

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

Crawford's (Stephen) Application [2011] NIQB 75

IN THE MATTER OF AN APPLICATION BY STEPHEN CRAWFORD
FOR JUDICIAL REVIEW

TREACY J

Introduction

[1] By this judicial review, in reliance on Article 18(6) of the Disease of Animals (Northern Ireland) Order 1981 (the "1981 Order"), the applicant challenges the decision of the Department of Agriculture and Rural Development (the "Department") to withhold a compensation payment relating to the slaughter of a number of his herd of cattle.

Background facts

[2] The 1981 Order makes provision in relation to diseases of animals and poultry. In particular, it provides that the Department may seize any carcase and destroy, bury dispose of or treat anything so seized if it is satisfied it is expedient for the purpose of preventing the spread of disease. Schedule 2 provides the Department may by order provide for the slaughter of any animal with bovine tuberculosis or suspected of being so affected. The 1981 Order also sets out when compensation is payable by the Department for any such carcase seized.

[3] The 1981 Order specifies the circumstances in which the Department has the power to withhold the payment of compensation. The decision whether to withhold compensation is made by a panel of senior officials appointed by the Department. In the present case, the Department withheld the payment of compensation to the applicant for the slaughter of a number of his cattle herd on the basis the applicant was guilty of an offence against the 1981 Order.

[4] The applicant was prosecuted for an offence pursuant to Regulation 7 of the Tuberculosis (Examination and Testing) Scheme Order (Northern Ireland) 1999 (the "1999 Order"). The scheme included in the schedule of the 1999 Order was made for the purposes of keeping bovine animals, so far as practicable, free from bovine tuberculosis, and controlling and, so far as practicable, reducing the incidence of that disease. Regulation 7 relates to the prohibition on tampering with official tests. It was alleged that, contrary to Regulation 7, the applicant did an act or permitted an act to be done during a test whereby the reaction of the animal to the test was likely to be affected, namely, that he administered or permitted to be administered an unknown substance to the bovine test site. Pursuant to Article 52(1)(a) of the 1981 Order, if a person contravenes any of the provisions of the 1981 Order or provisions of an order of the Department they would be guilty of an offence against the 1981 Order.

[5] The prosecution of the offence pursuant to Regulation 7 was conducted before District Judge Kelly on 6 February 2009. Ultimately, the prosecution was unsuccessful and, following an application for a direction that there was no case to answer, the applicant was acquitted of all charges.

[6] After the applicant's acquittal the Department continued to withhold the compensation payment in respect of his slaughtered cattle, contending it was entitled to do so pursuant to Article 18(6) of the 1981 Order.

Grounds of challenge

[7] The applicant seeks judicial review relief on the following grounds as set out in the amended Notice of Motion:

"(i) The Department have erred in law in concluding that Article 18(6) afforded any power to withhold a compensation payment in circumstances where a court of competent jurisdiction had dismissed all charges against the applicant pursuant to the 1981 Order.

(ii) The Department have erred in law in concluding Article 18(6) affords a discretion to withhold compensation payments in circumstances where a prosecution pursuant to that Order has been initiated by the Department and has been dismissed by the District Judge.

(iii) The Department have failed to apply the principle of *res judicata* in circumstances where the matter to be determined by the proposed Panel was the subject of extensive evidence before the District

Judge resulting in the dismissal of the prosecution case”.

The relief sought

[8] The relief sought by the applicant is set out in full in the amended Notice of Motion. The applicant’s supplementary skeleton argument refers to the development that, notwithstanding the applicant’s acquittal, the Department proposed to conduct a panel hearing to decide whether compensation should be withheld from the applicant pursuant to Article 18(6) of the 1981 Order. Paragraph 8 of the applicant’s supplementary skeleton argument suggests the Court should make such orders as are necessary to prevent the Department from purporting to adjudicate on the guilt of the applicant on an offence under the 1981 Order.

[9] The applicant submits that the Court might consider the following relief as additional to or instead of the relief currently proposed in the amended Order 53 statement and the amended Notice of Motion:

“A declaration that it is unlawful for the Respondent to rely on Article 18(6) of the 1981 Order to decide whether the Applicant is guilty of an offence under that Order when he has already been prosecuted unsuccessfully for the same offence before a District Judge (Magistrate)”.

