Neutral Citation Number: [2013]IEHC 619

THE HIGH COURT

[2013 No. 92 J.R.]

BETWEEN

THE IRISH COB SOCIETY LIMITED

APPLICANT

AND

THE MINISTER FOR AGRICULTURE, FOOD AND MARINE

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on 19th December, 2013

1. A series of controversies over the last two decades has highlighted that which, in retrospect at least, ought to be obvious, namely, the importance of traceability within the food and animal sectors. These concerns have been to the forefront of a range of legislative and administrative measures introduced at EU and national level within recent times. Compliance with this regulatory regime is considered to be of vital public importance given that the maintenance of proper records in relation to animals is essential if the integrity of the traceability system is not to be jeopardised. One might further observe that the identification and traceability system is a key element in the control and prevention of disease in the equine sector, since the objective of ensuring that meat from animals which are unfit to be slaughtered for human consumption does not enter the food chain is plainly of overwhelming public importance.

2. This is the general public policy backdrop to the present judicial review proceedings in which the applicant seeks to quash a decision of the Minister for Agriculture, Food and the Marine dated 15th November, 2012, which refused its application to maintain certain equine stud books and also revoked its existing authorisation to administer certain stud books with effect from 29th November, 2012. The applicant also seeks an order of certiorari quashing a similar decision made on 14th November, 2012, which refused its application to issue certain passports with effect from 29th November, 2012.

3. The applicant, the Irish Cob Society Ltd. ("the Society" or the "ICS") is a limited company which, prior to the events giving rise to these proceedings, had the approval of the Minister for Agriculture for the maintenance of stud books for the Irish Cob breed and Irish Cob part breed horses in 1998. This function entailed maintaining a form of passport in relation to each horse. The passport identifies the horse by reference to markings that are carrying naturally on the animals hide and by reference to a transponder which had been implanted in its neck by a registered veterinary practitioner at the time the animal is first identified. The passport book also records the forebears of the horse for two generations and it also records appropriate medicines administered to the horse.

4. Regulation No. 504/2008 ("the 2008 Regulation") was promulgated by the European Commission in 2008 and was later transposed into Irish law by virtue of the European Communities (Equine) Regulations 2011 (S.I. 357 of 2011) ("the 2011 Regulations").

The Equine Identification System

5. So far as equines are concerned, traceability rests on a passport issuing system which is maintained by passport issuing organisations operated by the Minister under Article 4 of the 2011 Regulations. These passports must be issued either in the calendar year or within six months of birth and are valid for the life of the animal. Approved organisations are automatically entitled by virtue of that status to issue passports for animals maintained on their studbooks. Article 4 of the 2008 Regulation provides that bodies which are approved to maintain a studbook are automatically entitled to issue passports for the animals registered on those studbooks.

6. These principles are given further effect by requirements as to the maintenance of records and rules regarding the insertion of transponders. The very concept of food traceability might be compromised not only if appropriate records were not kept, but also if transponders could be inserted into animals by unauthorised persons. In the latter case, quite apart from any issues of animal welfare arising from the administration of a veterinary procedure by unqualified personnel, the potential for consumer fraud would be significantly enhanced if such transponders could be inserted by persons other than veterinarians who, after all, are ultimately subject to statutory supervision by the Veterinary Council.

7. Article 21 of the 2008 Regulations (which came into force on 1st July, 2009) thus provides that the issuing body when issuing the identification document or registering previously issued identification documents shall record the critical information in its database or registering previously issued identification documents for 35 years or until at least two years from the date of the death of the animal. Section 1, Part A of the Regulations require, *inter alia*, that the identification details bear "the signature and stamp of the qualified person (or competent authority)."

