Trinity Term
[2019] UKSC 36
On appeal from: [2017] EWCA Civ 431

JUDGMENT

R (on the application of Association of Independent Meat Suppliers and another) (Appellants) *v* Food Standards Agency (Respondent)

before

Lady Hale, President
Lord Hodge
Lady Black
Lord Lloyd-Jones
Lord Sales

JUDGMENT GIVEN ON

24 July 2019

Heard on 5 March 2019

Appellants	*Respondent*
Stephen Hockman QC David Hercock (Instructed by SAS Daniels LLP (Stockport))	Sir Alan Dashwood QC Adam Heppinstall Jonathan Lewis (Instructed by Foods Standards Agency)

LADY HALE AND LORD SALES: (with whom Lord Hodge, Lady Black and Lord Lloyd-Jones agree)

The Facts

1. On 11 September 2014, the Cleveland Meat Company Ltd (CMC) bought a live bull at the Darlington Farmers' Auction Mart for £1,361.20. The bull was passed fit for slaughter by the Official Veterinarian (OV) stationed at CMC's slaughterhouse. It was assigned a kill number of 77 and slaughtered. A post mortem inspection of both carcass and offal was carried out by a Meat Hygiene Inspector (MHI), who identified three abscesses in the offal. The offal was not retained. Later that day, the OV inspected the carcass and, after discussion with the MHI, declared the meat unfit for human consumption, because pyaemia was suspected. Accordingly, the carcass did not acquire a "health mark" certifying that it was fit for human consumption. The consequence of this was that it would have been a criminal offence for CMC to seek to sell the carcass (under regulation 19 of the Food Safety and Hygiene (England) Regulations 2013 ("the Food Hygiene Regulations")).

2. CMC took the advice of another veterinary surgeon and challenged the OV's opinion. It claimed that, in the event of a dispute and its refusal to surrender the carcass voluntarily, the OV would have to seize the carcass under section 9 of the Food Safety Act 1990 ("the 1990 Act") and take it before a Justice of the Peace to determine whether or not it ought to be condemned. The Food Standards Agency (FSA) replied that there was no need for it to use such a procedure. Having been declared unfit for human consumption by the OV, the carcass should be disposed of as an animal by-product.

3. On 23 September 2014, the OV, acting for the FSA, served on CMC a notice for the disposal of the carcass as an animal by-product (the disposal notice) (under regulation 25(2)(a) of the Animal By-Products (Enforcement) (England) Regulations 2013 ("the Animal By-Products Regulations") and Regulation (EC) No 1069/2009). The disposal notice informed CMC that failure to comply with the notice could result in the Authorised Person under the Regulations arranging for compliance with it at CMC's expense and that it was an offence to obstruct an Authorised Person in carrying out the requirements of the notice. The disposal notice also stated:

> "You may have a right of appeal against my decision by way of judicial review. An application for such an appeal should be made promptly and, in any event, generally within three

> months from the date when the ground for the application first arose. If you wish to appeal you are advised to consult a solicitor immediately."

4. These judicial review proceedings are brought by the Association of Independent Meat Suppliers, a trade association acting on behalf of some 150 slaughterhouses, and CMC (the claimant appellants) to challenge the FSA's assertion that it was unnecessary for it to use the procedure set out in section 9 of the 1990 Act and to claim in the alternative that it is incumbent on the United Kingdom to provide some means for challenging the decisions of an OV in such cases. They failed in the High Court and Court of Appeal and now appeal to this Court. There are three main issues in the proceedings.

