IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2022] EWHC 1787 (Admin)

No. CO/2956/2021

Royal Courts of Justice

Tuesday, 22 March 2022

Before:

THE HONOURABLE MRS JUSTICE LIEVEN DBE

B E T W E E N :

THE QUEEN
ON THE APPLICATION OF
HUMANE LEAGUE UK — Claimant

- and -

SECRETARY OF STATE
FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS — Defendant

MISS C. McGAHEY QC and MR McGURK (instructed by Advocates for Animals) appeared on behalf of the Claimant.

MR R. TURNEY (instructed by the Government Legal Department) appeared on behalf of the Defendant.

J U D G M E N T

MRS JUSTICE LIEVEN:

1 I have reached the conclusion that this claim is not arguable and permission should not be granted. This is a renewed application for permission for judicial review, the application having been refused on the papers by Miss Grange QC, sitting as a Deputy High Court Judge. The claim is brought by the Humane League, which is an NGO concerned with animal welfare, and in the broadest terms it concerns the keeping of broiler meat, chickens and the terms of the Welfare of Farmed Animals (England) Regulations 2007 ("WOFER"). The type of chicken in issue are fast-growing breeds which it is anticipated will be slaughtered between 34 and 36 days. The claimant relies on evidence, including reports from a number of bodies, including the RSPCA, that suggest that such breeds cannot be raised without compromising their health and welfare. I note that the Secretary of State does not accept that proposition, but it is not a matter for the Administrative Court.

2 There are three grounds of challenge, all of which overlap, but the first two of which particularly overlap. I will summarise them from the statement of facts and grounds. Ground 1 is that the defendant is operating an unlawful policy which permits farmers in England to breed and rear fast-growing breeds of broiler chicken when such animals cannot be kept without unlawful detriment to their health and welfare; ground 2, the defendant's application of an unlawful system of welfare monitoring that is incapable of identifying unlawful systemic welfare detriment; ground 3 is a competition law ground which was added during the course of the proceedings and is parasitic upon grounds 1 and 2 in the sense that if I dismiss grounds 1 and 2 then ground 3 cannot stand on its own.

3 In my view, at the heart of this case are the terms of the Regulations themselves and how they fit together. The enabling provision is in s.12 of the Animal Welfare Act 2006, which states:

> "(1)The appropriate national authority may by regulations make such provision as the authority thinks fit for the purpose of promoting the welfare of animals for which a person is responsible, or the progeny of such animals."

The appropriate national authority is the UK Government, the Secretary of State for Environment, Food and Rural Affairs.

4 Under that power, the WOFER Regulations were made and the most relevant regulation is Regulation 4:

> "1) A person responsible for a farmed animal must take all reasonable steps to ensure that the conditions under which it is bred or kept comply with Schedule 1.
>
> (2) In complying with the duty in paragraph (1), a person responsible for a farmed animal must have regard to its—
>
> (a) species;
>
> (b) degree of development;
>
> (c) adaptation and domestication; and

(d) physiological and ethological needs in accordance with good practice and scientific knowledge."

Then Schedule 1 is divided into various different parts, the first point going to general conditions under which farm animals must be kept and at para.28 and para.29 there is a subheading "Breeding Procedures". Paragraph 28 deals with natural or artificial breeding or breeding procedures and then para.29, which is at the heart of this case, states:

> "Animals may only be kept for farming purposes if it can reasonably be expected, on the basis of their genotype or phenotype, that they can be kept without any detrimental effect on their health or welfare."

5 Then at Schedule 5A the heading is "Additional conditions that apply in relation to conventionally reared meat chickens" and conventionally reared meat chickens are defined in Regulation 2 and they include chickens being reared in the way that the claimants are concerned about in this litigation. I note, and this is important for ground 3, that they do not include Regulation 21(c) *inter alia* free range chickens and at (d) organic chickens. Schedule 5A then deals with a number of conditions specific to conventionally reared meat chickens, including, at para.3, stopping indensity levels and then notification provisions, feedings provisions, inspection. Then at para.14, "Food chain information and chickens dead on arrival", which sets out the provision of information by a food business operator operating a slaughterhouse about food chain information and chickens dead on arrival. Then para.15:

> "(1) An official veterinarian conducting controls under Regulation EU2017/625 in relation to chickens must evaluate the results of the post-mortem inspection to identify possible indications of poor welfare conditions in their holding or house of origin.
>
> (2) If the mortality rate of the chickens or the results of the post-mortem inspection are consistent with poor animal welfare conditions the official veterinarian must communicate the data to the keeper of those chickens and to the Secretary of State without delay."

Paragraph 15 is critical to this case because pursuant to para.15 the Secretary of State has drawn up a code of practice for the welfare of meat chickens and meat breeding chickens which refers to para.14 and 15 and which is known as the trigger system. At para.46 through 50 there is provision about the triggers for the purposes of 15(2) about when notification has to be given. Paragraph 47:

> "The post-mortem conditions currently monitored by the system are listed in Annexe 3. The system involves two processes. Process 1 is designed to identify situations where levels of a condition are exceptionally high and Process 2 is designed to identify situations where mortality levels are unusually high and additionally where the levels of a range of other conditions are above average. Different pre-defined thresholds known as "trigger levels" exist for these two processes."

Then in Annexe 3 the trigger levels, as referred to in that paragraph, for Process 1 and Process 2 are set out. Process 2 is further related to para.49.

6 I should have said at the start the claimant in this case is represented by Miss McGahey QC and Mr McGurk and the Secretary of State by Mr Turney and I am very grateful to all of them for me taking me very expeditiously through some quite complicated provisions.

