Doyle v An Taoiseach

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Finlay C.J.
Walsh J.
Henchy J.
Griffin J.
Gannon J.

THE SUPREME COURT

1979 No. 3852P
1983 No. 209

DOYLE & ORS

v.

AN TAOISEACH & ORS.

Judgment of Henchy J.
delivered the 29 March 1985

This is an appeal by the defendants against the order of Barrington J. which, in effect, held invalid a 2% levy on live bovine animals imposed for the period between May and December 1979. In the comprehensive and careful judgment of Barrington J., which followed on a reference by him under Art. 177 of the Treaty of Rome to the Court of Justice of the European Communities, all relevant aspects of the case, under both Community and domestic law, were dealt with. The arguments addressed to this Court were not so wide and fell under three main headings:

I. Whether S.I. No. 152 of 1970 and S.I. No.160 of 1979 (which were the two statutory instruments which introduced the levy) were ultra vires the sections of the Finance Act, 1966 (and the other

statutory provisions referred to in those sections), under which they were expressed to be made.

II. Whether, even if those statutory instruments were not thus ultra vires, the levy imposed by them was invalid because it operated arbitrarily and unreasonably, thus making the delegated legislation void for being in excess of the necessarily implied scope of the delegation.

III. Whether, having regard to the judgment of the European Court on the reference under Art. 177 and in the light of the facts subsequently found by Barrington J., the levy had an effect equivalent to a customs duty on exports of live bovine animals and was therefore void for being contrary to Community law.

Because of the conclusion I reach as to II, I do not find it necessary to express an opinion as to the ultra vires arguments under I. I assume for the purposes of this judgment that the statutory instruments were not ultra vires in any of the respects alleged. I treat them, without necessarily so holding, as having been duly made in exercise of the powers expressly delegated by the relevant sections of the Finance Act, 1966.

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Again because of the conclusion I reach as to II, I do not intend to express an opinion as to the submissions made under III. In my judgment the dispute between the parties is susceptible of a conclusive determination under the domestic law of this State. I consider that a decision on a question of Community law as envisaged by Art. 177 of the Treaty of Rome is not necessary to enable this Court to give judgment in this case. Just as it is generally undesirable to decide a case by bringing provisions of the Constitution into play for the purpose of invalidating an impugned law when the case may be decided without thus invoking constitutional provisions, so also, in my opinion, should Community law, which also has the paramount force and effect of constitutional provisions, not be applied save where necessary for the decision in the case.

The arguments put forward by the plaintiffs under II, both in the High Court and in this Court, rest on the admitted fact that this levy was introduced as a tax on the prime producer of live cattle, the farmer. The levy of 2% on the value of an animal was expressed to be payable (with exceptions which are not relevant) as an excise duty whenever an animal was slaughtered in the State or exported from the State. In the case of slaughtered animals, the

levy was payable on the day of slaughter by the proprietor of the slaughter-house. In the case of exported animals, the levy was payable by the exporter, usually as of the day of export. In no case was the farmer, on whom the levy was intended to fall as a tax, made primarily liable. This anomaly led to an unfair and oppressive operation of the levy, particularly in the case of exporters.

It would seem that if the levy had been made payable at the place and time when the farmer sold the animal for slaughter or for export, the unfair impact of the levy on exporters would not have arisen. The levy could have been made deductible from the sale price at the point of sale. But in the case of exporters, the sale price was not the basis of the levy; it was the value of the animal at the pier-head. This value might be, and frequently was, higher than the sale price. The exporter, therefore, became directly liable for a levy of an amount which he could not recover in full from the farmer, because he could not identify the seller of the animal; or, even when he could, because it would not be practical to seek to recover the full amount of the levy; or because it was not possible for the exporter to assess at the time of purchase what the amount

of the levy would be when the animal would arrive at the pier-head.

As I read the evidence given in the High Court, it amply bore out the conclusion of Barrington J. that exporters (and, to a lesser extent, butchers) found it impossible to pass the amount of the levy on to the prime producer, for whom the levy was intended as a tax, regardless of whether they purchased at a mart or by private treaty. Barrington J. held that this incidence of the levy was unreasonable to such an extent as to make the statutory instruments imposing the levy invalid on the applicaton of the test of reasonableness set out in my judgment in Cassidy v. Minister for Industry & Commerce 1978 I.R. 297.

I have no doubt that this conclusion was the correct one. Because the delegated legislation purported to impose a levy as a tax on the prime producers of live cattle, and because the ordinary operation of the levy in the context of market forces and other commercial realities had the effect that the prime producer frequently escaped liability for the levy, in whole or in part, so that it fell to that extent on the exporter or butcher, such a result was so untargeted, indiscriminate and unfair, so removed from the primary policy of the levy, that the delegated legislation must be deemed to have been

made in excess of the impliedly intended scope of the delegation. In that sense, it was ultra vires and therefore void.

Counsel for the defendants has submitted that any invalidity affecting S.I. No. 152 of 1979 was cured when it was expressly confirmed by s. 79 of the Finance Act, 1980. There might be force in that submission if the period of the operation of the levy came after the passing of that Act. However, the levy was expressed to operate only from May to December 1979. S. 79 of the 1980 Act must be read subject to the presumption that it was intended to operate prospectively and not retrospectively: see the judgments of this Court in Hamilton v. Hamilton 1982 I.R. 466. If it were to be held to operate retrospectively, it would have the effect of making, ex post facto, non-payment of the levy in 1979 an infringement of the law Such a result would make s. 79 invalid having regard to Art. 15.5 of the Constitution. However, there is nothing in the 1980 Act that would justify the attribution to Parliament of an intention that the section was to operate unconstitutionally. In my opinion, s. 79 should be treated as having only prospective effect and therefore having no application to this case.

I would dismiss this appeal.

Approved D.H. 18-3-85