Regulation (EC) No 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules."

23. It is to be noted that this Regulation applies in addition to Regulation 882/2004, to which I have also referred and to which I will return. Further, as appears from Article 2, this Regulation again imports the definitions from Regulation 178/2002.

24. Article 4 sets out certain general principles for official controls and specifies that such controls must, inter alia, verify food business operators' compliance with EU food law and involve appropriate audits.

25. Article 5 addresses fresh meat directly and makes provision for the health marking of carcases. It reads in material part:

> "Member States shall ensure that official controls with respect to fresh meat take place in accordance with Annex I.
>
> 1. The official veterinarian shall carry out inspection tasks in slaughterhouses, game handling establishments and cutting plants placing fresh meat on the market in accordance with the general requirements of Section I, Chapter II, of Annex I, and with the specific requirements of Section IV, in particular as regards:
>
> …
>
> (d) post-mortem inspection;
>
> …

> 2. The health marking of carcases of domestic ungulates … as well as half-carcases, quarters and cuts produced by cutting half-carcases into three wholesale cuts, shall be carried out in slaughterhouses … in accordance with Section I, Chapter III, of Annex I. Health marks shall be applied by, or under the responsibility of, the official veterinarian when official controls have not identified any deficiencies that would make the meat unfit for human consumption."

26. Annex 1, Section I sets out the duties of the OV. These include auditing (Chapter I), inspection tasks (Chapter II) and health marking (Chapter III). So far as health marking is concerned, Chapter III says this, so far as relevant:

> "1. The official veterinarian is to supervise health marking and the marks used.
>
> 2. The official veterinarian is to ensure, in particular, that
>
> (a) the health mark is applied only to animals (domestic ungulates, farmed game mammals other than lagomorphs, and large wild game) having undergone ante-mortem and post-mortem inspection in accordance with this Regulation and *when there are no grounds for declaring the meat unfit for human consumption*. However, the health mark may be applied before the results of any examination for trichinosis is available, if the official veterinarian is satisfied that meat from the animal concerned will be placed on the market only if the results are satisfactory;" (Emphasis added)"

27. Section II then sets out details of the action to be taken following controls and these include communication of inspection results and, in Chapter V, further details of how decisions concerning meat are to be taken. It is provided that meat is to be declared unfit for human consumption if, inter alia, it is derived from an animal affected by generalised disease such as pyaemia or, in the opinion of the OV, it may constitute a risk to public or animal health or is for any other reason not suitable for human consumption.

28. Section III addresses the responsibilities and frequency of controls and, in Chapter IV, sets out the details of the qualifications that an OV must have over and above his or her qualification as a veterinarian.

29. It is, I think, notable that nowhere does Regulation 854/2004 refer to a right of appeal against or challenge to a decision of the OV not to apply a health mark.

Regulation 882/2004

30. That brings me to Regulation 882/2004 upon which the appellants particularly rely. This lays down general rules for the performance of official controls to verify compliance with food law.

31. The appellants point first to recital (43) which reads:

> "Operators should have a right to appeal against the decisions taken by the competent authority as a result of the official controls, and be informed of such a right."

32. Turning now to the substantive provisions, Article 1(3) says:

> "This Regulation shall be without prejudice to specific Community provisions concerning official controls."

33. This makes it clear that this Regulation does not derogate from the particular controls established by Regulation 854/2004.

34. Article 2 contains relevant definitions and again imports the definitions in Regulation 178/2002. It also defines, so far as relevant, "competent authority" as the central authority of a Member State competent for the organisation of official controls, that is to say, in this jurisdiction, the FSA; "official control" as any form of control that the competent authority performs for the verification of compliance with food law; and "non-compliance" as non-compliance with food law.

35. This is followed by, in Title II, a series of general provisions relating to official controls; in Title III, provisions relating to reference laboratories; in Title IV, provisions dealing with administrative assistance; in Title V, provisions concerning control plans; and in Title VI, provisions concerning Community activities.