8. So far as the transponders are concerned, Article 11 of the 2008 Regulation prescribes certain electronic methods of identity verification in respect of equines. Article 11(1) thus requires that equines are "actively marked by the implantation of a transponder." Member States are then required to lay down "the minimum qualification" required for this procedure and to "designate the person or profession entrusted with such operations." Article 11(2) provides that the transponder "shall be implanted parenterally under aseptic conditions between the poll and withers in the middle of the neck in the area of the nuchal ligament." The competent authorities are also empowered by Article 11(2) to authorise the implantation of the transponder in a different area of the neck where this would not compromise animal welfare or the efficacy of the transponder". Article 11(3) stipulates that the issuing body shall enter the appropriate information regarding the insertion of the transponder in the issuing documentation. Critically, however, Article 11(3)(b) provides that the information so entered shall include "the signature and stamp of the person…who carried out the identification and implanted the transponder".

9. The 2008 Regulations were transposed into national law by the 2011 Regulations which were issued by the Minister on 5th July, 2011, and took effect on that day by virtue of the provisions of s. 16 of the Interpretation Act 2005. Notice of the making of the Regulations was first published in *Iris Oifigiúil* on 12th July, 2011.

10. Article 6 of the 2011 Regulations originally provided:

> "(1) The Minister shall set out the rules, in accordance with the Commission Regulation, to ensure the uniqueness of the numbers used for a transponder for implantation in an equine animal.
>
> (2) A person shall not implant a transponder intended for an equine animal unless the transponder has been supplied by an issuing body approved under Regulation 4(2)(a) or (b).
>
> (3) A transponder shall be implanted, by a registered veterinary practitioner in accordance with Article 11(2) of the Commission Regulation.
>
> (4) When a transponder is implanted in an equine animal, an issuing body shall enter in the passport the information required in Article 11(3) and (4) of the Commission Regulation."

11. Both Article 6(2) and Article 6(3) were deleted by Article 2 of the European Communities (Equine)(Amendment) Regulations 2012 (S.I. No. 371 of 2012)("the 2012 Regulations"). The new version of Article 6(2) is simply a more complete expression of the original prohibition:

> "(2) A person shall not implant an equine animal with a transponder unless-
> (i) the transponder has been supplied by an issuing body approved under Regulation 4(2)(a) or (b), and
>
> (ii) that person is a registered veterinary practitioner designated in accordance with Article 11(1) of the Commission Regulation."

12. It is clear from these provisions that (irrespective of the precise formulation) only a veterinary surgeon is authorised to insert a transponder into an animal and that the transponder must have been supplied by the issuing body. It seems surprising that there should be any doubt about the requirement in respect of certification by a veterinary surgeon, yet the Society maintained for some time both before and after the making of the 2011 Regulations that this was not the case.

13. Indeed, the Society in its statement of grounds contends that it has been prejudiced by the application by the Department of "special meanings and interpretations to the Regulations" which were only communicated to it by letter dated 1st February, 2012, and of which it could not "reasonably have been expected to give to the Regulations" prior to such notification. For my part, however, I fail, with respect, to see any possible basis for this complaint. The Department's interpretation of the 2011 Regulations was absolutely straightforward and correct and, as we shall now see, the applicant had ample notice of these views.

Inspections and complaints regarding the Society

14. A series of issues concerning the Society's practices and methods had been raised in the period from about 2009 onwards. Thus, for example, a departmental inspection on 11th May, 2010, raised issues of consistency regarding the marking charts maintained by the Society. While some of the marking charts had been issued by the Society itself, yet others had come from veterinary practices and others again from certain sales venues. Some of the charts had been informally amended and in other cases equine identification documents had been issued for animals where the marking charge had not been signed by the veterinarian. The minute of the inspection recorded that the Society had agreed to address the issues raised at the inspection including:

> "putting in place a quality management system to check and ensure that passports are only issued when full and complete documentation is available, i.e., fully completed, un-tampered, marking charts signed and stamped by a [veterinary surgeon].
>
> As part of this system accepting only double-sided ICS issued marking charts/application forms
>
> Where incomplete marking charts/applications etc. are sent to the ICS, the ICS undertook to return same and not issue documents until the full documentation is received;
>
> The ICS undertook not to tamper with marking charts or other official documentation."

13. A series of meetings had been held during this general period with industry representatives which had clarified that only veterinary surgeons were permitted to insert transponders and, furthermore, that it was the veterinarian who needed to sign the appropriate certification for the equine passport. Nevertheless, in a series of rather argumentative exchanges with the Department the Society appeared most reluctant to accept this state of affairs. A series of representative examples may be cited to illustrate this point.