7 Ground 1 is that para.29 of Schedule 1, which refers to the animals being capable of being kept without any detrimental effect on their health and welfare, requires the Secretary of State to ensure that such a standard can be met. It is argued that the Secretary of State, and I paraphrase, in adopting the trigger levels in the Code of Practice and the terms of the Code of Practice has adopted an unlawful policy, because the trigger levels are not compatible or do not meet the terms of para.29. Miss McGahey points to in Process 1, Annexe 3, to a trigger report only being required where the level of the post-mortem condition of the chickens is, to use the words of the Code, "exceptionally high". There are then a series of percentages which equate to levels of post-mortem condition which are some six standard deviations above the average and although the figures are slightly different under Process 2 one equally comes, she says, to a relatively high level of impact which is inconsistent with para.29. So she says that the Secretary of State, in adopting the Code with the trigger levels, has adopted an unlawful policy.

8 Ground 2 is closely related because she argues that the trigger system is a wholly inadequate monitoring and reporting system given the duty on the Secretary of State imposed by para.29. Ground 2 hovers close to being an irrationality challenge, but which would, in my view, be doomed to fail on its own, given the technical nature of the issues in the case and the ill-equipped role of the Administrative Court judge to engage in such matters. However, as I understand Miss McGahey's argument, it is not a pure rationality challenge because she argues it turns on the words of para.29 and what she says is the duty on the Secretary of State under that paragraph.

9 Ground 3, I can deal with very briefly in terms of the submissions because the argument is that there is a breach of the obligation to ensure equal treatment as between competing undertakings and the different undertaking. This is because by allowing the production of fast-breeding chickens, those who produce slower breeding chickens are at a disadvantage, if the trigger levels are adopted because the trigger levels allow these fast-breeding chickens to be used. However, as is accepted by the claimant, if I dismiss grounds 1 and 2, then ground 3 will necessarily fall because there is no unlawful policy or unlawful decision-making at the heart of any alleged unequal treatment. Therefore, in my view, I do not need to get into the potentially complex, although Mr Turney says unarguable issues of equal treatment, whether in domestic or allegedly retained EU law.

10 Mr Turney, who appears for the Secretary of State, says in respect of ground 1 that there is no relevant policy by the Secretary of State, because the trigger levels are not a policy in respect of para.29. The duties under Schedule 1 fall on the local authority as enforcer and primarily on the keepers of the chickens, or the farmers, and not on the Secretary of State. Therefore the Secretary of State has made no policy in respect of the keeping or not keeping of fast-breed chickens. In respect of ground 2, Mr Turney says that the trigger system, and this goes to both grounds as well, is made under para.15(2) and effectively has nothing to do with para.29, which is dealing with a wholly different matter.

11. Mr Turney's submission, and in my view this is at the heart of this case, is that para.29, which is under the heading of "Breeding Procedures", does not have any relation to welfare standards or the levels of mortality or condition set out in the trigger levels at Annexe 3. He says, and I accept this, that one has to read para.29 as part of Schedule 1 and see the different functions that the different paragraphs are have.

12. Paragraph 29 is about the type of breed in question and whether it can be kept, given its genotype or phenotype, without any detrimental effect on health or welfare. So para.29 is not focused on the nature of the keeping, but rather on the breed of the animal in question, whereas para.14 and para.15 and, indeed, the other parts of Schedule 5A, are those provisions which related to the welfare conditions of the animals in question.

11 Miss McGahey says that is wrong because she focuses on the words "if it can reasonably be expected" and says that, therefore, one has to reach a judgment or take some general view as to the nature of the conditions that the animal is to be kept in order to answer the para.29 question. Although I can see Miss McGahey's argument on the basis of the language alone of para.29, it seems to me that when one reads it together with the rest of the schedules and, in particular, Schedule 5A, it must be the case that para.29 is not focusing on welfare conditions or, indeed, on the conditions the animals are kept in at all, save that it is for farming purposes. The trigger levels that Miss McGahey points to are entirely about the welfare standards in para.15(2). It follows that, if that interpretation is correct, the Secretary of State has not adopted a policy in respect of fast-rearing chickens through the trigger levels, but has simply adopted the trigger levels for the welfare purposes of para.15.

12 In those circumstances, it seems to me that ground 1 is based on a false premise of there being an unlawful policy in respect of this type of chicken when there is no policy in respect of this type of chicken. There are welfare standards that apply to all conventionally bred chickens.

13 I think that probably deals with ground 2 as well, but in terms of there being any separate point about inadequate monitoring and reporting, once one accepts that the trigger system is all about welfare in para.15, it seems to me that all that can be left is a rationality challenge in respect of the keeping of the chickens. Such a challenge must fail, not least because, as Mr Turney says, if one takes the welfare reports in respect of the chickens, kept as conventionally reared chickens, the welfare reports drawn up by or on behalf of DEFRA show some 98 or 99 per cent of the chickens meeting the relevant welfare standards. Now, I appreciate that still leaves a high absolute number that do not, but in my view that does not go to whether the trigger levels are rational or not. The rationality argument can only turn on the construction of para.29. In my view, ground 2 is unarguable.

14 So far as ground 3 is concerned, there can be no unequal treatment, as I understand the argument, if there is not unlawful provision in respect of the particular type of chickens in issue, i.e., the fast-reared ones.

15 So, for all those reasons, I have reached the conclusion that this case is not arguable.

CERTIFICATE

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This transcript has been approved by the Judge.