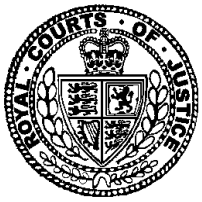

Neutral Citation Number: [2021] EWHC 2325 (QB)

Case No: CO/2295/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 July 2021

Before :

MR JUSTICE GRIFFITHS

- -

Between :

HELEN MACDONALD

Appellant

- and -

ANIMAL PLANT AND HEALTH AGENCY

Respondent

- -
- -

Cathryn McGahey QC (instructed by **Olephant Solicitors**) for the **Appellant**
Ned Westaway (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 29 July 2021

- -

Approved Judgment

Mr Justice Griffiths :

1. This is an appeal by way of case stated against the decision of District Judge (Magistrates Court) Layton on 4 May 2021 sitting at Bristol Magistrates Court to grant a warrant to the respondent to enter a farm in Wooton-under-Edge, Gloucestershire, and remove and slaughter an alpaca-nevalea named Geronimo owned by the appellant.

2. I will refer to the appellant as "Miss Macdonald", the respondent as "APHA", the alpaca as "Geronimo", District Judge Layton as "the Judge", and the decision of the Judge on 4 May 2021 as "the Ruling". APHA is an agency of the Department for Environment, Food and Rural Affairs.

3. Since this is an appeal by way of case stated it can only succeed if Miss Macdonald can persuade me of an error of law or that there was no jurisdiction to make the order complained of. Moreover, I am limited to the facts and matters in the case stated itself. Appeals against findings of fact, unless those findings are themselves errors of law because they were such that no reasonable judge could have made them, cannot be brought by way of case stated.

The law

4. By section 32(1) of the Animal Health Act 1981,

> "The Minister may, if he thinks fit, cause to be slaughtered any animal which-
>
> (a) is affected or suspected of being affected with [amongst other diseases, bovine tuberculosis]; or
>
> (b) has been exposed to the infection of any such disease".

5. Compensation is payable when he makes such a decision (section 32(3) of the Animal Health Act).

6. Section 62A of the Animal Health Act provides that

> "An inspector may at any time enter any premises for the purpose of
>
> (a) ascertaining whether a power conferred by or under this Act to cause an animal to be slaughtered should be exercised; or
>
> (b) doing anything in pursuance of that power".

7. By section 62B of the Animal Health Act, a justice of the peace may issue a warrant if various statutory conditions are satisfied. In this case it is accepted that the second condition is satisfied, but disputed whether the first condition is satisfied. Section 62B provides:

> **Slaughter: warrants**
>
> (1) If a justice of the peace is satisfied on sworn information in writing that the first condition is satisfied and that the second or third condition is satisfied he may issue a warrant authorising an inspector to enter any premises, if necessary using reasonable force, for the purpose mentioned in section 62A.
>
> (2) The information must include—
>
> (a) a statement as to whether any representations have been made by the occupier of the land or premises to an inspector concerning the purpose for which the warrant is sought;
>
> (b) a summary of any such representations.
>
> **(3) The first condition is that there are reasonable grounds for an inspector to enter the premises for that purpose.**
>
> (4) The second condition is that each of the following applies to the occupier of the premises—
>
> (a) he has been informed of the decision to seek entry to the premises and of the reasons for that decision;
>
> (b) he has failed to allow entry to the premises on being requested to do so by an inspector;
>
> (c) he has been informed of the decision to apply for the warrant."

8. The dispute in this case is over the first condition, namely, whether "there are reasonable grounds for an inspector to enter the premises" for a section 62A purpose, which includes doing anything in pursuance of the power to cause an animal to be slaughtered.

9. The alpaca is a species of camelid, to which the Tuberculosis (Deer and Camelid) (England) Order 2014 applies ("the 2014 Order").

10. Article 12(5) of the 2014 Order provides:

> "A person must not perform a test for tuberculosis on a camelid except with the written consent of the Secretary of State…"

11. Article 16(1) provides:

> "A person who does anything in contravention of this Order commits an offence under section 73 of the [Animal Health] Act [1981]."

