HENDERSON CHAMBERS

Alerter

EU Law

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R (Association of Independent Meat Suppliers, Cleveland Meat Company Ltd), v Food Standards Agency: the reference to CJEU C-579/19 and the final Supreme Court judgment

By Beatrice Graham

Henderson Chambers' Professor Sir Alan Dashwood QC, Adam Heppinstall QC and Jonathan Lewis were instructed for the Food Standards Agency in this reference to the CJEU and subsequent final judgment from the Supreme Court.

INTRODUCTION

1. In one of its last rulings on a pre-Brexit reference from an English Court, the CJEU has clarified the law on the role entrusted to official veterinarians ("**OVs**") under the EU Food Hygiene Regulations, when deciding on (i) the fitness for human consumption of meat from a recently slaughtered carcass, and (ii) the nature of the legal remedy available to food businesses for the review of such decisions.

2. Though relating to a somewhat specialised field, the case has wider implications in post-Brexit administrative law, where discretionary powers are conferred on a public official by virtue of their special training and expertise.

3. The case has now returned to the Supreme Court, where in the light of the ruling given by the CJEU, the appeal was dismissed.

Facts

4. In 2014, Cleveland Meat Company Ltd ("**Cleveland**") purchased a live bull. The OV stationed at the company's slaughterhouse passed it as 'fit for slaughter'. On post-mortem inspection of the offal by a meat hygiene inspector, 3 abscesses were identified in the offal. The same day, the OV inspected the carcass and, after discussion with the meat hygiene inspector, declared the meat unfit for human consumption. The reason cited was suspected 'pyaemia', a form of blood poisoning.

5. As a result, no hygiene mark was affixed to that carcass to certify that it was fit for human consumption. This meant Cleveland was prohibited from selling the carcass.

6. 12 days later, the OV, acting on behalf of the FSA, served notice on Cleveland requiring it to dispose of the carcass at issue as animal by-product.[1] Failure to comply with the notice could have resulted in sanctions against Cleveland, but the notice also made clear that Cleveland had a remedy against the decision of the OV by way of judicial review and that such an action had to be brought within three months.

[1] In accordance with Regulation 25(2)(a) of the Animal By-Products (Enforcement) (England) Regulations 2013 and Regulation (EC) No 1069/2009 of the European Parliament and of the Council of 21 October 2009 laying down health rules as regards animal by-products and derived products not intended for human consumption.

Procedural history

7. Cleveland and the Association of Independent Meat Suppliers ("**the Association**") made an application for judicial review before the High Court, QBD. The principal challenge was to the FSA's assertion that it was not required to use the procedure set out in section 9 of the Food Safety Act 1990 and to claim, in the alternative, that it was incumbent on the United Kingdom, under its human rights obligations, to provide some means of challenging an official veterinarian's decision as to whether meat is fit for human consumption.

8. The section 9 procedure is, broadly, as follows: an authorised officer of a supervisory authority (here the FSA), who suspects that food intended for human consumption fails to comply with food safety requirements, can seize the food in order to have it dealt with by a local justice of the peace.[2] The latter, having heard evidence they consider appropriate, may condemn the food and order it to be destroyed, or refuse to condemn it, in which case the supervisory authority is required to compensate the owner for any depreciation in the value of the food.

9. The application by Cleveland and the Association was dismissed before the Administrative Court and, on appeal, before the Court of Appeal. The appellants brought a further appeal before the Supreme Court, which decided to make a reference to the CJEU for a preliminary ruling under Article 267 of the Treaty on the functioning of the European Union (TFEU).

[2] The Justice of the Peace may be a lay magistrate or a legally qualified district judge is readily accessible at all hours.

Reference to CJEU

10. The judgment on referral identified three issues arising in the case:

    a. The first was an issue of domestic law:

       Is the procedure contained in section 9 of the 1990 Act available in the present circumstances and does it have to be used by the OV or the FSA where the carcass owner – here Cleveland, the slaughterhouse operator – refuses to surrender the carcass voluntarily, so as to afford that operator a means of challenging decisions of the official veterinarian with which it disagrees?

       For the purposes of the referral, the CJEU was asked to assume that, on this issue, the appellants' interpretation of section 9 of the 1990 Act was correct and that a justice of the peace has power to give a ruling which may result in an award of compensation, if he considers that a health mark ought to have been applied to a carcass.

    b. The second issue identified by the Supreme Court became the subject of the first question referred to the CJEU:

       Do Regulations (EC) Nos 854/2004 and 882/2004 preclude a procedure whereby, pursuant to section 9 of the 1990 Act, a justice of the peace decides on the merits of the case and on the basis of the evidence of experts called by each side whether a carcass fails to comply with food safety requirements?

    c. The third issue identified by the Supreme Court became the subject of the second question referred to the CJEU:

       Does Regulation (EC) No 882/2004 mandate a right of appeal in relation to a decision of an OV under article 5.2 of Regulation (EC) No 854/2004

that the meat of a carcass was unfit for human consumption and, if it does, what approach should be applied in reviewing the merits of the decision taken by the OV on an appeal in such a case?

