000201

1989/325 JR

THE HIGH COURT

JUDICIAL REVIEW

BETWEEN

NOEL CARROLL

APPLICANT

AND

THE MINISTER FOR AGRICULTURE AND FOOD

RESPONDENT

Judgment of Mr. Justice Blayney delivered the 28th day of February 1990

The Applicant is a farmer and businessman. He owns lands at Erris, Boyle in the County of Roscommon on which, in October 1989, he had a herd of 131 cattle. These cattle were tested for Bovine Tuberculosis on the 7th October 1989 by Mr. Barry Lynch V.S., and Mr. Lynch came back on the 10th October to check the result of the test. One of the cattle, bearing tag number 802728-1NCA, gave a reading of 14-16, which is regarded as being an inconclusive reading. But the Applicant's lands are in what the Respondent had designated as a "black spot area", that is to say, an area of high disease incidence, and in such an area an animal with an inconclusive reading is deemed to be a reactor. Accordingly, on the 11th October 1989, Mr. Thomas O'Brien, the Senior Veterinary Inspector of the District Veterinary Office in Roscommon had the Applicant served with a restricted Holding

Notice under Article 12 of the Bovine Tuberculosis (Attestation of the State and General Provisions) Order 1978 (S.I. No. 256 of 1978). The effect of the Order was that the Applicant was prohibited from moving any animals into or out of his lands until his herd had had two wholly clear tests carried out at sixty day intervals. In addition, the animal deemed to be a reactor had to be removed from the lands and sent to a factory for slaughter within thirty days.

The Applicant protested against the service of the Notice and sought to have the animal in question retested. This was refused and on the 15th December 1989 the Applicant sought and was granted leave to apply by way of Judicial Review for an Order of Certiorari quashing the restricted Holding Notice and an Order of Mandamus directing the Respondent to have the animal in question retested.

Article 12 (1) of the 1978 Regulations already referred to, under which the restricted Holding Notice was served, is as follows:-

> "12 (1) Where, by reason of a test or otherwise, a veterinary inspector is satisfied or has reasonable grounds for suspecting that -
>
> (a) there is a reactor on a holding, or
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> (b) bovine tuberculosis is present on a holding, or
>
> (c) the owner or person in charge of any holding has not, in relation to any animal, goat or swine, complied with any provision of the Act or of this Order,
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> he shall declare the holding to be a restricted holding and shall give or send, or cause to be

given or sent, to the owner, occupier or person in charge of the holding a notice in the form set out in Part I of the Second Schedule to this Order."

A reactor is defined in Article 2 of the Order as meaning "an animal which, by reason of a test or otherwise, a veterinary inspector believes or suspects is affected with bovine tuberculosis or is capable of infecting other animals with bovine tuberculosis."

The grounds on which the Applicant claims to have the Notice quashed are set out in the statement grounding the application for Judicial Review as follows:

"1. The Order/Notice purported to be served under the provisions of the Bovine Tuberculosis (Attestation of the State and General Provisions) Order 1978 and dated the 11th day of October 1989 is null and void by reason of the said Regulations being ultra vires the power of the Minister and consequently being null and void and of no effect.

2. In the alternative on the grounds that the test purported to be carried out on the 10th of October 1989 was not in accordance with the provisions of the Bovine Tuberculosis (Attestation of the State and General Provisions) Order 1978.

3. The test purported to be carried out was not carried out in a fair and proper manner and in accordance with the Regulations and EEC Directive L. 47-31 dated 21st day of February 1980.

4. The circumstances in which the test was carried out was not carried out in a fair and proper manner and failed to accord the Applicant a fair and proper determination of the testing of his animals.

5. The procedures as adopted by the Respondent are in breach of natural and constitutional justice.

6. By reason of the want of the fairness in or about the procedures as adopted leading to the making of the Order.

7. On the grounds that the Respondent failed to act in accordance with the Regulations and acted in a manifestly unfair and improper manner."

