Michaelmas Term
[2021] UKSC 54
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
Lord Hodge
Lady Black
Lord Lloyd-Jones
Lord Sales

JUDGMENT GIVEN ON
8 December 2021

Heard on 5 March 2019

Appellants
Stephen Hockman QC
David Hercock
(Instructed by Roythornes Solicitors)

Respondent
Sir Alan Dashwood QC
Adam Heppinstall
Jonathan Lewis
(Instructed by Food Standards Agency)

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

1.
This case is concerned with the operation of the regime set out in EU law for inspection of meat products to ensure that proper standards of health and safety are maintained. This is the second judgment of the court. In the first judgment ([2019] UKSC 36; [2019] PTSR 1443) we set out the background to the dispute and made a reference to the Court of Justice of the European Union ("the

CJEU"). The CJEU has delivered its judgment answering the questions posed in the reference ((Case C-579/19) EU:C:2021:665). That judgment is clear in its effect and enables us to determine the appeal without the need for any further hearing.

2.
It will assist the reader of this judgment if we again briefly set out the facts of the case.

3.
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, 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 inspector, 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.

4.
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 ("section 9") 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.

5.
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 under regulation 25(2)(a) of the Animal By-Products (Enforcement) (England) Regulations 2013 and Regulation (EC) No 1069/2009. The disposal notice informed CMC that failure to comply with it 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."

6.
These judicial review proceedings are brought by CMC and the Association of Independent Meat Suppliers, a trade association acting on behalf of some 150 slaughterhouses, to challenge the FSA's assertion that it was unnecessary for it to use the procedure set out in section 9 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. Their claim failed in the courts below.

7.
The FSA accepts that taking action pursuant to section 9 in respect of a carcass would be one method by which it could seek to prevent the carcass from entering into the supply chain to be sold for human

consumption. However, it denies that it is obliged to use this method since others are available. Further, the FSA denies that it is obliged to use the section 9 procedure in order to treat the hearing before the Justice of the Peace as an appeal from the decision of the OV that carcass 77 was unfit for human consumption and indeed maintains that reliance on the section 9 procedure as a means of appeal is incompatible with EU law. This is on the grounds that the section 9 procedure would involve a Justice of the Peace substituting his or her view regarding the fitness of a carcass for human consumption for that of the OV. In so far as EU law requires that there should be a means of appeal from a decision by an OV, the FSA points out that judicial review is available to challenge such a decision and it maintains that this is all that is necessary in order to satisfy this requirement.

8.
At this stage of the proceedings, it is sufficient to focus on the two questions addressed by the CJEU and the answers given by it.

9.
The first question is whether use of the procedure in section 9 is compatible with the food safety regime laid down by EU law, specifically as set out in Regulation (EC) No 854/2004 on the hygiene of foodstuffs and 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.

10.
The CJEU has answered this question in the negative. It began by explaining that under Regulation (EC) No 854/2004 the EU legislature entrusted the OV with the responsibility for ensuring that meat placed on the market is fit for human consumption and the OV is accordingly considered to be the person best qualified to carry out such checks, but application of the section 9 procedure would lead to the replacement of the OV, as the person ultimately responsible in matters of food safety, by a court ruling on the merits of the case: paras 44-49 of the judgment. This position is not changed by consideration of other features of the EU food hygiene regime. Although article 54(3) of Regulation (EC) No 882/2004 has the effect that a member state is required to provide a remedy by which a slaughterhouse operator may challenge a decision of an OV such as that at issue in these proceedings (paras 50-59 of the judgment), the section 9 procedure cannot be regarded as apt to meet this requirement: it does not allow an operator such as CMC to bring an action on its own initiative and it does not authorise the Justice of the Peace to annul the decision of the OV declaring the carcass unfit for human consumption or to lift the effects of that decision, and hence does not result in a judicial decision which has relevant legally binding effects (paras 60-69 of the judgment). Therefore, the CJEU held (para 70) that Regulations (EC) Nos 854/2004 and 882/2004 must be interpreted as precluding national legislation of the kind in section 9.

11.
The second question is whether the appeal procedure required by article 54(3) of Regulation (EC) No 882/2004 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 on conventional public law grounds is all that is required. Such grounds would allow for a decision of the OV to be quashed if, for example, he or she acts for an improper purpose, fails to apply the correct legal test or reaches a decision which is irrational or which has no sufficient evidential basis. The CJEU explained (para 74) that in order to determine the rigour required in relation to judicial review of national decisions adopted pursuant to EU law "it is necessary to take into account the purpose of the act and to ensure that its effectiveness is not undermined." In this regard, EU law is aligned with the approach adopted by the European Court of Human Rights with respect to

examining whether there is effective judicial protection in relation to legal rights, which involves taking into account “such factors as, first, the subject matter of the decision appealed against, and in particular, whether or not it concerned a specialised issue requiring professional knowledge or experience and whether it involved the exercise of administrative discretion and, if so, to what extent; second, the manner in which that decision was arrived at, in particular the procedural guarantees available in the proceedings before the administrative body; and third, the content of the dispute, including the desired and actual grounds of appeal” (para 79).

12.
Applying this approach, at paras 83-98 of its judgment the CJEU examined the factors relevant to determining the degree of rigour appropriate for a legal challenge to a decision of an OV of the kind at issue in these proceedings. It had regard to the facts that in deciding whether or not a health mark should be affixed to a carcass the OV “must carry out a complex technical assessment requiring appropriate professional qualifications and expertise in the field” (para 88) and that OVs are obliged to give written notification of their decisions including a statement of reasons, which is “particularly important, since it puts their addressees in a position to defend their rights under the best possible conditions and decide in full knowledge of the circumstances whether it is worthwhile to bring an action against those decisions” and also assists courts to review the lawfulness of those decisions (para 89). Further, the responsibility of the OV in relation to securing the objective pursued by Regulations (EC) Nos 854/2004 and 882/2004 of achieving a high level of protection of public health means that EU law does not require a member state to establish a procedure which allows for judicial review of all of the OV’s assessments of the specific facts found during inspections relating to health marking (paras 90-91). For these reasons, in this context, judicial review of an OV’s decision on conventional public law grounds can satisfy the right under EU law of a slaughterhouse operator to effective judicial protection, in accordance with the Regulations (paras 92-93 and 98). That conclusion is not undermined by the effect of the OV’s decision on the property rights of CMC in relation to carcass 77 (paras 94-97). As the CJEU pointed out (para 97), “[t]he importance of the objective of consumer protection may justify even substantial negative economic consequences for certain economic operators”, including food business operators such as CMC.

13.
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.