The issues in the case

5. The first revolves around an issue of domestic law. Is the procedure contained in section 9 of the 1990 Act available in these circumstances and does it have to be used by the OV or the FSA, if the carcass owner refuses to surrender the carcass voluntarily, so as to afford the carcass owner a means of challenging decisions of the OV with which it disagrees? The Food Hygiene Regulations provide that section 9 is to apply for the purpose of those Regulations. Under section 9, if it appears to an authorised officer of an enforcement authority such as the FSA that food intended for human consumption "fails to comply with food safety requirements", he may seize the food and remove it in order to have it dealt with by a Justice of the Peace (who may be either a lay magistrate or a legally qualified District Judge, but who will be local to the slaughterhouse and readily accessible at all hours). If it appears to the Justice of the Peace, on the basis of such evidence as he considers appropriate, that the food "fails to comply with food safety requirements", he shall condemn it and order it to be destroyed at the owner's expense. If he refuses to condemn it, the relevant enforcement authority must compensate the owner for any depreciation in its value resulting from the officer's action. Under section 8(2), food fails to comply with food safety requirements if it is unsafe within the meaning of article 14 of Regulation (EC) No 178/2002: ie injurious to health or unfit for human consumption (see para 12 below).

6. The procedure in section 9 of the 1990 Act is not framed in terms of an appeal from the OV's decision. It sets out a procedure whereby an officer of a food authority or an enforcement authority can refer the question of destruction of a carcass to a Justice of the Peace for decision. Normally, we are told, the owner accepts the OV's decision that an animal is not fit for human consumption and voluntarily surrenders it. But if the owner does not, the claimant appellants say that this procedure provides both (i) a way in which the OV or the FSA can take enforcement action consequent upon the OV's decision and (ii) a means whereby the owner can subject that decision

to judicial scrutiny and ask the Justice of the Peace to decide whether or not the carcass did in fact comply with the food safety requirements. They accept that the Justice of the Peace cannot order the OV to apply a health mark. However, they argue that the OV can be expected to respect the decision and apply a health mark accordingly. Further, compensation may be payable under the 1990 Act if the Justice of the Peace refuses to condemn the carcass. In the claimant appellants' view, this procedure has been part of the United Kingdom's food safety regime since the 19th century, and continues to operate under the European Union's food safety regime contained in the suite of Regulations coming into force in 2006.

7. The FSA agrees that the procedure under section 9 of the 1990 Act would be available to it as one possible means of enforcement if the operator of a slaughterhouse attempted to introduce into the food chain an animal carcass which had not been given a health mark by an OV. However, it does not accept that this procedure would be suitable, still less obligatory, to resolve a dispute as to whether the carcass is or is not fit for human consumption. A Justice of the Peace has no power to order an OV to apply a health mark and, moreover, the FSA says that he would have no power under section 9 to do anything other than condemn for disposal a carcass bearing no such mark.

8. Although not raised by the FSA in argument, the Court observes that it would be open to the operator of a slaughterhouse such as CMS to bring judicial review proceedings in the High Court to challenge the OV's decision that the meat of a carcass was unfit for human consumption, and thus to deny a health mark, or to quash a disposal notice. The High Court may quash a decision of an OV on any ground which makes the decision unlawful, including if he acts for an improper purpose, fails to apply the correct legal test or if he reaches a decision which is irrational or has no sufficient evidential basis. The High Court does occasionally hear oral evidence and make mandatory orders, and has power to award compensation for breaches of the rights under the European Convention on Human Rights (ECHR). However, contrary to what was said in the notice quoted in para 3 above, judicial review is not an appeal on the merits of the decision.

9. The main reason advanced by the FSA why the section 9 procedure is not also applicable is that such a procedure, operated in the way the claimant appellants say that it can be operated, in effect as an appeal against the merits of the OV's decision, would be incompatible with the regime contained in the suite of EU food safety Regulations which came into force in the United Kingdom in 2006.

10. Hence, the second issue is whether use of the procedure in section 9 of the 1990 Act is compatible with the food safety regime laid down by European Union law, specifically by Regulation (EC) No 852/2004 on the hygiene of foodstuffs; Regulation (EC) No 853/2004 laying down specific hygiene rules for food of animal

origin; Regulation (EC) No 854/2004 laying down specific rules for the organisation of official controls on products of animal origin intended for human consumption; Regulation (EC) No 882/2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules; and Regulation (EC) No 1069/2009 on health rules as regards animal by-products. Also relevant is the prior Regulation (EC) No 178/2002 laying down the general principles and requirements of food law.