The 1978 Regulations were revoked and replaced by the Bovine Tuberculosis (Attestation of the State and General Provisions) Order 1989 (S.I. No. 308 of 1989) which came into operation on the 4th day of December 1989 and a new restricted Holding Notice under Section 12 of these Regulations was served on the Applicant on the 6th December 1989. Part of the 1978 Regulations had been declared ultra vires by Murphy J. in a judgment delivered on the 3rd day of October 1989 in the case of Howard .v. The Minister for Agriculture and Food (which I was informed by Counsel for the Respondent is under appeal) and for this reason new Regulations had been enacted. On the application of Counsel for the Applicant I amended the relief being claimed by adding a claim to quash also the Notice of the 6th December 1989 and I allowed a claim for the following relief to be added also:

"A declaration that if contrary to what is

hereinbefore contended the Bovine Tuberculosis (Attestation of the State and General Provisions) Order 1978 is intra vires the Respondent (which is denied), the said Regulations, and the Regulations entitled the Bovine Tuberculosis (Attestation of the State and General Provisions) Order 1989 (if intra vires) are defective or are inherently defective by reason of the failure to incorporate therein whether expressly or by implication an appeal mechanism or procedure or by failing to incorporate firm and proper procedures to enable the Applicant or any herdowner affected on foot of a test carried out under the Regulations to challenge the test or to vindicate his rights or to allow an independent retest in the event of a disputed finding (and if necessary at the Applicant's or herdowner's expense)".

Counsel for the Applicant expressly abandoned the ground that the 1989 Regulations were ultra vires but contended that they were defective in that they embodied no safeguards for the Applicant. He had no way of knowing whether the Department was right or wrong. The Applicant also complained that he had no way of knowing that he was in a black spot area and that this was a considerable disadvantage as in such an area a stricter standard was applied by the District Veterinary Inspector. The Applicant also criticized the manner in which the test had been carried out by Mr. Lynch.

The evidence in the case is contained in six affidavits, the Applicant, Mr. Lynch and Mr. O'Brien each

having sworn two affidavits. While some facts were in dispute, the following basic facts it seems to me are not.

Mr. Lynch carried out the first part of the test on the Applicant's cattle on the 7th October 1989. The cattle were in three separate locations. The animal bearing tag number 802728-1NCA was on the Castle Fineogue Farm and was the second animal injected with tuberculin on that farm. The skin reading was 9/8 on the 7th October 1989 when injected, and when read on the 10th October 1989 had increased to 14/16. This was measured with callipers by Mr. Lynch and the reading was made in broad daylight before 5.45 p.m.. Mr. Lynch told Mr. Carroll that the reading could result in the holding being restricted. He had overlooked the fact that the Applicant's farm was in a black spot area which meant that an animal with an inconclusive reading would be deemed a reactor. If he had remembered he was working in a black spot area he would have tagged and punched the animal in question after declaring it a reactor.

On the 11th October 1989 Mr. Lynch informed the District Veterinary Office in Roscommon by telephone of the result of the test and on the same day Mr. O'Brien had the initial restricted Holding Notice served on the Applicant.

On or about the 30th January 1989 the Eradication of Animal Disease Board (ERAD) had issued a press release in County Roscommon which, inter alia, conveyed the information that certain high disease incidence areas in the county had been designated black spot areas. The press release was accompanied by a map which showed that the Applicant's farm at Castle Fineogue was in such an area. The press release

was the subject of articles in both the Roscommon Herald and the Roscommon Champion. And on the 30th March 1989 each of the participating veterinary surgeons was sent a circular letter by ERAD which contained the following paragraph:

> "Interpretation of inconclusives: I wish to confirm that all standard inconclusives in A or B category herds or in black spot areas should be removed as reactors."

Mr. O'Brien explained the term black spot area in his second affidavit as follows:

> "The term "black spot" has no legal basis, but it is used by ERAD to define areas in relation to which ERAD has decided that a stricter standard or interpretation should apply, for the reasons given above. The decision to define an area as black spot relates to all areas (the basis of an area being a "District Electoral Division") where a high incidence of Bovine Tuberculosis is present. The District Electoral Division in which Mr. Carroll's holding is situated has a particularly high incidence, being approximately seven times the county average during 1988/1989."