36. The focus of the appellants has been on Title VII, however. This is concerned with enforcement measures. Article 54 reads in material part:

> "1. When the competent authority identifies non-compliance, it shall take action to ensure that the operator remedies the situation. When deciding which action to take, the competent authority shall take account of the nature of the non-compliance and that operator's past record with regard to non-compliance.
>
> 2. Such action shall include, where appropriate, the following measures:
>
> …
>
> (b) the restriction or prohibition of the placing on the market, import or export of feed, food or animals;
>
> (c) monitoring and, if necessary, ordering the recall, withdrawal and/or destruction of feed or food;
>
> …
>
> 3. The competent authority shall provide the operator concerned, or a representative, with:
>
> (a) written notification of its decision concerning the action to be taken in accordance with paragraph 1, together with the reasons for the decision;

> and
>
> (b) information on rights of appeal against such decisions and on the applicable procedure and time limits."

37. As I shall explain, the appellants say that these provisions provide the necessary remedial and enforcement measures missing from Regulation 854/2004 but that their implementation is left to national law. Further, they continue, the EU legislature clearly contemplated that the operator concerned should have a right to appeal against any adverse decision of the competent authority.

The Food Safety and Hygiene (England) Regulations 2013 (SI 2013 No. 2996)

38. That brings me to national law and I must begin with the Food Safety and Hygiene (England) Regulations 2013 (SI 2013 No. 2996) ("the 2013 National Regulations") which provide for the execution and enforcement in England of Regulation 178/2002 and the EU Hygiene Regulations.

39. The 2013 National Regulations define themselves and the EU Hygiene Regulations as "the Hygiene Regulations" and provide that the competent authority for the purposes of the EU Hygiene Regulations is the FSA.

40. There follows provision for various enforcement measures to be available in respect of a food business operator, such as hygiene improvement notices (Regulation 6); and remedial action notices (Regulation 9). A failure to comply with any such notice constitutes an offence.

41. Regulation 19 also creates criminal offences for failure to comply with what are referred to as "specified EU provisions" including Article 14 of Regulation 178/2002 (which specifies that unsafe food must not be placed on the market); and Article 5(1) of Regulation 853/2004 (which specifies that operators must not place on the market a product of animal origin unless it has a health mark applied to it in accordance with Regulation 854/2004).

42. Regulation 22 makes provision for certain rights of appeal. It says that a person aggrieved by, for example, a decision of an authorised officer to serve a hygiene improvement notice or a remedial action notice may appeal to a magistrates' court.

43. Regulation 25 is of particular importance for it applies s.9 of the 1990 Act for the purposes of the 2013 National Regulations, but not, it is to be noted, the EU Hygiene Regulations more generally. It reads:

> "**Application of section 9 of the Food Safety Act 1990**
>
> 25. Section 9 of the [1990] Act (inspection and seizure of suspected food) applies for the purposes of these Regulations with the modification that it shall apply in relation to an authorised officer of an enforcement authority as it applies in relation to an authorised officer of a food authority."

44. Regulation 29 confers a power on an authorised officer to certify that food has not been produced, processed or distributed in compliance with the Hygiene Regulations,

and specifies that such food is to be treated for the purposes of s.9 of the 1990 Act as failing to comply with food safety requirements. It is another important provision and reads:

> "**Food which has not been produced, processed or distributed in accordance with the Hygiene Regulations**
>
> 29.—(1) On an inspection of any food, an authorised officer of an enforcement authority may certify that it has not been produced, processed or distributed in compliance with the Hygiene Regulations.
>
> (2) Where any food is certified as mentioned in paragraph (1) it shall be treated for the purposes of section 9 of the Act as failing to comply with food safety requirements.
>
> (3) Where any food certified as mentioned in paragraph (1) is part of a batch, lot or consignment of food of the same class or description, all the food in the batch, lot or consignment shall, until it is proved that it has been produced, processed or distributed in compliance with the Hygiene Regulations, be treated for the purposes of paragraph (2) as having been so certified."

45. So if, for example, an authorised officer finds meat being sold which does not bear a health mark then under this Regulation and s.9 of the 1990 Act, the meat can be seized and taken before a magistrate for condemnation.