The issue

[10] The principal issue in this case is whether, in exercise of its power under Article 18(6)(a) of the 1981 Order, the Department is entitled to withhold compensation in respect of animals slaughtered by reason of bovine tuberculosis from an owner or herd keeper where, in its judgment, notwithstanding that a criminal court has previously acquitted the owner or herd keeper of offences against the 1981 Order, the owner or herd keeper has been guilty of such offences tending to prejudice the due control of the disease necessitating the slaughter.

[11] Primarily, the determination of this application for judicial review requires the Court to engage in an interpretative examination of the powers afforded to the Department by Article 18(6) of the 1981 Order.

Article 18(6) of the 1981 Order

[12] The 1981 Order and the Tuberculosis Control Order (Northern Ireland) 1999 provide a statutory scheme for the payment of compensation in cases involving the Department’s slaughter of any animal with bovine tuberculosis or suspected of being so affected. The Department is given primary

responsibility for administering the compensation scheme provided by the 1981 Order and related legislation (including the Tuberculosis Control Order (NI) 1999).

[13] As previously mentioned, the Department has power to withhold payment of compensation, either in whole or in part, by virtue of Article 18(6) of the 1981 Order. However, such compensation may only be withheld on establishing one of three specific grounds:

“(6) Notwithstanding anything in this Order, the Department may withhold, either wholly or partially, compensation or other payment in respect of an animal or bird slaughtered under this Order at its direction where, in the *judgment* of the Department

(a) the owner or the person having charge of the animal or bird has been guilty of an offence against this Order tending to prejudice the due control of the disease necessitating the slaughter; [or

(b) the animal or bird, being an imported animal or bird, was diseased at the time of its landing or, before or while being brought from any member State, exposed to the infection of disease; or

(c) the bird was hatched from an imported egg which carried disease or infection at the time of landing or came from the same source as eggs found to carry disease or infection”. [My emphasis]

The applicant’s submissions

[14] The applicant argues that, in circumstances where a Court of competent jurisdiction, conclusively and finally, determined he should be acquitted of an offence pursuant to the 1981 Order, the Department is acting *ultra vires* by withholding the compensation payment in reliance on the discretion contained in Article 18(6)(a) and in convening an in-house panel to consider whether “on the balance of probabilities” the applicant committed such an offence pursuant to the 1981 Order.

[15] The applicant further contends that the subject matter of an Article 18(6)(b) and (c) judgment is likely to involve the making of expert judgments which the Department is best equipped to make about the likelihood of disease being present in animals. However, it is asserted that the judgment in Article 18(6)(a) is not a matter of expertise in animal health but a matter of evidence and legal principle which the Department or an in-house panel is

not best equipped to make. The applicant argues that, in making such a judgment under Article 18(6)(a), the officials on the panel would be acting judicially. The point is made that a decision as to whether someone is “guilty” of an offence is not an administrative function.

[16] The applicant says the plain intention of Article 18(6)(a) in the 1981 Order (and the repealed antecedents of this provision in England and Wales) is that, in cases where no prosecution had ever been initiated, the respondent could still withhold compensation where it was possible to form a view about the guilt of a farmer/herd keeper. It is submitted that the Department has used this power entirely inappropriately in cases where the guilt of the farmer/herd keeper has already been scrutinised by a competent Court and where he has been found to be not guilty.

[17] As to the standard of proof which applies to an Article 18(6)(a) determination, the applicant submits Parliament deliberately chose to use the word “guilty” which connotes a criminal process and necessarily involves a determination based on the criminal standard of proof. The significance of this, the applicant asserts, is that where a body seeks to determine a matter for a second time based on the same facts and applying the *same* standard of proof, the doctrine of *res judicata* applies.

[18] The applicant submits that the doctrine of *res judicata* applies, i.e. there must be an end of litigation. In this regard, it is specifically asserted that ‘cause of action estoppel’ applies as referring the matter of the applicant’s entitlement to compensation to an in-house panel involves a further determination as to the “guilt” of the applicant based on the same subject matter and factual background as that determined in the proceedings before the District Judge in relation to an offence for which he has already been prosecuted and acquitted. It is contended this is a plain case where the respondent should be estopped from such a course of action.

[19] The applicant also contended that the hearing before the panel, in breach of Art 6 ECHR, amounted to a retrial in respect of the offence of which he had been acquitted and that its processes were not Art 6 compliant.