On the basis of these facts what I have to decide is whether there are any grounds for quashing Mr. O'Brien's decision under Article 12 of the 1978 Regulations and the 1989 Regulations to declare the Applicant's farm a restricted holding. In my opinion there are not. Where a veterinary inspector is satisfied or has reasonable grounds for suspecting that there is a reactor on a holding, or bovine tuberculosis is present on a holding, the article obliges him

to declare the holding to be a restricted holding. He has no discretion in the matter. So, in considering whether the declaration is properly made, all I have to consider is whether Mr. O'Brien was bona fide satisfied or had reasonable grounds for suspecting that there was a reactor on the Applicant's farm. I have no doubt that at the very least he had reasonable grounds for suspecting this. On Mr. Lynch's test the animal bearing tag number 3C2728-1NCA had given an inconclusive reading, 14-16, and as the Applicant's farm is in a black spot area an animal with such a reading had to be removed as a reactor. So Mr. O'Brien clearly had reasonable grounds for suspecting that the animal was a reactor. And that being so, he was obliged to make the Order.

The Applicant's criticism of the manner in which Mr. Lynch carried out the test, even if well founded, which it seems to me is unlikely, is not really relevant. No such criticism had been made by the Applicant at the time Mr. O'Brien made his decision. Accordingly, he was perfectly entitled to act on Mr. Lynch's finding. There was no reason why he should have any doubt about ~~his~~ its accuracy. There was no obligation on him to investigate how Mr. Lynch had carried out the test. The position might have been different if, before making his decision, the Applicant had questioned the manner in which Mr. Lynch had carried out the test. In the absence of any such complaint it was perfectly normal for him to rely on Mr. Lynch's finding.

Apart from criticising the manner in which the test was carried out, the Applicant, in his amendment to the original grounding statement, claimed that the relevant Regulations were defective in that they did not incorporate

any appeal mechanism and did not enable the Applicant to challenge the test or have an independent retest in the event of a disputed finding. It was submitted that because of this there was an absence of basic fairness in the procedure.

This submission has to be looked at against the background of the purpose of the Regulations. They were enacted to assist in the eradication of bovine tuberculosis. In his second affidavit Mr. O'Brien sets out how important this is for the cattle, beef and dairy industry in the country. These industries account for over 70% of farm output and some 20% of Irish manufacturing output. The combined value of these exports in 1987 came to 2.3 billion pounds. The existence of bovine tuberculosis creates problems in that inter-community trade in cattle or beef showing any signs whatsoever of bovine tuberculosis is prohibited.

The question is whether, given the importance in the public interest of eradicating bovine tuberculosis, Article 12 of the Regulations lacks basic fairness. It seems to me that it does not. Strict measures are necessary. To permit an appeal against the test findings of a veterinary surgeon would introduce delays into the scheme which could jeopardise its effectiveness to identify, isolate and remove reactors. Furthermore, the tests are conducted by an independent veterinary surgeon and the manner in which they are to be carried out is laid down strictly in the Regulations, and the risk of error in any test result would appear to be slight since all that is involved in ascertaining the result of a test is a physical measurement with a calliper. In the circumstances I am satisfied that there is not any want of

basic fairness and that the Regulations are not defective.

In addition to seeking an Order of Certiorari, the Applicant also sought an Order of Mandamus directing the Respondent to order that the anima in question be retested. I am satisfied that the Respondent has no duty whatsoever to do this and accordingly the Applicant is not entitled to such an Order.

It seems to me that what the Applicant was contesting in this case was not so much the result of the test as the consequences that it had for him by reason of his farm being in a black spot area. Mr. Lynch stated in his first affidavit that the Applicant had told his (Mr. Lynch's) mother that he had had an unauthorised second test carried out on the animal in question, and that the veterinary surgeon who carried it out had refused to sign the cattle card. In his replying affidavit, the Applicant made no reference to his having had the animal retested. In particular he did not give the result of the test. The only conclusion I can draw from this is that the result did not differ from that obtained by Mr. Lynch. The Applicant's real complaint therefore was that his lands were in a black spot area because it was this which had resulted in the restricted Holding Notice being served on him. If his lands had not been in a black spot area, the only result of the inconclusive reading would have been that the animal in question would have had to be isolated until the entire herd had been retested after an appropriate interval. And while the Applicant claimed in his second affidavit that his lands were not in a black spot area, it was clear from the map

exhibited by Mr. O'Brien that this was not so.

For the reasons given, this application fails and must be dismissed.

-/s/ J. Kenny.

25. 2. 1990

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