The Food Safety Act 1990

46. Section 9 is the relevant provision in the 1990 Act. It reads so far as material:

> "**9 - Inspection and seizure of suspected food**
>
> (1) An authorised officer of a food authority may at all reasonable times inspect any food intended for human consumption which—
>
> (a) has been sold or is offered or exposed for sale;
>
> (b) is in the possession of, or has been deposited with or consigned to, any person for the purpose of sale or of preparation for sale; or
>
> (c) is otherwise placed on the market within the meaning of Regulation (EC) No 178/2002.
>
> and subsections (3) to (9) below shall apply where, on such an inspection, it appears to the authorised officer that any food fails to comply with food safety requirements.
>
> …

(3) The authorised officer may either—

(a) give notice to the person in charge of the food that, until the notice is withdrawn, the food or any specified portion of it—

(i) is not to be used for human consumption; and

(ii) either is not to be removed or is not to be removed except to some place specified in the notice; or

(b) seize the food and remove it in order to have it dealt with by a justice of the peace;

and any person who knowingly contravenes the requirements of a notice under paragraph (a) above shall be guilty of an offence.

(4) Where the authorised officer exercises the powers conferred by subsection (3)(a) above, he shall, as soon as is reasonably practicable and in any event within 21 days, determine whether or not he is satisfied that the food complies with food safety requirements and—

(a) if he is so satisfied, shall forthwith withdraw the notice;

(b) if he is not so satisfied, shall seize the food and remove it in order to have it dealt with by a justice of the peace.

(5) Where an authorised officer exercises the powers conferred by subsection (3)(b) or (4)(b) above, he shall inform the person in charge of the food of his intention to have it dealt with by a justice of the peace and—

(a) any person who under section 7, regulation 19(1) of the Food Safety and Hygiene (England) Regulations 2013, so far as relating to the second entry in the list of specified EU provisions set out in column 1 of Schedule 2 to those Regulations or regulation 4(b) of the General Food Regulations 2004 might be liable to a prosecution in respect of the food shall, if he attends before the justice of the peace by whom the food falls to be dealt with, be entitled to be heard and to call witnesses; and

(b) that justice of the peace may, but need not, be a member of the court before which any person is charged with an offence under that section in relation to that food.

(6) If it appears to a justice of the peace, on the basis of such evidence as he considers appropriate in the circumstances, that any food falling to be dealt with by him under this section fails to comply with food safety requirements, he shall condemn the food and order—

> (a) the food to be destroyed or to be so disposed of as to prevent it from being used for human consumption; and
>
> (b) any expenses reasonably incurred in connection with the destruction or disposal to be defrayed by the owner of the food.
>
> (7) If a notice under subsection (3)(a) above is withdrawn, or the justice of the peace by whom any food falls to be dealt with under this section refuses to condemn it, the food authority shall compensate the owner of the food for any depreciation in its value resulting from the action taken by the authorised officer.
>
> (8) Any disputed question as to the right to or the amount of any compensation payable under subsection (7) above shall be determined by arbitration …"

The judgment of Simon J

47. I summarised the three ways that the appellants put their case at trial at the outset of this judgment. The judge rejected each of them. His essential reasoning ran as follows.

48. As for the first ground, the judge thought it clear that the EU Regulations did not provide for a system of appeal against a decision of an OV as to whether to apply a health mark and so whether the meat was fit for human consumption. The OV was required to make what might be described as a 'weighted double negative' decision, namely whether there were no grounds for declaring the meat unfit. In reaching such a decision, the OV exercised a judgment which was both expert and subjective, and a right of appeal, in this case to a justice of the peace, would be entirely inconsistent with the EU legislative scheme.

