

Neutral Citation no. [2003] NIQB 60

Ref: **WEAC3989**

Judgment: approved by the Court for handing down
(subject to editorial corrections)

Delivered: **09/09/2003**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

**IN THE MATTER OF AN APPLICATION BY JOHN TIERNAN
FOR JUDICIAL REVIEW**

WEATHERUP J

The application

[1] This is an application for judicial review of a decision of the Department of Agriculture and Rural Development (DARD) dated 29 November 2002 rejecting an application for Sheep Annual Premium made by the applicant for the year 2001.

The background

[2] The applicant is a farmer on lands at Forkhill, Newry. On 29 November 2000 he applied to DARD under the Sheep Annual Premium Scheme 2001 for payment of a premium in respect of 100 sheep. The scheme required that the applicant would establish that he had retained the sheep for a period of 100 days from midnight on 29 November 2000 to midnight on 7 April 2001. On 1 March 2001 the presence of Foot and Mouth Disease was confirmed in Northern Ireland and on 26 March DARD announced a cull of sheep within a defined area that included the applicant's farm. The cull took place over a period of 4 days and involved 80 flocks comprising almost 10,000 animals. The applicant did not present any sheep to be culled. The applicant claimed that he was never made aware that his farm was within the designated area of the cull and that his 100 sheep remained on his farm and were never observed by DARD officials in the area. DARD did not accept that the applicant had 100 sheep.

[3] The Sheep Annual Premium Scheme 2001 is operated by DARD under the authority of Council Regulation (EEC) 2467/98 as amended. Domestic implementation is provided for in the Sheep Annual Premium Regulations (Northern Ireland) 1992 as amended. Procedures are provided for in the Farm Subsidies (Review of Decisions) Regulations (Northern Ireland) 2001. These regulations provide for three stages of review of DARD decisions involving a first review by DARD, a further review by DARD and a third review by an independent panel that reports to DARD with their findings and recommendations. The final decision is made by DARD having regard to the findings and recommendations of the independent panel.

[4] On 23 July 2001 the applicant's claim was refused by the decision of administration staff in the Grants and Subsidies Payments Branch of DARD. A first review of the decision was undertaken by the scheme manager at the Grants and Subsidies Payments Branch of DARD and on 29 March 2002 the applicant was notified that his claim had been refused. A further review was undertaken by the head of payments in the Grants and Subsidies Payments Branch and on 17 July 2002 the applicant was informed that his claim had been refused. The applicant then applied to the independent panel, a process described by DARD as "Stage 3 - Review by the Independent Appeals Panel". The Panel comprised three members who are independent of DARD and the Panel was serviced by an appeals secretariat of DARD employees. The Panel conducted oral hearings on 26 September 2002 and 29 October 2002, on which date it set out its conclusions and recommended that the applicant's appeal be rejected. DARD accepted that recommendation and by letter to the applicant dated 29 November 2002 he was informed of the decision.

[5] The Panel adopted an inquisitorial approach rather than an adversarial approach and the procedure was described as informal. The applicant and his solicitor appeared before the Panel in the absence of DARD's representatives and then the applicant and his solicitor left the hearing while DARD's representatives appeared before the Panel. The questioning of witnesses was undertaken by the Panel, and as each side appeared separately there was no cross examination of witnesses by the opposite party. The Panel did not apply legal rules of evidence so, for example, there was general admission of hearsay evidence.

The applicant's grounds.

[6] The applicant's grounds were as follows -

(a) DARD were given two opportunities to present their case to the appeal panel and were not simply restricted to the first convened hearing on 26 September 2002.

(b) The appeal panel heard evidence from DARD officials in the absence of the applicant.

(c) The applicant had no opportunity to cross-examination or challenge evidence given by DARD officials.

(d) The panel failed to have regard to the applicant's fair trial rights pursuant to Article 6 of the European Convention on Human Rights.

(e) The appeal panel decision was irrational and Wednesbury unreasonable.

(f) The decision deprived the applicant of property to which he was entitled, in breach of Article 1 of the first protocol to the European Convention on Human Rights.