14. On 20th April, 2011, the Department once again informed the Society that it was not authorised to sign the certificate and that this could only be done by a veterinary surgeon or by the Minister as competent authority. The Society responded to this email taking issue with this and asserted that it was the competent authority authorised to certify the equine passport. It was further indicated that the Society intended to complain to the European Commission regarding the manner in which Ireland had transposed the 2008 Regulation. As it happens, the Society did make such a complaint, but the Commission ultimately found no fault in the manner in which the Regulation was transposed.

15. On 2nd June, 2011, the Society had a meeting with the Department regarding many of these issues. The Departmental officials reminded the Society that it was not a competent authority for the purposes of the Regulation. They also stressed that the implantation of a transponder was an invasive veterinary procedure which could only be carried out by a veterinary surgeon under the Veterinary Practice Act 2005. It was again stressed that only veterinary surgeons could certify for the purposes of the equine passport and the Society expressed itself content with this.

16. A few days later, however, the secretary of the Society, Ms. Flynn, sent an email to the Department noting an exchange she just had with the owner of a particular horse sale who had complained that the Society's equine passports had been issued and stamped by the Society and not by a veterinary surgeon. The owner maintained that the Society's passports could not be taken "seriously" as a result. Ms. Flynn had responded by explaining that the Society "as an issuing body must sign and stamp Point 11 of Section 1, Part A as the person who implanted the chip" and that the Society was awaiting the enactment of legislation "which will legally establish and clarify the position where a [veterinary surgeon] cannot sign and stamp point 11 of Section 1 Part A because the [veterinary surgeon] did not implant the chip." She added that she had explained that "anyone can get microchips and implant them without infringing or breaking any laws at this time".

17. In view of what had been agreed with the Department following the May, 2010 inspection, this would seem a curious attitude to have taken. Even if it were technically true to say that the domestic transposing Regulations to give effect to the requirements of Article 11 of the 2008 Regulation to determine the category of persons who could insert the transponder had not yet been promulgated, the Society must have been aware that the 2011 Regulations were imminent. Besides, it was quite inaccurate to say that anyone could insert a transponder into a horse without infringing the law. By virtue of the Veterinary Practice Act 2005 ("the 2005 Act") only registered veterinary surgeons are permitted to practice veterinary medicine. The practice of veterinary medicine is defined by s. 53(1)(a)(iii) of the 2005 Act as performing a surgical procedure in relation to an animal, such as the insertion of an equine transponder. It is all too plain, therefore, that only veterinary surgeons may lawfully insert an equine transponder into an animal. Yet this was the very point which the Departmental officials had (correctly) made to Ms. Flynn just a few days previously.

18. The second example came about following an inspection which the Department carried out on 16th January, 2012. The Department wrote to the Society on 1st February, 2012, stating that in the course of the inspection it had been noted that:

> "…..you were signing the marking charts of replacement equine passports for non-registered (non-pedigree) *equidae* on behalf of the issuing body, relying on a signed statement from the equine owner that the equine has a microchip inserted of a given number. Such information must be verified by a veterinary practitioner…..
>
> You are advised to discontinue this practice with immediate effect and ensure that passports are issued in accordance with both national (S.I. 357 of 2011) and EU legislation, particularly with regard to the requirement to have equines micro chipped by veterinary surgeons and the marking charts signed accordingly.
>
> Further action will be taken in relation to the approval of your organisation to issue *equidae* identification documents if evidence the action identified above is found again."

19. It is striking that in a letter sent to the Department on the 8th January, 2013, the Society nonetheless saw fit to complain that "it had not been informed or advised in relation to what was expected of us at the inspection". A rider to the effect that had the Department "assisted the ICS by providing the ICS with a document prior to the inspection…the ICS would not have been caught out in this regard as we would have been better informed and better prepared for our inspection" can scarcely be regarded as reassuring so far as the Society's approach to the inspection process was concerned.