49. Secondly, the 2013 National Regulations did not expressly modify s.9 of the 1990 Act so as to enable a justice of the peace to decide whether there were no grounds for declaring the meat unfit and that it should have a health mark applied to it. As the judge put it at [51]:

> "51. … to have this result the 2013 Regulations would have to have had a provision making substantial modifications to the operation of section 9 of the 1990 Act, which applies to food intended for human consumption which has been sold, offered for sale, or is in possession, has been deposited or consigned for the purpose of or in preparation for sale or is otherwise placed on the market. A carcase at a slaughterhouse which lacks a health mark fits into none of these categories. Furthermore it cannot properly be described as having been placed on the market, since a carcase cannot be placed on the market without a health mark, see article 5 of Regulation 853/2004. If it were placed on the market without a health mark the person who was responsible would be guilty of a

> criminal offence and the meat could be condemned under section 9. A carcase at the slaughterhouse, which the OV has refused to mark and which must be disposed of as animal by-product, cannot be treated as having been 'placed on the market' and is outside of the scope of a provision which is designed to deal with the inspection and seizure of suspected food."

50. As for the second ground, the judge accepted that, if the EU Regulations made it clear, or even indicated, that Member States should enact rights of appeal against an OV's decision refusing to apply a health mark, then the court would be bound to do its best to interpret the relevant domestic legislation so as to give effect to that intention or indication. However, that was not the position here. The EU Regulations did no such thing. And even if they had, it was doubtful that the Court's interpretative obligation could involve a manipulation of s.9 of the 1990 Act sufficient to give effect to it.

51. As for the third ground, the judge accepted that if there was a right of appeal, it must be effective but that the European Court of Human Rights (the "ECtHR") had not interpreted the ECHR as giving rise to a right of appeal from an administrative act. The existence of any such right was a matter of domestic law. The FSA had not adopted an arbitrary practice of denying slaughterhouse operators a right of appeal. It had simply applied the law which, for understandable reasons, did not afford a right of appeal. Further, the procedure for applying or refusing to apply a health mark was appropriate for securing public safety and instilling confidence in meat production, and it struck an appropriate balance between, on the one hand, the interests of slaughterhouse operators and other businesses supplying meat for food and, on the other hand, the general interests of those members of the public who consume meat products.

The appeal

52. Upon this appeal, the appellants have been represented by Mr Stephen Hockman QC and Mr David Hercock. The appellants' primary case is that, in circumstances where an OV's decision not to apply a health mark to a carcase is disputed and the slaughterhouse operator declines to surrender the carcase, the FSA is required to follow the statutory procedure set out in s.9 of the 1990 Act and take the issue before a justice of the peace. The FSA, represented by Sir Alan Dashwood QC and Mr Adam Heppinstall, responds that the decision whether or not to apply a health mark is one exclusively for the professional judgment of the OV, and that the judge was right so to hold.

53. Mr Hockman has developed the appellants' primary case as follows. He begins with the history of the domestic meat inspection regime. In that connection he has taken us to first, the Food and Drugs Act 1938 which, in s.10, conferred a power on an authorised officer of a local authority to examine any food intended for human consumption and, if it appeared to him to be unfit for human consumption, to seize it and remove it in order to have it dealt with by a justice of the peace. The officer seizing the food was required to inform the person in whose possession it was found of his intention, and that person was then entitled to attend before the justice, to be heard and to call witnesses. If it appeared to the justice that any food brought before

him was unfit for human consumption, he was required to condemn it and order it to be destroyed.

54. This statutory scheme was then carried forward, with modifications, via s.9 of the Food and Drugs Act 1955 and s.9 of the Food Act 1984 into s.9 of the 1990 Act.

55. The existence of a domestic system for health marking can be traced back even earlier. The Public Health (Meat) Regulations of 1924 conferred on the Minister of Health a power to authorise a local authority to apply a health mark to the carcase of an animal slaughtered for human consumption provided that an inspector engaged by the local authority was satisfied that the carcase was free from disease and "fit for the food of man".

56. This general scheme was carried forward via the Meat Inspection Regulations of 1963 and the Meat Inspection Regulations of 1987 into the Fresh Meat (Hygiene and Inspection) Regulations 1992 ("the 1992 Regulations"). These were the first Regulations to reflect EU principles and policy and by this time the 1990 Act had, of course, come into force.