[7] The applicant introduced an additional complaint, without objection from the respondent, namely that Ian McDowell, an employee of DARD, acted as secretariat representative at the meeting of the Independent Appeals Panel. It was submitted that his presence was likely to create the perception of the Panel's partiality to DARD. The appeals secretariat is staffed by employees of DARD. At each meeting of the Panel there is a secretariat representative who acts in an administrative capacity and in effect as secretary to the Panel. The secretariat representative keeps a written record of the proceedings. The representative does not take part in the deliberations of the Panel but acts in an administrative capacity. Mr McDowell had no influence in the deliberations of the Panel. The question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased – Lord Hope in Magill v Porter [2002] 2 AC 357 paragraph 103. No reasonable observer could have any basis for considering there to be a possibility of bias on the part of the decision makers. I do not accept the applicant's objection to the secretary to the Panel being an employee of DARD.

Procedural fairness

[8] At the heart of the applicant's complaints was concern for the fairness of the proceedings before the independent panel. There is a general duty to act fairly. This general requirement for procedural fairness, or the rules of natural justice as they were originally described, applies to an adjudication affecting the rights of individuals. Fairness is a flexible principle depending upon "the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates." In any scheme of statutory decision-making the courts will imply "so much and no more to be introduced by way of additional procedural safeguards as will

ensure the attainment of fairness.” Lord Bridge in Lloyd v McMahon [1987] AC 625.702.

[9] Of particular relevance to the present case was the central requirement of procedural fairness that a party has the right to know the case against him and the right to respond to that case. The right to know and to respond requires the disclosure of material facts to the party affected, such disclosure being within a reasonable time to allow the opportunity to respond. The right to know and to respond has traditionally recognised that the statutory context may allow disclosure of the substance of material facts and may not require the details or the sources of those facts; that the right of challenge need not include the right of a party to cross-examine witnesses; that it may not be necessary to observe the legal rules of evidence, for example in relation to hearsay evidence. See the examples provided by Re Pergam & Press Ltd [1971] Ch 388, R v Deputy Industrial Injuries Commissioner ex parte Moore [1965] 1 QB 456.490 and R v Commission for Racial Equality ex parte Cottrell & Rothon [1980] 1 WLR 1580.

[10] The applicant submitted that this traditional approach had to be reconsidered in the light of the Human Rights Act 1998 and that it had been overtaken by the demands of the right to a fair trial under Article 6 of the European Convention on Human Rights. Article 6 provides that –

“In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

The parties debated the impact on the present case of the recent decision of the House of Lords in Runa Begum v Tower Hamlets London BC [2003] 2 WLR 388. The applicant emphasised the importance of the fact-finding exercise undertaken by the Panel and relied on this decision in support of his contention that there had been procedural unfairness and that the Panel ought to have adopted adversarial procedures. Runa Begum concerned a statutory scheme for housing allocation where the decision was made by a local authority officer, who was not an independent tribunal for the purposes of article 6. The decision was subject to appeal to the county court on limited grounds equivalent to those applying on applications for judicial review. The House of Lords held that the scheme satisfied the requirements of article 6 as fair procedures had applied and the decision was subject to appropriate judicial control.

[11] The nature of the “civil rights” to which article 6 has been applied has extended, as the jurisprudence has developed, to embrace a variety of

administrative decisions that would not normally have been taken in the context of court proceedings, although such administrative decisions would be subject to review by a court. The requirements of article 6 would not be met by reference only to the administrative decision-making and it has become necessary to consider the whole of the process, including the role of the court, in order to determine if the matter is article 6 compliant. However the extension of the nature of civil rights has led to a modification of the form of judicial control. In relation to disputed factual issues there may be an absence of independence in the administrative decision-making and the limited capacity of a judicial review court to address factual findings. The Strasbourg jurisprudence has accepted that a limited right of review on questions of fact is sufficient. In part this approach recognises that, as in Runa Begum, an administrative decision may be based more on discretionary judgments than factual findings and Lord Bingham described the factual findings as “staging posts on the way to the much broader judgments which the authority has to make”, namely to be satisfied on a number of matters specified in the legislation (paragraph 9). However the focus on the scope of judicial review of factual findings arose in circumstances where there was no independent fact finding tribunal and it was necessary to consider the court’s role in order to determine if the whole process was article 6 compliant. Lord Hoffmann considered that the test as to whether it was necessary to have an independent fact finder did not depend upon the extent to which the administrative scheme was likely to involve the resolution of disputes of fact but that the question was whether, “... consistently with the rule of law and constitutional propriety, the relevant decision-making powers may be entrusted to administrators”. If so, it was said that it did not matter that there were many or few occasions on which there was a need to make findings of fact (paragraph 58).