20. The applicant Society had applied on 1st February, 2011, seeking approval to maintain the Cob stud books. The existing approvals were extended pending the Minister's review of the application. However, by letter dated 23rd July, 2012, the Minister gave notice pursuant to Article 4(8)(a) of the 2011 Regulations that he intended to refuse the application. The Minister identified three general grounds of concern.

21. First, the Society had issued equine passports which had been signed by a representative of the Society rather than by a veterinary surgeon "in contravention of [Article] 6(3) of the European Communities (Equine) Regulations 2011". The Department had noted "several instances of this after the 2011 Regulations took effect".

22. Second, the Society had failed to record the "food chain" status on equine passports issued by the Society and failure to record the "food chain" status of equines "identified by the Society on the database maintained by the Society" in contravention of Article 5(4) of the 2011 Regulations.

23. Third, the Society had issued replacement passports for equines in circumstances "where they should not have been issued", in contravention of Article 5(8) of the 2011 Regulations.

24. The Society responded by means of a lengthy letter dated 30th July, 2012. In summary, it contended that the Society had been notified only of the making of the 2011 Regulations on the 14th July, 2011, and that since that date it had issued only first time equine identification passports where Section 1, Part A had been signed and stamped by a veterinary surgeon in accordance with Article 6(3) of the 2011 Regulations. It further stated that it was only upon receipt of the 2011 Regulations that it realised that it was required to record the "food chain status of equines" on the equine passport and on the database.

25. So far as the replacement passport issue was concerned, the Society acknowledged that it had issued replacement passports based on a signed statement from the owner that the animal had a transponder inserted of a given number. It stated that it did not consider that it was breaking any existing laws when they were so acting as "they knew that the food chain was protected whenever we issued a replacement equine passport." The Society further stated that having received the letter of 1st February, 2012, it realised that it was "unknowingly acting against the intentions of the Minister in relation to the issue of replacement passports….regarding the involvement of the veterinary profession in the processing of replacement passports." It then stated that no evidence had been adduced to prove that the Society had issued replacement passports "in circumstances where they should not have been issued following ICS Ltd. receipt of the letter" of 1st February, 2012, from the Department.

26. Further correspondence followed in which the Society sought a meeting with the Department in order to press its own case, but this request was refused by letter dated 7th August, 2012. This culminated in the Minister's decision of 15th November, 2012, to refuse to grant approval. The Minister again identified three general grounds of non-compliance.

Ground No. 1: Equines not being identified by a registered veterinary practitioner
27. The Minister noted Section 1, Part A of the identification documents had been signed by a representative of the Society rather than by a registered veterinary practitioner. He commented that the Minister "has noted several instances of non-compliance after the 2011 Regulations took effect." Three examples in respect of specific animals were noted in respect of passports issued on 13th July, 2011, and three further examples dating from November and December, 2011 respectively were also set out.

Ground No.2: Failure to record the "food chain status" of equines
28. Five examples of non-compliance in respect of passports issued after 5th July, 2011, were identified. Two such passports were issued on 13th July, 2011; two were issued on 29th July, 2011, and a further passport was issued on 5th September, 2011.

Ground No. 3: Issuing of replacement passports
29. Three examples were given in respect of passports issued on 29th July, 2011, 25th October, 2011, and the 23rd January, 2012, respectively.

The power to refuse or revoke the application
30. The power to refuse or revoke an application is contained in Article 4(8) of the 2011 Regulations. This provision empowers the

Minister to refuse or revoke an application

> "if in his or her opinion –(a) an act of the institutions of the European Communities or these Regulations have not or are not likely to be complied with…"

31. The statutory formula employed here ("if the Minister is of opinion") is a very familiar one in the sphere of administrative law. The courts have consistently held that the opinion formed by the Minister must satisfy the triple test of demonstrating that the opinion is held bona fide, that it is factually sustainable and is not unreasonable: see, *e.g., The State (Lynch) v. Cooney* [1982] I.R. 337, 361 *per* O'Higgins C.J., *The State (Daly) v. Minister for Agriculture* [1987] I.R. 165 *per* Barron J. and in more recent times, *Mallak v. Minister for Justice and Equality* [2012] IESC 59, [2013] 1 I.L.R.M. 73, 91-99 *per* Fennelly J.