Respondents Submissions

[20] The respondent submits that Article 18(6)(a) (together with articles 18(6)(b) and (c)) is essentially a control mechanism to prevent abuse of the compensation scheme and has a deterrent function. The respondent made the point that legislative powers to withhold compensation regarding the slaughter of animals in substantially the same terms as Article 18(6)(a) of the 1981 Order have existed in Northern Ireland for over 100 years and the same power existed in England and Wales until 1981. The respondent submits that if it was the intention of the legislature to limit or remove or otherwise modify

the Department's power to withhold compensation regarding the slaughter of animals in the manner suggested by the applicant it would have included the appropriate amending provision in the 1981 Order.

[21] The Respondent asserted that the practical effect of the applicant's restrictive interpretation of Article 18(6)(a) would be to remove from the Department its statutory power to withhold compensation in all cases in which there had been an unsuccessful prosecution. The result of this would be that the herd keeper's entitlement to compensation would, de facto, be determined by the District Judge or other criminal court. The respondent submits such an outcome would be completely at variance with the express wording of the statute which makes it clear an integral part of the exercise of the power to withhold compensation is that the Department makes a judgment whether the owner is guilty of a relevant offence against the 1981 Order.

[22] Further, the respondent points out that the applicant's interpretation of article 18(6)(a) would lead to anomalies such as, for example, if a herd keeper was prosecuted in respect of a relevant offence under the 1981 Order and the prosecution failed, he would enjoy immunity from the provisions of Article 18(6)(a). The respondent explained that, in such circumstances, compensation could never be withheld or reduced irrespective of the reasons why the prosecution had failed. However, a herd keeper who was not prosecuted would be subject to Article 18(6)(a).

[23] In response to the applicant's argument that the legislature intended the Department should only exercise its power under Article 18(6)(a) in cases where no prosecution had been initiated, in summary, the respondent asserts:

- (i) this is not consistent with the wording of Article 18(6)(a);
- (ii) in all cases where a prosecution had been initiated, the Department would be bound by the decision of the criminal Court;
- (iii) this does not take into account that a criminal prosecution may not take place or may fail for many reasons; and
- (iv) this assumes the function of the panel and character of its decision are equivalent to those of a criminal Court.

[24] In respect of the applicants reliance on the doctrine of *res judicata* the respondent submits that it is primarily a private law concept and has limited application in public law. It is argued that this doctrine cannot be relied on to prevent a public body exercising a power expressly given to it by the legislature.

[25] The respondent also contended that this doctrine only applies to proceedings before other courts and a panel convened by the Department to

make a determination pursuant to Article 18(6)(a) is not “a court”. Further, the respondent says that any suggestion there is parity or equivalence between a determination made by a panel and the finding of a criminal court that the applicant was not guilty of the offences with which he was charged is misconceived.

[26] The respondent submits it is not correct that the panel would be determining the same issues as the court based on the same facts and applying the same standard of proof. It is asserted that the issues to be determined by the panel are not confined to deciding simply whether the applicant was guilty of a relevant offence against the 1981 Order but also involves determining whether compensation should be withheld in whole or in part. In any event, in reliance on *Saeed v Greater London Council (Inner London Education Authority)* [1986] IRLR 23 (QAD) and *R (on the application of Redgrave) v Commissioner of Police for the Metropolis* [2003] 1136 (CA), the respondent contends that even if the issues were the same, the panel would not be precluded from making a determination pursuant to Article 18(6).

[27] The respondent submits that, as a matter of principle, of practice, and of construction, the correct *standard of proof* applicable in determining whether to withhold compensation under Article 18(6)(a) is the balance of probabilities.

[28] The respondent argues that the function of the Department’s panel and the character of its decision are fundamentally different from that of a criminal court. It is argued the panel’s determination is not a retrial of the offences in respect of which the herd keeper has been acquitted - instead, the panel is acting administratively. The respondent argues that the panel’s determination should be based on the civil standard of proof as Articles 18(6)(a), (b) and (c) all relate to situations of a civil character where reduction or exclusion of compensation is viewed as appropriate. The point is made that the result of the application of Article 18(6)(a) is not a restriction on the liberty of the applicant or the imposition of any criminal sanction on him. It is contended that the proceedings under Article 18(6)(a) involve the protection of the integrity of compensation arrangements under the legislation and the outcome of the process, at the very worst, is simply that the applicant does not obtain compensation for an animal or animals which have tested positive and thereby had to be slaughtered.