[12] In my opinion the applicant’s case is not advanced by reference to this discussion in Runa Begum. The issue of independent fact finding does not arise in the present case as there was no internal fact finder. In the present case the Panel was an independent and impartial tribunal capable of being an independent fact finder and its findings appear to have been accepted by DARD. The Panel must of course observe the duty to act fairly in making its findings of fact and in reaching its decision. The Strasbourg jurisprudence on the requirements of procedural fairness does not impose a particular procedural format or dictate that article 6 is not satisfied if there is an inquisitorial system, or a lack of cross examination or the use of hearsay evidence. I do not find that the introduction of the right to a fair hearing under article 6 adds to the traditional requirements that the Panel must act fairly and in accordance with the applicant’s right to know and to respond. In the statutory context of the present case the outworking of the article 6 right to a fair hearing does not import any additional benefits for the applicant than the outworking of the general duty to act fairly.

[12] The applicant contended that the statutory context indicated that formal procedures, to include an essentially adversarial system, should have been adopted by the Panel and that this was reinforced by the background to the present case which involved an investigation for the purposes of criminal proceedings. The respondent contended that the statutory context admitted of informal procedures that included the essentially inquisitorial system adopted by the Panel. The statutory framework does not lay down a procedure for the Panel and accordingly it is not for the court but for the Panel to decide on the procedure to be adopted, consistently with the statutory scheme and with the aim of achieving fairness, and it is for the court to determine if that procedure operates fairly. There is nothing in the character of the Panel or in the kind of decision that it had to make or in the statutory framework in which it operated that would render unfair the essentially inquisitorial system adopted by the Panel. I find that there can be no objection in principle to the procedures adopted by the Panel. However it is necessary to consider whether the procedures operated fairly in the circumstances of the case.

Hearings on 26 September 2002 and 29 October 2002

[13] The applicant objected to the resumed hearing arranged by the Panel on 29 October 2002 on the basis that this provided DARD with an opportunity to supplement the case that had been made at the first hearing on 26 September 2002. According to the record of the meeting of 29 September the Panel was prepared to recommend that the sheep premium be paid to the applicant, subject to what it described as “corroborative evidence” in relation to DARD checkpoints. The applicant’s case had proceeded on the basis that he believed that he was outside the cull area and according to the applicant this was confirmed by the location of two DARD checkpoints at locations that excluded the applicant’s lands. The record of the Panel meeting concluded:

“Subject to the corroborative evidence indicated by the panel as being required, it recommends that the appeal be upheld and the premium paid. Should this evidence not verify appellant’s statements, the panel would wish to reconsider its recommendation.”

[14] DARD submitted further comments to the Panel and these were made available to the applicant and his solicitor prior to the resumed hearing on 29 October. On that occasion the applicant had the opportunity to respond to the additional comments made by DARD.

[15] In effect the Panel decided, on 29 September 2002, that it required further information from DARD before reaching a final decision. The Panel was entitled to take that course subject to the requirements of fairness. There was nothing inherently unfair in effectively adjourning the hearing for further

evidence and representations. Provided that each side had an opportunity to know the adverse case and to respond to that case, and provided that the requirements of fairness were otherwise satisfied, the Panel was entitled, in the exercise of its discretion, to allow either party the opportunity to produce further evidence or make further submissions.

The evidence before the panel

[16] I turn then to consider the manner in which the Panel dealt with the relevant evidence. Included in the record of the Panel meetings are two matters of particular relevance to the present application. The first concerned the location of DARD checkpoints. While the applicant maintained that there were only two checkpoints in the area and that they were located in positions that indicated that the applicant's lands were excluded from the cull zone, DARD maintained that there were three checkpoints in the area at locations that indicated the inclusion of the applicant's lands in the cull zone. The second matter concerned the confusion that existed on the part of DARD representatives between the applicant and his brother Patrick. The brothers both owned lands in the area and their farming enterprises were interconnected so that in dealings between DARD and each of the brothers there appears to have been lack of certainty from time to time as to whether matters related to the applicant or to his brother Patrick.