Facts

12. The background facts in the case stated are as follows.

13. Miss Macdonald imported Geronimo from New Zealand in 2017. As a result of a positive bovine tuberculosis test reported to APHA in 2017 by Miss Macdonald, a Notice of Intended Slaughter was served on Miss Macdonald.

14. Miss Macdonald rejected the validity of the test result. APHA agreed to a further test. That test was also positive for bovine tuberculosis. A further Notice of Intended Slaughter was then served on Miss Macdonald.

15. Miss Macdonald refused to comply with this Notice and applied for judicial review. This came before the High Court in 2019.

16. The claim for judicial review was dismissed by Mr Justice Murray in the case of *R (Macdonald) v Secretary of State for Environment, Food and Rural Affairs* [2019] EWHC 1783 (Admin). It can be seen from para 3 of the judgment of Murray J that Miss Macdonald maintained that there was a substantial risk that the two test results were false positives and by her challenge sought an order quashing the decision sent by APHA on the Secretary of State's behalf confirming the second Notice of Intended Slaughter, which followed the second positive test. She was willing for Geronimo to undergo further testing. He was in isolation and therefore currently posed no risk to human or animal health.

17. Murray J, in his summary of the facts, noted that Geronimo had twice tested negative for bovine tuberculosis before being imported from New Zealand in 2017; that he had been held in quarantine in New Zealand before being imported; that, after importation, he was quarantined with a companion animal; and that Miss Macdonald's premises were surrounded by badger-proof fencing (badgers being a known carrier of the disease).

18. He examined the details of Geronimo's positive tests on 21 August 2017 and again on 11 December 2017, including evidence of the extent to which the results were inconsistent with other, negative results and indications of negative status, and also issues about the reliability of the positive test results. He did this in considerable detail: see paras 19-51 of the judgment of Murray J and the expert evidence and other evidence before him, which is referred to later in the judgment, at paras 76-81.

19. He then considered the Notice of Intended Slaughter which followed, dated 21 December 2017, and subsequent disagreements, ventilated in correspondence, about the reliability of the testing and about whether slaughter was appropriate in this case.

20. He noted that the Secretary of State had refused to agree to any further testing. He noted the application for a warrant, which was only being forestalled by the pending judicial review proceedings.

21. He then ruled on the Grounds of the application for judicial review, which were:

    i) The Decision to slaughter Geronimo on the basis that he was infected with Mycobacterium bovis, the main cause of bovine tuberculosis, was "irrational in

that the Secretary of State has refused to recognise the scientific and factual evidence to the effect that the test results… [were] unreliable"; and

ii) In reaching the Decision, the Secretary of State had failed to take into account relevant evidence including:

a) the warning from the manufacturer of the tests taken by Geronimo that the results were not consistent with the presence of a progressive disease and "should be treated with great caution";

b) the fact that Geronimo, after first testing positive for bovine tuberculosis on 21 August 2017, was still showing no clinical signs of the disease; and

c) the scientific evidence that "priming" to which Geronimo had been subjected could cause false positive results.

22. After careful consideration of the submissions on both sides, which he (again) set out in detail (in paras 93-110 of the judgment), Murray J rejected all these Grounds. He noted that the Secretary of State's power under section 32(1) of the Animal Health Act conferred "a broad discretion", and that he had been "charged by Parliament with the onerous and important public duty of exercising the functions of expert decision-maker in relation to the control of disease in animals in the United Kingdom" (para 112). He noted the authorities warning the court against substituting its own view for the view of the designated person acting in good faith with knowledge of all the facts (paras 113-115).

23. He noted that at the heart of the case was "a conflict of view as to the level of risk associated with the fact that Geronimo was primed three times over a 14-month period" (para 119), which was said to increase the risk that the positive results were false. He decided that neither the expert evidence nor any other evidence adduced by Miss Macdonald "comes close to establishing that the Secretary of State's assessment of the risks raised by priming is irrational or perverse" (para 119). He found that the Secretary of State had considered and was entitled to reject all the points made by and on behalf of Miss Macdonald (para 122). He accepted the Secretary of State's conclusion that, while it was possible that Geronimo was not infected, "the two positive test results provide strong evidence, to a high degree of certainty, that he is so infected. Given the contagious nature of bTB and the devastating effect it can have on other animals, bovine and non-bovine, including the risk to humans, the Secretary of State deems it fit to exercise his power to have Geronimo slaughtered and to pay compensation…" (para 126).