57. Regulation 10 of the 1992 Regulations conferred on an OV, to whom it appeared that, in relation to particular premises, the requirements of the Regulations were not met, a power to issue a notice in writing to the occupier prohibiting the use of any equipment or any part of the premises specified in the notice. It also conferred on any person aggrieved by such a decision a right of appeal to a magistrates' court.

58. Regulation 11 addressed health marking. It required a local authority to carry out post-mortem health inspections in every slaughterhouse and, where fresh meat had been passed as fit for human consumption, to mark that meat with a health mark. However, it did not confer a right of appeal upon any person aggrieved by such an action.

59. The general scheme of the 1992 Regulations was then carried forward, via the Fresh Meat (Hygiene and Inspection) Regulations 1995, the Food Hygiene (England) Regulations 2005 and the Food Hygiene (England) Regulations 2006 into the 2013 National Regulations. In the meantime, the General Food Regulations of 2004 amended s.9 of the 1990 Act by adding paragraph (c) to subsection (1).

60. Turning next to the current legal position, Mr Hockman submits that the domestic legislative scheme, including the requirement in s.9 of the 1990 Act for a process before a justice of the peace where meat has failed an inspection, has continued to sit alongside the EU Hygiene Regulations and Regulation 882/2004. Further, he continues, this provides important protection to an allegedly non-compliant operator and EU law has not cut it down.

61. Mr Hockman has developed this general submission as follows. He points first to the definitions of "official control" and "non-compliance" in Article 2 of Regulation 882/2004 and the wide definition of "food law" in Regulation 178/2002. He then turns to Regulation 854/2004 and submits that this lays down specific rules for the organisation of official controls on products of animal origin intended for human consumption. As we have seen, it makes provision for the inspection of a slaughterhouses and a decision concerning meat, including a decision that the meat is

unfit for human consumption. But it confers no power of enforcement on the OV or, indeed, any other authority.

62. Focusing again upon Regulation 882/2004, Mr Hockman points to Article 54 which provides that when the competent authority identifies non-compliance, it must take action to ensure the operator remedies the situation. Further, such action may include, under Article 54(2)(b) and (c), a prohibition upon the marketing of the meat in issue and, if necessary, a requirement that it be destroyed. He also submits that Article 54 clearly envisages that the precise mechanisms by which it is given effect are a matter for domestic law.

63. In this connection, Mr Hockman places particular reliance upon Recital (43) and Article 54(3). He submits these provisions mandate written notification of any decision, together with reasons, and also a right of appeal. To interpret them as giving the competent authority an option whether to grant a right of appeal would be plainly contrary to the meaning and intention of the Regulation. Further, he continues, the right to challenge a decision exists in the s.9 process and has so existed for many years. It is, he says, for this reason that, following the coming into force of the 2004 EU Regulations, the 2005, 2006 and 2013 domestic Regulations engaged the application of s.9 as an enforcement or remedial mechanism.

64. What is more, argues Mr Hockman, s.9 of the 1990 Act has never been narrowed. To the contrary, it was amended by the General Food Regulations 2004 (by adding subsection (c)) to ensure conformity with the new EU Regulations and to expand its scope to include any placing on the market within the meaning of Regulation 178/2002. Had it been intended that s.9 should apply only in circumstances where food has been placed on the market, subsections (a) and (b) (dealing with, inter alia, preparation for sale) could simply have been replaced by subsection (c). Accordingly, he continues, it is clear that the application of s.9 is not confined to meat which has been placed upon the market and the judge fell into error in finding that it was.

65. Drawing the threads together, Mr Hockman turns to the 2013 National Regulations. It would, he says, be absurd to interpret Regulation 25 as meaning that s.9 does not apply for the purposes of, inter alia, the official controls dealt with in 854/2004 for this would be to deprive Regulation 25 of practical effect. Further, under s.9, the authorised officer, upon inspecting the meat, will consider whether it fails to comply with food safety requirements and this is the very same test which the OV has to apply under Regulation 854/2004. The s.9 procedure therefore applies to a decision by an OV as to whether to apply a health mark to a carcase.