11. The third issue is whether Regulation (EC) No 882/2004 mandates an appeal procedure and if so whether such an appeal should be capable of challenging the OV's decision on the full factual merits or whether the more limited scope of challenge involved in judicial review of the OV's decision and of a disposal notice as referred to above is sufficient to comply with the requirements of Regulation (EC) No 882/2004.

Relevant European Union Law

12. Under article 2 of Regulation (EC) No 178/2002, "'food' means any substance or product … intended to be, or reasonably expected to be ingested by humans". It is common ground between the parties that carcass 77 was "food" when it was slaughtered and remained so after the OV formed the opinion that it was unfit for human consumption and declared it as such. Article 14 of Regulation (EC) No 178/2002 provides that food shall not be placed on the market if it is unsafe. Food is deemed unsafe if it is considered to be (a) injurious to health, (b) unfit for human consumption. Article 5.1 of Regulation (EC) No 853/2004 provides that food business operators (FBOs) such as slaughterhouses shall not place on the market a product of animal origin unless it has a health mark applied in accordance with Regulation (EC) No 854/2004 (or an identification mark if a health mark is not required by the latter Regulation).

13. Regulation (EC) No 854/2004 lays down specific rules for the organisation of official controls on products of animal origin (article 1.1). The application of the official controls which it requires is without prejudice to the primary legal responsibility of FBOs to ensure food safety under Regulation (EC) No 178/2002 (article 1.3). The controls are of several types. Article 4, for example, deals with official controls to verify an FBO's general compliance with the Regulations, including detailed audits of good hygiene practices.

14. Article 5 requires member states to ensure that official controls with respect to fresh meat take place in accordance with Annex I. Under article 5.1, the OV is to carry out inspection tasks in, inter alia, slaughterhouses in accordance with the general requirements of section I, Chapter II of Annex I and the specific

requirements of section IV. Under article 5.2, the health marking of domestic ungulates, such as cattle, is to be carried out in slaughterhouses in accordance with section I, Chapter III of Annex I; the criterion for applying health marks is stated thus:

> "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."

15. Annex I lays down detailed rules about ante-mortem and post-mortem inspections, how they are to be done and by whom, the application of health marks and the communication of results. Chapter IV of section III lays down detailed requirements for the qualifications and skills of Official Veterinarians and their auxiliaries (such as MHIs).

16. Regulation (EC) No 854/2004 does not define "official controls" nor does it lay down any specific enforcement measures or sanctions for non-compliance with the controls which it mandates. Article 1.1a provides that it applies in addition to Regulation (EC) No 882/2004 and article 2.2(b)(a) provides that the definitions in Regulation (EC) No 882/2004 shall apply as appropriate. Regulation (EC) No 882/2004 lays down general rules for the performance of official controls for a variety of purposes, including preventing risks to humans and animals and protecting consumer interests in the feed and food trade (article 1.1). It is "without prejudice to specific Community provisions concerning official controls" (article 1.3). "'Official control' means any form of control that the competent authority or the Community performs for the verification of compliance with feed and food law, animal health and animal welfare rules" (article 2.1). "'Non-compliance' means non-compliance with feed or food law, and with the rules for the protection of animal health and welfare" (article 2.10).

17. Recitals (41) and (42) to Regulation (EC) No 882/2004 state, inter alia, that breaches of food law may constitute a threat to human health and therefore should be subject to effective, dissuasive and proportionate measures at national level, including administrative action by competent authorities in the member states. Recital (43) states:

> "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."

The Court notes that in the French language version of the Regulation the relevant phrase used is "Les exploitants devraient avoir un droit de recours …" and in the German language version "Unternehmer sollten … Rechtsmittel einlegen können …".