24. Murray J noted that, even if a third test were to be permitted and was negative, the Secretary of State was entitled to take the view that he would still insist on ordering slaughter, because of the two positive tests.

25. The Court of Appeal refused permission to appeal. An application to the European Court of Human Rights was unsuccessful.

26. The case stated notes that District Judge Layton heard evidence and legal argument before giving his Ruling on 4 May 2021. It then says this:

> "In my ruling dated 4th May 2021 I determined that the applicant had satisfied the first and second conditions of Section 62B Animal Health Act 1981.
>
> The first condition required me to be satisfied that there were reasonable grounds for an inspector to enter the premises of the applicant. Based on the accepted evidence set out above, coupled with the ruling of Murray J sitting in the Administrative Court in *R (Macdonald) v Secretary of State for Environment, Food and Rural Affairs* [2019] EWHC 1783, I concluded that the first condition was met. In reaching my determination on this point I gave full consideration to new veterinary and scientific evidence placed before me by the applicant that Geronimo remained symptom free of any clinical signs of bTB. I concluded that this fresh evidence did not persuade me to depart from the decision of the Administrative Court and permit further bTB testing to be undertaken.
>
> I further found from the evidence before me that the second condition was met. The applicant had been informed of the decision to seek entry. She had been given reasons for that decision. She had failed to allow entry on request by an inspector. She had been informed of the decision to apply for a warrant. I further found that the procedural hearing of the application did not offend Article 6 ECHR or amount to a breach of the applicant's common law rights. Accordingly, I granted the warrant application…"

The questions in the case stated

27. The questions of law identified in the case stated are as follows:

i) Whether the Judge erred in holding that he was bound in May 2021 by the decision made in 2019 by the Administrative Court in *R (Macdonald) v Secretary of State for Environment, Food and Rural Affairs* [2019] EWHC 1783 (Admin) to the effect that the Secretary of State was entitled to rely on the results of two positive Enferplex tests for bovine tuberculosis ["bTB"] as the evidential basis for the slaughter of Geronimo.

ii) Whether the Judge erred in holding that the new evidence placed before him to the effect that Geronimo was, in 2021, still showing no signs of bTB, was insufficient to cause him to depart from the ruling of the Administrative Court.

iii) Whether the Judge erred in failing to adjourn the application for a warrant, to enable Miss Macdonald to obtain further test results.

iv) Whether, in the circumstances, the Judge erred in finding that APHA had established reasonable grounds pursuant to section 62B of the Animal Health Act 1981 to enter her property to remove and slaughter Geronimo.

v) Whether the proceedings were procedurally fair at common law and Article 6 compliant.

Discussion and decision

28. I have had the benefit of submissions from Counsel on both sides, and the coherence and consistency of those submissions has benefitted from the fact that both Counsel have been instructed throughout, including at the hearing before Murray J in 2019.

29. In support of the appeal, Ms McGahey for Miss Macdonald groups the arguments in the seven grounds of appeal into parts, recognising that some of them are closely inter-related to each other.

Grounds (1) and (2): The effect of the decision of the Administrative Court

30. Grounds (1) and (2) were argued together, and they are: (1) the Judge erred in holding that he was bound by the decision of Murray J; and (2) the Judge erred in holding that the new evidence did not justify a departure from that decision.

31. It seems to me obvious that the Judge was bound by the decision of the Administrative Court. It is argued that that decision did not set out any proposition of law, but a decision of a higher court between essentially the same parties and in respect of the same subject matter and issues is binding on those parties in all its conclusions on those issues, whether they be factual or legal. There might have been an issue about what the ambit of that decision was, and about what its implications were. But there can be no doubt whatsoever that he was bound by it, so far as it went.