[17] The written response from DARD for the purposes of the reconvened hearing included materials relevant to the two matters referred to above. In relation to the checkpoints DARD confirmed that there was a third checkpoint, of which the applicant appeared to have been unaware, and the existence of which tended to confirm the inclusion of the applicant's lands in the cull zone. As to the second matter concerning the confusion between the applicant and his brother Patrick, the DARD paper referred to an inspection of the applicant's lands by a veterinary surgeon on 23 April 2001 when the applicant did not present any sheep for clinical inspection, which he should have done if, as he claimed, he still had 100 sheep on his lands.

The right to know and to respond: the checkpoints

[18] At the reconvened hearing the applicant and his solicitor disputed the existence of the third checkpoint and the panel questioned DARD representatives as to the presence of the third checkpoint. Having completed that exercise the Panel concluded that there had been a third checkpoint. The applicant objects that he did not have the opportunity to be present when the DARD witnesses were giving their evidence about the checkpoint and did not have the opportunity to cross-examine those witnesses. However the applicant had knowledge in advance of the hearing of the claim made by DARD and had the opportunity to challenge the existence of the third checkpoint by giving his evidence and making his submissions on that issue.

The applicant did so. There was no aspect of the matter left unexamined by the Panel. The panel preferred the evidence of the DARD witnesses. I find no unfairness in the method by which the Panel arrived at that conclusion.

The right to know and to respond: the farm visit

[19] In relation to the veterinary surgeon's inspection of 23 April 2001 the applicant and his solicitor contended at the hearing that there had been no such inspection of the applicant's property and any inspection related to the applicant's brother Patrick. In the absence of the applicant and his solicitor the Panel received on behalf of DARD the evidence of Roly Harwood, Divisional Veterinary Officer, confirming a visit to the applicant's premises by a veterinary surgeon in private practice who had completed a report indicating the absence of any sheep on the applicant's premises. Mr Harwood's evidence was based on his conversation with the veterinary surgeon concerning the visit and his consideration of the related documentation. In answer to questions from the Panel on the issue of the specific premises involved, Mr Harwood confirmed that the veterinary surgeon had visited the applicant's premises rather than those of his brother Patrick. Inspection reports were produced for 23 April 2001 relating to the applicant and to Patrick Tiernan and they indicated some linkage between the two farms. Having considered the evidence the Panel concluded that there had been a clinical inspection of the applicant's premises on 23 April 2001 at which no sheep were produced. That factor was taken into account by the Panel in reaching its overall conclusion that the applicant was not entitled to the sheep annual premium.

[20] The finding in relation to the inspection of 23 April 2001 is an important strand in the final rejection of the applicant's claim. It was important that the Panel should be satisfied that the inspection had involved the applicant. On this critical issue the Panel relied on the evidence of Mr Harwood who was reporting his conversation with the veterinary surgeon who had carried out the inspection. I have given careful consideration to the written record of the Panel's treatment of this issue. It is not for the court to make the factual findings but to be satisfied on the issue of procedural fairness. On this critical issue I am satisfied that the confusion between the applicant and his brother was not resolved in an acceptable manner. The evidence was second hand. It is not recorded on what basis Mr Harwood had established that the veterinary surgeon would have been able to confirm that he was dealing with the applicant's holding rather than Patrick's holding. In any event, on an important issue on which much of the Panel's recommendation appeared to turn, I would have expected that the Panel would have required the veterinary surgeon involved in the inspection to provide direct evidence to the Panel, whether in the form of a written statement or if necessary orally. In addition it is unclear whether there was some documentation produced by DARD during their second appearance

before the Panel, in connection with the farm visit, that had not been made available to the applicant. Further, the applicant's right to know and to respond would have required that he had reasonable notice in advance of the hearing of at least the essence of the evidence of the veterinary surgeon that DARD would rely on to establish that it was indeed the applicant's holding that was involved if the farm visit of 23 April 2001 and not that of his brother Patrick. As this issue was a material consideration in the final recommendation of the Panel, and as it appears to have been adopted by DARD in making the decision to reject the applicant's claim, the decision will be quashed.

[21] The applicant claimed that the decision of the panel deprived the applicant of property to which he was entitled, in breach of article 1 of the first protocol to the Convention. The applicant has no entitlement to the subsidy until he satisfies DARD of his entitlement through the established procedures, carried out lawfully and fairly. The issue will have to be reconsidered by the Panel in the light of this judgment and by DARD in the light of the further decision of the Panel.