66. In my judgment, Mr Hockman has chosen the wrong starting point. The analysis must begin, not with the legislative history of s.9 of the 1990 Act or the 2013 National Regulations, but with the EU Regulations which now embody the principal rules governing food hygiene.

67. Regulation 854/2004 makes clear that official controls on products of animal origin are important for protecting the public health, that EU legislation on food safety should have a sound scientific basis and that, in view of their specific expertise, it is appropriate for OVs to carry out, inter alia, inspections of slaughterhouses. It is against this background that Article 1 says that the Regulation lays down specific rules for the organisation of official controls on products of animal origin and, by

Article 1a, that it is to apply in addition to Regulation 882/2004 on the official controls performed to ensure the verification of compliance with food law. In so providing, the EU legislature has made it clear that Regulation 854/2004 is to apply in what Sir Alan Dashwood describes as its particularity.

68. Article 5 of Regulation 854/2004 deals expressly with the health marking of carcasses and provides that these are to be applied by, or under the responsibility of, the OV when official controls have not identified any deficiencies in the meat. Further details are set out in Chapter III of Annex 1. The OV must carry out the post-mortem inspection and ensure a health mark is only applied when there are no grounds for declaring the meat unfit for human consumption. The judge was right to describe this as a weighted double negative decision for if the OV is left with any doubt about the fitness of the meat in question then a health mark cannot be applied. He was also right to observe that the issue for the OV is framed in the way that it is because the Regulation is designed to give assurances of a high level of protection of human health and consumers' interest in relation to food. What is more, the Regulation lays down details of the qualifications that an OV must have wherever in the EU the OV may be based and wherever the inspection may occur. In this way the legislature has ensured that the official to whom the decision is entrusted is fully and properly qualified to make it.

69. In my judgment, a provision in domestic law that, in the event of any dispute, the operator has the right to require the issue to be taken before a justice of the peace for determination would be inconsistent with this EU legislative scheme. The Regulation contains no suggestion of any such right of appeal or reference and it would take the issue out of the hands of the expert OV and place it before a justice of the peace who is unlikely to have any expertise in this area at all.

70. Turning now to Regulation 882/2004, it must also be recalled that, by Article 1(3), it is said to be without prejudice to specific Community provisions concerning official controls, so including Regulation 854/2004. As for rights of appeal, I have some doubt as to whether Article 54, read in light of recital (43), confers any general right of appeal against a decision of the competent authority concerning non-compliance. It says only that the competent authority must provide the operator with information on its rights of appeal, whatever they may be. However and be that as it may, I am satisfied that Article 54 does not confer a right of appeal against a decision of an OV not to apply a health mark. In that connection, I recognise that health marking is part of the EU system of official controls on food production. I accept too the wide definitions of 'food law' and 'non-compliance'. However, a decision not to apply a health mark does not involve and is not based upon any finding of non-compliance by the operator with any food law and there is nothing for the operator to remedy. It is founded instead upon the assessment by the OV of whether there are, in the words of Chapter III of Section 1 of Annex 1 of Regulation 854/2004, "no grounds for declaring the meat unfit for human consumption". This assessment is one which the OV is required to carry out for each and every carcase. To my mind it is striking that Regulation 854/2004 does not confer any right of appeal against or challenge to such an assessment and, in my judgment, no such right is conferred by Article 54 of Regulation 882/2004.

71. Does s.9 of the 1990 Act nevertheless apply to a decision by an OV not to apply a health mark? In my judgment, it does not. I have come to that conclusion for the

following reasons. First and as I have explained, the 2013 National Regulations provide for the execution and enforcement in England of Regulation 178/2002 and the EU Hygiene Regulations. Regulation 25 of the 2013 National Regulations applies s.9 of the 1990 Act for the purposes of these Regulations with only one modification, namely that it applies in relation to an authorised officer of an enforcement authority as it applies in relation to an authorised officer of a food authority. Then, under Regulation 29, such an authorised officer of an enforcement authority may, on inspection of food, certify that it has not been produced, processed or distributed in accordance with the Hygiene Regulations and, if the food is so certified, it is to be treated for the purposes of s.9 of the 1990 Act as failing to comply with food safety requirements. So if a slaughterhouse were found to be selling meat which did not bear a safety mark, the meat could be seized and taken before a justice of the peace for condemnation. But in my judgment this provides no foundation for an argument that the 2013 National Regulations provide a right of appeal against a decision of an OV not to apply a safety mark when the EU Hygiene Regulations and Regulations 178/2002 and 882/2004 do not. As Sir Alan Dashwood put it, the 2013 National Regulations do not say that s.9 applies generally where it is needed to make up some perceived shortfall in the EU regulatory scheme.