32. I have been shown a variety of material which is said to make a fresh consideration of the decision of Murray J necessary or, at least, to justify the submissions that matters have moved on since his decision so that a different conclusion ought now to be reached.

i) A witness statement dated 24 January 2019, from Leonie Walker, who sold Geronimo to Miss Macdonald and had looked after him in New Zealand before that. This evidence, however, pre-dated the decision of Murray J and was part of the evidence in the case before him.

ii) A report from Mr R S Broadbent dated 8 September 2020, which said that an examination of Geronimo on 8 September 2020 showed no sign of disease. That was evidence before the District Judge. It did not take matters very far, as the Secretary of State suspected infection, based on the positive tests, and contends that it might be years before any symptoms appear. This contention is supported (for example) by a Veterinary Risk Assessment dated 13 September 2017 which was referred to by Murray J at para 36 of his judgment in *R (Macdonald) v Secretary of State for Environment, Food and Rural Affairs* [2019] EWHC 1783 (Admin), although it is disputed by Miss Macdonald.

iii) An expert report from Karin Mueller dated 30 September 2020. This was her fourth report. Her first three reports (dated 21 September, 8 November and 14 December 2018) pre-dated Murray J's judgment in July 2019, and he refers to her evidence. Her fourth report to some extent repeated her earlier evidence but

it did build upon it by pointing to the 22 months which had passed since that evidence, and to the fact that Geronimo showed no clinical signs of disease after what was now a longer period since the original positive tests. However, her opinion was, naturally, qualified: she says it was "not possible to say with 100% certainty" (para 4.1); and that there is a lack of epidemiological studies (para 4.1.2); concluding that "there is the real possibility of a false positive blood test result at the initial test" and that the circumstances and results of the second test cast "real doubt" as to whether Geronimo "is a true bTB positive animal". This was evidence which supported Miss Macdonald's case, therefore, but was not conclusive of it, even leaving aside the point that it was the opinion of one expert, among (it seems, in this field) many.

iv) An email dated 20 December 2017 from Alastair Hayton commenting on the second test result. This was evidence referred to and considered at paras 51-56 and para 121 of the judgment of Murray J.

v) A letter from the British Alpaca Society dated 13 March 2018. This was available to Miss Macdonald before the decision of Murray J, but it seems it was not relied upon in those proceedings. It was, however, shown to District Judge Layton. The concerns it expressed were considered, on the basis of other evidence making essentially the same points, in the judgment of Murray J.

33. It is clear from para 9 of the Ruling that the Judge was not persuaded by "the fresh scientific and veterinary evidence" to "depart from the Administrative Court's ruling". In other words, he recognised that he had an opportunity to depart from it if the new material, in his judgment, made that appropriate. He was not persuaded. He agreed with the decision of the Administrative Court as well as deferring to it.

34. In so doing, he cannot be said to have made an error of law or to have adopted a course which was, in the technical sense of the word, perverse, and therefore unlawful.

35. The effect of the new evidence was disputed, and the view adopted by the Judge in that dispute was one that was open to him. It is not my role to form an independent view, but only to decide whether his view was perverse. It was not. It was logical and consistent with the evidence. The Judge was correct to take the decision of Murray J as his starting point, notably in paras 7-8 of his Ruling, where he said:

> "7. The matters that fall to be considered by me today have, to a large degree, already been considered by the Administrative Court. The challenge to the reliability of the Enferplex test was considered by Murray J sitting in the Administrative Court in *R (Macdonald) v SoS for Environment, Food and Rural Affairs* [2019] EWHC 1783 and rejected. The Respondent accepts that the Administrative Court considered similar expert evidence to that before me. However, the passage of a further two years or so with Geronimo still displaying no clinical signs of disease coupled with new and updated scientific and veterinary evidence is advanced as reason to depart from this judgment.
>
> 8. The absence of symptomatic disease was also considered by Murray J who accepted the evidence before him that the

> development of clinical TB and potential death "can range from a few weeks to years depending on the rate of progression of infection" (para 36)."

36. These were valid points, which supported the Judge's conclusion that "The fresh scientific and veterinary evidence does not persuade me to depart from the Administrative Court's ruling."

37. It is not suggested that the Judge failed to take into account any relevant evidence given to him, or that he misunderstood the evidence. The challenge is to his evaluation of the evidence and to his findings on the evidence. It was for the Judge to perform the evaluation and he did so in a way which was reasonable and lawful.

38. Therefore, the answer to questions (i), (ii) and (iv) of the case stated is in each case "No" and the appeal fails on Grounds (1) and (2).