18. Title VII of Regulation (EC) No 882/2004 deals with enforcement measures and Chapter I is concerned with national enforcement measures. Article 54.1 requires the competent authority, when it identifies non-compliance, to take action to ensure that the operator remedies the situation. In deciding what action to take it "shall take account of the nature of the non-compliance and that operator's past record with regard to non-compliance". Article 54.2 gives a non-exhaustive list of the measures which must be available where appropriate. These include (b) the restriction or prohibition of the placing on the market of food; (c) if necessary, ordering the recall, withdrawal and/or destruction of food; and (h) any other measure the competent authority deems appropriate. Article 54.3 requires the competent authority to provide the operator concerned with written notification of its decision and the reasons for it and "information on rights of appeal against such decisions and on the applicable procedure and time limits". The Court notes that in the French language version this text appears as "des informations sur ses droits de recours contre de telles decisions, ainsi que sur la procedure et les délais applicables" and in the German language version the phrase "sein Widerspruchsrecht" is used.

19. Article 55 requires member states to lay down the rules on sanctions applicable to infringements of feed and food law and to take all measures necessary to ensure that they are implemented. "The sanctions provided for must be effective, proportionate and dissuasive."

The parties' arguments

20. The claimant appellants argue that the procedure in section 9 of the 1990 Act is applicable in cases such as this and is not incompatible with the regime laid down by the EU Regulations; indeed it - or something like it - is contemplated by the terms of article 54 of Regulation (EC) No 882/2004. In summary, they assert that:

> (1) The section 9 procedure was applied during the very similar regime adopted pursuant to the EU Directives before the coming into force of the suite of Regulations referred to above. There is no evidence that this caused any practical difficulties. If it was not thought inconsistent with that regime, there is no reason to think it inconsistent with the current regime. Indeed, in 2006, when the Regulations came into force, the *Meat Hygiene Service Manual of Official Controls* stated (and continued to state until shortly before these proceedings began) that where the OV was not satisfied that the meat

was fit for human consumption and voluntary surrender was not forthcoming, the OV must seize the food under section 9 and take it before a Justice of the Peace for it to be condemned. At the very least, this is an indication of past practice under the very similar regime which preceded the current EU Regulations and of what the FSA, as competent authority, initially thought the position to be under the Regulations.

(2) The official controls in Regulation (EC) No 854/2004 are in addition to the more general provisions in Regulation (EC) No 882/2004. They are specific to food of animal origin. But they contain nothing about enforcement and sanctions. Thus it is not surprising that they do not provide for a right of appeal against the decisions of the OV and competent authority. Enforcement and sanctions are provided for in Regulation (EC) No 882/2004. Regulation (EC) No 854/2004 is intended to work in combination with Regulation (EC) No 882/2004. Recital (43) to Regulation (EC) No 882/2004 indicates that a right of appeal is required in a case such as this. Articles 54 and 55 are applicable to all kinds of non-compliance with Regulation (EC) No 854/2004, including non-compliance with article 5 in individual cases as well as the more general non-compliance dealt with by article 4. The references to prohibiting placing on the market and ordering destruction in article 54.2 are clearly apt to deal with non-compliance under article 5. Article 54.3 should apply to action to deal with all kinds of non-compliance. These articles, read together with recital (43) mandate a right of appeal against the OV's decision.

(3) There is nothing in any of the Regulations to prohibit a procedure such as that laid down in section 9. This not only provides a means whereby the competent authority can enforce the requirements of Regulation (EC) No 854/2004 in relation to non-compliance but also provides the operator with a means of challenging the decision of the OV that a carcass is not fit for human consumption on its merits. The Justice of the Peace can (and should) hear expert evidence to determine the matter. While only the OV can apply the health mark, on the claimant appellants' interpretation of section 9 the Justice of the Peace can make a ruling which may result in an award of compensation if the mark is wrongly withheld.

(4) At the point when the OV inspects the meat and forms the opinion that it is unfit for human consumption and declares it as such, the carcass is still "food" within the meaning of the above Regulations. It has not become an "animal by-product" within the meaning of Regulation (EC) No 1069/2009, laying down health rules as regards animal by-products. Animal by-products are defined as "entire bodies or parts of animals, products of animal origin or other products obtained from animals, which are not intended for human consumption" (article 3.1). Until the process of condemnation is complete, the FBO still intends the carcass for human consumption.