72. What is more, were it otherwise, the 2013 National Regulations would need to make substantial modifications to s.9 of the 1990 Act so as to enable a justice of the peace to decide the relevant issue. Section 9 confers on an authorised officer a power to inspect food intended for human consumption and which has been sold or is offered or exposed for sale; is in possession of, or has been deposited with or consigned to, any person for the purpose of sale or of preparation for sale; or is otherwise placed on the market. Now it is true to say that this extends beyond food which has been sold or is being offered or exposed for sale. For example, it encompasses food which is in possession of a person for the purposes of sale. But in my judgment it does not extend to a carcase before it has been inspected by an OV to determine whether there are no grounds for declaring the meat unfit for human consumption. At this point in time the carcase cannot lawfully be placed on the market, nor can it lawfully be held for the purposes of sale or preparation for sale.

73. Secondly, the s.9 procedure is very different from that for health marking under Regulation 854/2004. Under s.9, an authorised officer, to whom it appears that meat fails to satisfy food safety requirements, must seize the meat and take it before a justice of the peace for condemnation. By contrast, under Regulation 854/2004, it is the OV who must decide whether there are no grounds for declaring the meat unfit for human consumption. If he is not so satisfied, he cannot apply the health mark and the meat must be declared unfit for human consumption. Section 9 would need substantial amendment to accommodate this procedure.

74. Thirdly and as the judge observed, unless the operator of the slaughterhouse is charged with committing an offence created by Regulation 19 and Schedule 2 of the 2013 National Regulations, it has no right to be heard or to call evidence under s.9(5)(a). The relevant offences are concerned with meat that has been placed on the market, so reinforcing the conclusion that s.9 is concerned with food that has been placed on the market or is being held or prepared for sale.

75. Finally, s.9(7) confers upon the owner of the food a right to compensation if the justice of the peace refuses to condemn it. No such right is conferred by the EU

Hygiene Regulations, however. The judge considered and I agree that a right to compensation would probably require primary EU legislation and the desirability of conferring it would need to be balanced against the important public interest in vesting the OV with a discretion to reject meat which represents a possible threat to human health.

76. I should add that I do not accept Mr Hockman's submission that this conclusion deprives Regulation 25 of the 2013 National Regulations of practical effect. It means the procedure of s.9 can be applied to meat which has been placed on the market notwithstanding the lack of a safety mark.

77. It only remains to deal with the legislative history with which Mr Hockman began. I accept that there has been in this country a scheme for the health marking of carcases in slaughterhouses since, at the latest, 1924. The earliest such scheme to which we have been referred was embodied in the Public Health (Meat) Regulations of 1924. I accept too that there has been a system for the inspection of food intended for human consumption since, at the latest, 1938. The earliest such system to which we have been referred was embodied in s.10 of the Food and Drugs Act 1938 and, as we have seen, it conferred on local authorities, by an authorised officer, a power to seize food which appeared to be unfit for human consumption and take it before a justice of the peace for condemnation. However, as Sir Alan Dashwood has fairly noted, the evidence of any close connection between the two systems is thin. Mr Hockman referred us to the decision of the Divisional Court in *R v Cornwall Quarter Sessions ex parte Kerley*, [1956] 1 WLR 906 in which it was held that there was no right of appeal to the appeals committee of the quarter sessions for the county of Cornwall against a decision of the justices of the peace condemning a carcase of an animal as unsound and unfit for human consumption under s.10 of the 1938 Act. But there is no suggestion in the report that a safety mark had been applied to the carcase or that the decision of the justices was founded in any way upon the Public Health (Meat) Regulations of 1924.