Grounds (3), (4) and (5): breach of Article 6 and unfairness at common law

39. Grounds (3), (4) and (5) were, like Grounds (1) and (2), grouped together for the purposes of argument. They are:

> Ground (3): the Judge erred in failing to find that the Secretary of State's actions in prohibiting Miss Macdonald from obtaining further tests amounted to a breach of her rights under Article 6 ECHR
>
> Ground (4): the Judge erred in failing to find that the Secretary of State's actions in prohibiting Miss Macdonald from obtaining further tests amounted to unfairness at common law; and
>
> Ground (5): the Judge erred in failing, when considering the fairness and lawfulness of the proceedings, to give weight to fact that APHA was seeking to exercise a draconian State power – namely the execution of a warrant to enter Miss Macdonald's property and destroy an animal that she owned.

40. Para 10 of the Ruling correctly identified the issue which is now presented to me on the appeal by way of case stated. Nothing was overlooked. It was then a matter for the Judge's judgment whether, on the facts, Miss Macdonald's Article 6 rights had been breached. His conclusion that she had had a fair hearing cannot be faulted. She had been permitted to make legal submissions and to advance legal argument. She had been permitted to adduce admissible evidence, which had been considered and taken into account.

41. She did not have evidence of further tests, as a result of the Secretary of State's exercise of his right not to permit further tests, which the Administrative Court had decided was lawful. Miss Macdonald's leading counsel accepts that the Secretary of State was entitled to refuse consent to further testing, and she also accepts that, in the absence of his consent, further tests could not take place. She argues, however, that it was unfair for the Secretary of State to prevent her from obtaining further tests, so that she did not have a fair hearing. She says that the Judge should either have refused the warrant, on the basis that the refusal to allow further tests meant there were no reasonable grounds for the warrant (echoing the words of section 62B(3) of the Animal Health Act) or

adjourned to allow the Secretary of State to reconsider his refusal to allow further testing.

42. The Secretary of State was not, it is conceded, bound to allow further testing as a matter of law, even of public law. He has explained the policy and other reasons for his position. His position has been upheld by the Administrative Court. He made it clear, repeatedly (I am told by both Counsel) that he had not changed his mind and that he was not agreeing to a third test on Geronimo – indeed, the usual policy is to proceed on only one test, and yet he had allowed a second test, which was also positive. There was evidence to support the warrant without a third test, and it was argued that even if a third test were to be negative, the evidence as a whole would still support slaughter, especially given the policy considerations requiring risks not to be taken even in cases of uncertainty.

43. Miss Macdonald's argument seems to be that, following two positive tests, the absence of a third test meant that Geronimo should be given the benefit of an assumption that a third test would have been negative. I see no reason in that. I also understand the Secretary of State's argument that the evidence had to be considered as a whole, and that he was adopting a precautionary principle in accordance with established protocols agreed with interested parties and supported by expert advice, such that a third test could not, regardless of the result, be decisive in Miss Macdonald's favour.

44. Counsel for the Secretary of State also argues that many owners of valuable animals may make arguments to doubt positive tests and ask for an array of alternative tests. Some of the alternatives are experimental. The Enferplex tests relied upon by the Secretary of State are not perfect, but their use is supported by research, consultation and advice. It cannot be that a District Judge can alter the testing regime by requiring further tests as a condition of granting a warrant, if on the existing evidence he is satisfied, as District Judge Layton was, that there are reasonable grounds for the warrant. I think that there is force in these submissions.

45. Miss Macdonald had, in this case, no right to attend before the District Judge, but she was granted a hearing, as an indulgence, and in those circumstances I do accept that the hearing had to be fair. However, it is impossible to argue that a refusal to hear evidence which was not available is a breach of Article 6 rights. It was not in the power of the District Judge to compel evidence to be obtained which did not exist, in the form of a test which the Secretary of State was entitled to refuse, and which he did refuse. The nature of the objection to the evidence in this case was quite unlike objections in other cases on the grounds of public interest immunity (as in *Regner v Cxech Republic* ECtHR Application no. 35289/11, which has been cited to me). Miss Macdonald did not have any test results or evidence of Geronimo's health or otherwise which she was prevented from putting before the court. All the evidence she had, insofar as she wished to present it, was presented, and, having been presented, it was considered and taken into account.