[29] In reliance on *R (on the application of Redgrave) v Commissioner of Police for the Metropolis* [2003] 1136 (paragraphs 37 - 38), the respondent submits that even if Article 18(6)(a) did involve the application of the criminal standard, the applicant still could not rely on the doctrine of *res judicata*. The respondent explains that the function of the panel and the nature of its determination are fundamentally different from a criminal court - the panel

has a different procedure; it applies different rules of evidence; it has different powers; and it has a different responsibility. It is asserted that these factors, in themselves, preclude the application of the doctrine of *res judicata* or the rule against double jeopardy.

[30] The respondent asserts that, in the context of civil proceedings, if there are circumstances where en route to a conclusion about the civil issue in question, a decision maker has to grapple with the issue of whether a person has conducted himself in a way which would involve a breach of the criminal law, this will not convert the proceedings into criminal proceedings or require the use of the criminal standard of proof to determine whether the conduct in question would breach the criminal law. In this regard, the respondent relies on two recent House of Lords decisions: *B (Children) (Care Proceedings): Standard of Proof* [2009] 1 A C 11 and *In Re CD'S Application* [2008] UKHL 33. In both cases the House of Lords said that, notwithstanding the serious nature of the conduct alleged in the context of grave findings of serious sexual abuse of children relevant in one case to care proceedings and in the other case to the release of a life sentence prisoner, the civil standard of the balance of probabilities applied.

[31] The respondent submits that Article 6(2) ECHR only applies in respect of those charged with a criminal offence. It is asserted that, as the panel's proceedings do not involve the preferment and determination of a criminal charge, the proposed addressing of the Article 18(6)(a) issue does not breach Article 6(2) of the ECHR. The respondent also relied on *Walsh v Assets Recovery Agency* [2005] NICA 6 contending that on proper analysis there is no criminal charge at issue in the proceedings before the panel.

[32] The respondent argues the present case is not an exceptional case in which the Court is dealing with an issue which is so related to criminal proceedings that Article 6(2) ECHR may be viewed as applying. The respondent submits the process of determining compensation payable by the Department for the slaughter of animals played no part in the criminal proceedings taken against the applicant.

[33] The respondent distinguishes the present case from those relied on by the applicant (*R v Gibbins, Mullen v Secretary of State for the Home Department* [2004] UKHL 18, *Rushiti v Austria* (2001) 22 EHRR 56 and *Sekanina v Austria* (1994) 17 EHRR 221). It asserts that such cases either related directly to criminal proceedings or there was an immediate and sufficient linkage between the issues under discussion and the relevant criminal proceedings. It is submitted that such direct relation or immediate and sufficient linkage is not found in the present case.

[34] The respondent then considered the issue of the application of Article 6(2) ECHR where there has been an acquittal in criminal proceedings which is

followed by civil proceedings. Primarily in reliance on *Ringvold v Norway* (Application No 34964/97) (paragraphs 36 - 41), it is submitted that, in general, there will be no breach of Article 6(2) ECHR where there has been an acquittal and later an issue of the payment of civil compensation arises. Further, the respondent relies on a number of domestic cases to argue there is no legal impediment to the consideration of issues in civil proceedings which are the same or similar to issues considered in criminal proceedings which resulted in an acquittal. In any event, the respondent argues, in the present case, there are clear differences between the criminal proceedings in respect of the applicant and the current issue to be addressed by the panel.

Discussion

[35] Art 18(6)(a) confers a discretionary power on the Dept to withhold payment. It is triggered by its formation of the requisite judgment. Once this judgment has been formed there is nothing on the face of the provision restricting its exercise to cases in which no prosecution has been brought. Undoubtedly the failure of a prosecution, once brought, will be a very material factor in the formation (or not) of the requisite judgment. The applicant however contended that the “plain intention” of the provision is that in cases where no prosecution had been initiated payment could be withheld but not when a competent criminal court had acquitted.

[36] If correct this contention could lead to surprising and anomalous outcomes. For example, farmer A and farmer B (brothers) own adjacent cattle farms. Both are judged by the Dept to be guilty of relevant offences within the meaning of A18(6)(a). Farmer A is not prosecuted because the evidential test for prosecution is not met. In the case of B the evidential test is met because the evidence is considerably stronger. On the applicants argument the failure of the prosecution case in B ousts the jurisdiction of the Dept to exercise its power under 18(6)(a). In stark contrast the Dept could in A’s case (evidentially weaker than B) withhold compensation but would be precluded from doing so in the case of B by virtue of the acquittal – irrespective of the reason for the acquittal.