32. While it is true that Article 27 of the 2011 Regulations (as amended) provides that the failure to comply with either the 2011 Regulations and the 2008 Regulation is an offence, this does not have to be established before the Minister could properly refuse the application or revoke an existing licence. This is because Article 4(8) simply requires the Minister to form the opinion that the applicant has either not complied with the 2011 Regulations or may not do so in the future. The Minister's opinion must naturally meet the administrative law standards articulated in cases such as *The State (Lynch) v. Cooney* and *Mallak,* as failure to do so would render the decision liable to be quashed. The Minister is nevertheless only required by Article 4(8) to form the requisite *opinion* as to the past existence of these matters by reference to the *civil standard of proof*. This is quite a different matter from establishing the *objective existence* of such a breach before a *court* by reference to the burden of proof in criminal cases, namely, proof beyond reasonable doubt in the manner envisaged by Article 27.

33. In the present case, no question of the *bona fides* of the Minister arises. The second part of the three part test, namely, factual sustainability, is also satisfied in that it is clear that there had been a manifest non-compliance on the part of the Society with the requirements of both the 2008 Regulation and the 2011 Regulations in a number of respects, so that the Minister could properly have formed the view that the applicant had, in fact, breached these provisions in the past.

34. Can it therefore be said that the Minister acted unreasonably in refusing to grant the application? It is true that the Society has doubtless done much good work in advancing the cause of the Irish Cob and it may fairly be observed that the Minister would have to have more pressing grounds for revoking an existing licence than, perhaps, would have been the case had the Society being applying for a licence on an entirely *de novo* basis. It is also true that in the latter case especially any such decision must respect the principle of proportionality, so that purely minor and technical breaches of the 2011 Regulations might accordingly be excused or overlooked.

35. I nevertheless cannot think that the present case can be so regarded. It is true that the personal propriety of the Society and the integrity of its Secretary and its members is absolutely beyond question. Yet given that the importance of adhering to fundamental regulatory principles is of immense importance in matters of animal welfare and food safety, the revocation power cannot be confined to those cases of personal wrong doing on the part of the officers of an issuing society maintaining a studbook. There should be little room for error or equivocation in respects of matters as fundamental as the proper and regular administration of equine passports if the principle of traceability is not to be wholly compromised. One cannot avoid observing that, regrettably, the Society had demonstrated by its conduct that it could not be relied on faithfully and consistently to apply the Regulations, warning after warning notwithstanding.

36. Even if it be said that some of the infractions of the Regulations were in the days and weeks immediately post-dating the entry into force of the 2011 Regulations in July, 2011 – and could thus be explained by a lack of immediate familiarity with the specific requirements of the Regulations – the fact remains that the Society had been given much advance notice of these changes. In any event, critically, some of the breaches took place several months after any possible transitional period had long expired. Specifically, the matters disclosed in the course of the January, 2012 inspection must have been exasperating for the Departmental officials concerned and wholly undermined confidence in the Society.

Breach of fair procedures

37. It is common case that the Department held no oral hearing prior to the decision, but the Society maintains that the failure to afford it this opportunity amounts to a breach of fair procedures. The Minister had, however, fully put his case to the Society in detailed correspondence and the Society had had every opportunity to reply. There is no suggestion here of the existence of any conflict of fact which was essential to the fair determination of the matter and in respect of which some form of oral hearing was critical to its fair resolution. The present case is thus far removed from classic cases such as *Re Haughey* [1971] I.R. 217 and *Maguire v. Ardagh* [2002] IESC 21, [2002] 1 I.R. 385 where the failure to permit or even to limit the cross examination of witnesses had huge implications for the reputation and good name of the persons affected.

38. In these circumstances one cannot conclude that the failure to hold some form of oral hearing rendered the hearing unfair.

Conclusions

39. For the reasons stated, I fear that I must uphold the decision of the Minister to refuse to grant the Society approval status in respect of the maintenance of the Irish Cob (and associated breeds) studbooks. The decision was obviously taken *bona fide* and it has not been shown that it was not factually sustainable or that it was unreasonable.