46. The Judge, by proceeding on the basis of the evidence he had, and the very full arguments which were presented to him on both sides, was applying the law, and exercising the jurisdiction given to him by law. He did not in so doing deprive Miss Macdonald of a fair hearing or of her Article 6 or common law rights. Nor was there an inequality of arms. Both sides were allowed to adduce the evidence they had. Neither side was allowed to adduce evidence which was, either not admissible, or not available

because it was not lawful to obtain it, or not in the power of the party in question to obtain it. There was perfect equality of arms in that respect.

47. The judge decided the case in accordance with the evidence, and he received the evidence in accordance with the law. It is said that he was exercising a draconian power by granting a warrant of entry for destruction of an animal belonging to Miss Macdonald. There is no power so draconian that it requires a case to be conducted otherwise than in accordance with the usual rules of evidence and the law, or that requires a party to be allowed to gather evidence which he or she has no power or right to gather.

48. Therefore, the answer to question (iii) of the case stated is "No" and the appeal fails on Grounds (3), (4) and (5).

Ground (6): the learned judge erred in failing to adjourn the proceedings for the Appellant to obtain further tests

49. It is submitted on behalf of Miss Macdonald that the Judge should have granted an adjournment to enable her to obtain further tests, if permitted to do so by the respondent, and that the warrant should have been refused if the respondent continued to prohibit further testing.

50. It was clear that the respondent was not going to permit further testing, for reasons which had been ventilated and accepted by the Administrative Court, and those reasons remained reasonable and lawful, whether or not others agreed with them. The Judge was not bound to overrule that reasoning; he could not have done so without finding it to be perverse, or unjust, and there was no basis for either of those conclusions.

51. The power to adjourn, or not, was a case management decision which was in the discretion of the Judge. It cannot be said that he decided perversely in refusing an adjournment to permit the collection of evidence which required the consent of the respondent, which the respondent did not consent to, and which the respondent was not required by law to consent to. Indeed, it would have been perverse if he had granted an adjournment in those circumstances.

52. Hence, the answer to question (v) of the case stated is "Yes" and the appeal fails on Ground (6).

Conclusion

53. Ground (7) draws the conclusion, based on the earlier Grounds, that in all the circumstances, the Judge erred in finding that there were reasonable grounds for an inspector to enter Miss Macdonald's premises, and therefore that Condition 1 of Section 62B was satisfied. Since the earlier Grounds have failed, however, this conclusion does not follow.

54. The Judge recognised (in para 12 of his Ruling) how sad it is for Miss Macdonald that her alpaca must, having been diagnosed with the bacterium which causes bovine tuberculosis in two tests, now be taken from her and put down. He said that he had "a great degree of sympathy" for her and he recognised that his Ruling would "come as a great disappointment to her". His empathy did him credit, and perhaps no-one would

not feel sorry for Miss Macdonald and Geronimo. Murray J said something similar in para 129 of his judgment. But this is not a case in which the wishes and feelings of Miss Macdonald can be paramount. It is a case in which powers conferred in order to combat the serious consequences of bovine tuberculosis to the animal population, and to the owners of animals infected with it, are being invoked by an official body under a duty to exercise its powers systematically and consistently. The Judge, too, had a duty to follow the law and to exercise his discretion lawfully and rationally. Had he not done so, the appeal by way of case stated would have succeeded. Despite the skilful arguments of Ms McGahey QC on Miss Macdonald's behalf, I am perfectly satisfied that he did do so and that, consequently, this appeal must be dismissed.

55. The order of Holman J provided for the appeal to be decided before expiry of the warrant on 28 July 2021, which was yesterday. That would have precluded Miss Macdonald from being represented by Counsel of her choice. It was therefore agreed between the parties, in order to allow the hearing to take place a day later, when Miss Macdonald's Leading Counsel was available, that a new warrant should be issued if the appeal was unsuccessful, as it has been. Under CPR 52.20 I have all the powers of the court below and I will issue a fresh warrant accordingly. I will ask Counsel to agree a draft order for my review.