[37] The fallacy of the applicants argument lies in equating the determination of a criminal charge by a competent court applying criminal standards of proof and evidence with the exercise of the discretionary power to withhold/reduce compensation under 18(6)(a). This exercise, triggered by the formation of the requisite judgment, is fundamentally different. The refusal/reduction of compensation does not result in a criminal conviction nor does it involve the imposition of a criminal penalty. It does not appear on any criminal record and would not turn up on any criminal record check. There is no threat to the liberty of the individual. The decision about compensation however involves a “*judgment*” by the Dept which, given its plainly civil context, does not involve proof to the criminal standard. The

judgment will be formed by the Dept on the balance of probabilities. The *judgment* must of course be arrived at in a manner which is unimpeachable in public law. Subject to considerations of fairness the Dept may be able to have regard to material which was not before the criminal court and which might not be admissible in a criminal trial.

[38] Art 18(6)(a) [and (b) and (c)] confers statutory powers in the public interest to prevent abuse of the compensation scheme and public monies. The fact that in England and Wales the equivalent power in 18 (6) (a) has not been retained is of no assistance to the applicant. The legislative divergence is presumptively intentional and may serve to reinforce the Respondents contention that the provision should be given its ordinary and natural meaning and should not be construed restrictively. If the legislature had wanted to exclude from its ambit a category of cases namely those in which an acquittal had resulted and to thereby distinguish them from cases in which no prosecution had been brought it could have so stated. It would not have been difficult to frame such an exclusion if such had been intended. In fact the provision has been in existence for a century or more and has been repeatedly re-enacted in substantially the same form. No authority has been cited in support of the restrictive construction which is, in any event, not consistent with the express words of the provision.

[39] I reject the applicant's argument based on the doctrine of *res judicata*. The doctrine cannot be here relied upon to prevent the Respondent from exercising the statutory power expressly conferred upon it by the legislature. Furthermore I agree with the Respondent that the doctrine only applies to proceedings before other courts and the panel convened by the Respondent is not a court.

[40] I also reject the applicant's contention that the correct standard of proof to be applied is the criminal standard. As I have already stated the fallacy in the applicants argument is in equating the judgment of the panel (in the context of whether to withhold/reduce compensation) with a criminal court. For the reasons given they are fundamentally different. Furthermore since the panels proceedings do not involve the determination of a criminal charge and Art 6(2) ECHR (presumption of innocence) only applies in respect of those charged with a criminal offence the proposed addressing of the Art 18(6)(a) issue does not infringe Art 6(2). Moreover the administrative process of determining the payment of compensation for the slaughter of animals played no part in the criminal proceedings taken against the applicant and the present case is readily distinguishable from *Rushiti* and *Sekanina* which were considered in some detail by Lord Steyn in *Mullen* [see para 33 above].

[41] I agree with the Respondent that if en route to a conclusion about the civil issue in question a decision maker has to decide whether a person has conducted himself in breach of the criminal law this will not convert the

proceedings into criminal proceedings or require the use of the criminal standard of proof to determine whether the conduct in question would breach the criminal law. This is exemplified by the two recent decisions of the House of Lords relied upon by the applicant: *B (Children) (Care Proceedings): Standard of Proof* [2009] 1 A C 11 and *In Re CD'S Application* [2008] UKHL 33. In both cases the House of Lords acknowledged, notwithstanding the serious nature of the conduct alleged in the context of grave findings of serious sexual abuse of children (relevant in one case to care proceedings and in the other case to the release of a life sentence prisoner), the civil standard applied.

Conclusion

[42] The fact of acquittal by a competent court does not operate in my view as a bar to the exercise of the Department's power under Article 18(6) of the 1981 Order. In my view it is clear that under the statutory scheme the Department has an obligation to exercise its own judgment about whether the applicant has been guilty of an offence against the 1981 Order tending to prejudice the due control of the disease necessitating the slaughter. The exercise of this judgment takes place in a wholly different context of whether to withhold either wholly or partially compensation for animals slaughtered under the order. Acquittals in the criminal context applying the criminal standard of proof may occur for a variety of reasons. Whilst an acquittal particularly after a full hearing may be accepted by the Department as persuasive it cannot absolve the Department of its duty to exercise its own judgment. This exercise takes place in the civil not the criminal context in which the standard of proof is different and in which the applicant is not liable to conviction or criminal penalty. The acquittal is nonetheless a clearly relevant factor but it need not be determinative and it does not prevent or absolve the Department from exercising its Article 18(6) powers. I therefore have concluded that none of the applicant's grounds of challenge are made out and accordingly the judicial review is dismissed.