(5) Providing a mechanism for judicial oversight of the process of condemnation is required by article 17 of the Charter of Fundamental Rights of the European Union (CFR) (equivalent to article 1 of the First Protocol to the ECHR) which protects the right to property, read with article 47, which requires an effective judicial remedy for everyone whose rights and freedoms guaranteed by community law are violated. It would be a violation if an FBO were deprived of the property in the carcass - or required to dispose of the carcass in such a way as to render it valueless - without proper justification or compensation.

(6) Judicial review does not constitute an appeal which satisfies the requirement in Regulation (EC) No 882/2004 that there be a right of appeal. Regulation (EC) No 882/2004 requires that there be a right of appeal against the decision of an OV on the merits going beyond what is possible in judicial review.

21. Against this, the competent authority, the FSA, argues that it would be incompatible with the regime established by the Regulations if resort were made to the procedure under section 9 of the 1990 Act in order to challenge the decision of the OV under article 5 of Regulation (EC) No 854/2004 on its merits. The FSA accepts that the lawfulness of the decision can be challenged in judicial review proceedings as set out above. In summary, the FSA asserts that:

(1) The requirements of Regulation (EC) No 854/2004 are a lex specialis in relation to products of animal origin. Regulation (EC) No 882/2004 is without prejudice to specific Community provisions regarding official controls (article 1.3). Regulation (EC) No 854/2004 therefore takes precedence over Regulation (EC) No 882/2004 where it is necessary to do so.

(2) There is a distinction between the roles undertaken by the OV under article 4 of Regulation (EC) No 854/2004 and those undertaken under article 5. The former concerns the audit of an FBO's general practices and compliance with food hygiene requirements. It is accepted that article 54 of Regulation (EC) No 882/2004 is capable of being applied to that role. However, it should be noted that, despite the wording of recital (43), article 54.3 stops short of positively requiring that there be a right of appeal.

(3) The role of inspecting and health marking individual carcasses under article 5 is quite different from the audit role under article 4. The OV alone (with the assistance permitted under the Regulation) has responsibility for deciding whether or not to apply a health mark, which is a necessary

prerequisite to placing the meat on the market. Nobody other than the OV can perform this task. This can only be done when "official controls have not identified any deficiencies that would make the meat unfit for human consumption". That "weighted double negative" test is consistent with the overall aim laid down in article 1.1 of Regulation (EC) No 178/2002, of the "assurance of a high level of protection of human health and consumers' interest in relation to food". It may be that the meat remains "food" even after the OV has decided not to apply a health mark, but it cannot thereafter be lawfully intended for human consumption.

(4) The qualifications and experience of the OV are carefully specified so as to ensure that he or she is properly qualified to undertake that decision-making role (with the assistance permitted under the Regulations). It would be incompatible with the requirements of Regulation (EC) No 854/2004 for a person or body other than the OV as referred to in article 5.2 and which does not have those qualifications and experience, such as a Justice of the Peace acting pursuant to section 9 of the 1990 Act, to decide whether a carcass should have had a health mark applied to it, even if adjudicating with the benefit of expert evidence presented by each side.

(5) Article 17 of the CFR (and article 1 of the First Protocol to the ECHR) permit control of the use of property if this is a proportionate means of achieving a legitimate aim (reference is made to *Booker Aquaculture Ltd (trading as Marine Harvest McConnell) v Scottish Ministers* (Joined Cases C-20/00 and C-64/00) [2003] ECR I-7411). The above aim is undoubtedly legitimate and the means chosen proportionate. Article 17 does not mandate a right of challenge to the imposition of such controls.

(6) If there is a requirement that there be a right of appeal in relation to the decision of an OV under article 5.2 of Regulation (EC) No 854/2004, it is satisfied by the availability of judicial review as set out above. Judicial review also satisfies any requirement under article 17 of the CFR (or article 1 of the First Protocol to the ECHR) of a possibility of judicial control of the actions of an OV.

Conclusion

22. For the purposes of this reference, the Court of Justice of the European Union is asked to assume that the claimant appellants' interpretation of section 9 of the 1990 Act is 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. In order to determine this appeal, this Court refers the following questions to the Court of Justice of the European Union:

> (1) 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?
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> (2) 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?