The First Question referred

11. There were two features of the section 9 procedure that the CJEU considered fatal to its compatibility with the applicable EU Regulations.

12. In the first place, the role entrusted to the OV, "*as an administrative authority and a duly qualified expert who specialises in and is ultimately responsible for food safety matters*" could not be reconciled with national legislation laying down a procedure like that of section 9, because this would lead to "*the replacement of the official veterinarian, as the person ultimately responsible in matters of food safety, by a court ruling on the merits of the case*" (paragraphs 48 and 49).

13. Secondly, while Member States were required to provide a remedy against a decision by an OV refusing a health mark, the section 9 procedure was unsuitable for this purpose. The defects of the procedure as a remedy for challenging the OV's decision were, more particularly: that it "*does not allow the operator concerned whose rights and obligations are directly affected by a decision of the official veterinarian to bring an action on its own initiative before the court having jurisdiction* (paragraph 63); that "*the court is not in a position to impose on the OV its own decision concerning the factual assessments on which the decision of the [OV] at issue is based*" (paragraph 64), nor is it "*authorised to annul the decision of the [OV]*" (paragraph 85); and that, consequently, the section 9 procedure "*seeks neither the annulment of the decision of the official veterinarian declaring the carcass at issue unfit for human consumption nor the lifting of the effects of that decision and, therefore does not result in a judicial*

decision which has legally binding effects on the administrative authority concerned" (paragraph 66).

14. The CJEU, therefore, answered the first question in these terms:

"*Regulation (EC) No 854/2004… and Regulation No 882/2004… must be interpreted as precluding national legislation under which , where an official veterinarian refuses to affix a health mark to a carcass and the owner of the carcass does not concur with that decision, the official veterinarian must bring the latter before a court so that the latter may give a decision on the merits and on the basis of the evidence of experts called by each side whether a carcass fails to comply with food safety requirements, without being able formally to annul decisions of the [OV] or order the lifting of the effects of such decisions*".

The Second Question referred

15. In responding to the second question, the CJEU took into account a number of factors including the risks involved in food safety, the complexity and specialisation of the field of food safety, the technical and qualified nature of the inspection and decision of the OV, the fact that the right to property, though guaranteed, is not an absolute right and the fact that consumer protection can legitimately have negative economic consequences. It concluded that a right to challenge the merits of the OV's decision was not required and that the limited nature of the English remedy of judicial review was appropriate.

16. The CJEU, therefore, answered the second question in these terms:

"*In the light of all the foregoing considerations, the answer to the second question is that Article 54 of Regulation No 882/2004, read in conjunction with recital 43 thereof and in the light of Article 47 of the Charter, must be interpreted as not*

precluding national legislation according to which the decision made by the official veterinarian, in accordance with Article 5(2) of Regulation No 854/2004, as amended by Regulation No 882/2004, not to affix a health mark to a carcass may be subject to limited judicial review only, in the context of which the court seised may annul that decision on any ground rendering it unlawful, including where that veterinarian has acted for a purpose other than that for which his or her powers have been conferred on him or her, fails to apply the correct legal test or reaches a decision that is irrational or has no sufficient evidential basis."

The Supreme Court

17. Lady Hale and Lord Sales handed down a judgment on 8 December 2021 with which the rest of the court agreed. They concluded, having summarised the position of the CJEU:

"*In the light of the answers given by the CJEU, it is clear that the section 9 procedure is not compatible with the requirements of Regulations (EC) Nos 854/2004 and 882/2004, whereas judicial review of a decision of an OV such as that at issue in these proceedings is compatible with those requirements. It follows that there is no legal foundation for CMC's claim that the FSA acted unlawfully in declining to proceed under the section 9 procedure in relation to carcass 77; nor is there any basis for the alternative complaint that the United Kingdom has failed to provide an appropriate means to challenge decisions taken by an OV. Accordingly, this appeal should be dismissed.*"

Conclusion

18. The case is an important authority on the nature of public powers exercisable on the basis of specific training and expertise and the appropriateness of the English remedy of judicial review in providing

procedural safeguards where there is state interference with private property. A right to challenge the merits of a decision to interfere with private property rights is not always necessary, particularly where the state decision maker is an expert. Insofar as EU law is retained in the UK, in this area, or where article 1, protocol 1 issues arise in other areas of English law, this case will provide an important guide as to how procedural safeguards are to be provided in order to discharge private property based human rights, especially in the public health sectors.

Beatrice Graham (2016)

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