78. Mr Hockman has also referred us to the 2007 version of the Manual of Official Controls issued by the FSA which stated that, in circumstances where the OV was not satisfied that meat was fit for human consumption and had decided not to apply a health mark, voluntary surrender of the meat should be sought. However, it continued, "where voluntary surrender is not forthcoming, the OV must seize the food under the provisions of s.9(3)(b) of the Food Safety Act 1990 (as amended) and take it before a Justice of the Peace or a Sheriff to be condemned". Mr Hockman submits this shows a recognition and acceptance by the FSA of a right to challenge before a justice of the peace a decision of an OV not to apply a health mark.

79. I am not persuaded by this submission for three reasons. First, the manual was at some point amended. We were shown a later version in which this passage had been re-written. Secondly, the manual did not say and it has not been shown that the FSA has ever accepted that a justice of the peace has jurisdiction to reconsider a decision by an OV not to apply a health mark. Thirdly, the issue is in any event now one for this court to decide.

80. I am therefore wholly unpersuaded that it has ever been a feature of domestic legislation that the operator of a slaughterhouse has ever had a right to challenge the

refusal by the responsible officer to apply a health mark to a carcase. In my view the legislative history does not assist the appellants.

81. In my judgment, the appellants' primary case therefore fails.

82. The appellants' secondary case is that the approach taken by the FSA amounts to an unlawful and unjustified interference with the property rights of Cleveland and the other members of AIMS.

83. Mr Hockman has developed this case as follows. He submits first, the FSA was required to follow the statutory procedure in s.9 of the 1990 Act. In failing to do so, the FSA has acted in a way which has circumvented the rights and safeguards embodied in that provision. Secondly, the applicability of s.9 to the circumstances under consideration in this appeal is supported both by Article 54 and recital (43) of Regulation 882/2004 and by the rights to the peaceful enjoyment of property and possessions embodied in A1/P1 of the ECHR and Article 17 of the EU Charter. Alternatively, the FSA is obliged to afford to slaughterhouse operators a forum to challenge a decision by an OV not to apply a health mark. This right of challenge arises from Regulation 882/2004 but also from the procedural guarantees that arise from A1/P1 and Article 17.

84. Mr Hockman also submits that the carcase in this case was a business asset of financial value and amounted to property or a possession within the meaning of A1/P1 and Article 17; and that the decision by the FSA that Cleveland must dispose of the carcase as an animal by-product amounted to an interference with its property rights under those provisions. He continues that the critical question, therefore, is whether that interference was justified. To be justified, the process leading to the interference has to be fair, afford due respect to the rights guaranteed by those provisions and also provide a reasonable opportunity of effective challenge. As it was, however, the failure by the FSA to afford to Cleveland any right of challenge to the measures it had deployed was unfair and gave rise to an unjustified interference with its property and possession.

85. I can deal with this secondary case quite shortly for, in my judgment, the judge's conclusions in relation to it are entirely correct. First and so far as the EU Hygiene Regulations and Regulation 882/2004 are concerned, I am satisfied, for the reasons I have given, that they do not provide for a right of appeal or challenge to the decision of an OV not to apply a health mark. There is therefore no incompatibility with EU law for this court to address. As for A1/P1 of the ECHR and Article 17 of the EU Charter, the judge was right to find that, if there is a right of appeal, it must be effective. However, the ECtHR has not interpreted the ECHR as giving rise to a right of appeal from an administrative act, such as a decision by an OV not to apply a health mark. Further and as the judge noted, although it was true to say that the lack of an appeal assigned a financial risk and potential burden on slaughterhouses, there is here an important competing interest to take into account, namely the protection of public safety.

86. In my judgment, the appellants' secondary case also fails.

Conclusion

87. For all of the reasons I have given, I would dismiss this appeal. I would add that the issues of EU law arising in this appeal are, in my view, clear. In my judgment, it is not necessary to refer any question to the CJEU for a preliminary ruling.

Lady Justice Rafferty:

88. I agree.

Lord Justice Jackson:

89. I also agree.