IN THE UPPER TRIBUNAL **Appeal No. MISC/466/2021**
(ADMINISTRATIVE APPEALS CHAMBER)

ON APPEAL FROM FIRST-TIER TRIBUNAL
(GENERAL REGULATORY CHAMBER)
WELFARE OF ANIMALS
WA.2019.0017, WA.2019.0023, WA.2019.0026, WA.2019.0029

BETWEEN

FOOD STANDARDS AGENCY

Appellant

And

(1) EURO QUALITY LAMBS LIMITED

(2) JOHN AND DAVID PENNY T/A JOHN PENNY AND SONS

Respondents

BEFORE UPPER TRIBUNAL JUDGE WEST

Hearing date: 28 January 2022
Decision Date: 2 March 2022

Representation: Mr Adam Heppinstall, counsel (for the Appellant)
(instructed by the Food Standards Agency)

Mr Ian Thomas, counsel (for the First Respondent)
(instructed by Roythornes)

Mr David Hercock, counsel (for the Second Respondent)
(instructed by Roythornes)

DETERMINATION

The decision of the First-tier Tribunal sitting at Fox Court dated 13 October 2021 under file references WA.2019.0017, WA.2019.0023, WA.2019.0026 and WA.2019.0029 involves an error on a point of law. The appeal against that decision is allowed and the decision of the Tribunal is set aside.

The decision of the Tribunal is remade. The inspectors in these appeals were properly appointed under regulation 34 of The Welfare of Animals at the Time of Killing (England) Regulations 2015 and the Food Standards Agency was the competent authority for the purposes of appointing the Official Veterinarians under regulation 34 for the purposes of issuing the Welfare Enforcement Notices which are the subject of the appeals.

This decision is made under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

REASONS

Introduction

1. In this decision the following definitions apply:

"FSA": the Appellant, the Food Standards Agency

"EQL": the First Respondent, Euro Quality Lambs Ltd

"JPS": the Second Respondent, John and David Penny trading as John Penny & Sons

"OVs": Official Veterinarians

"WENs": Welfare Enforcement Notices

"Regulation (EC) No. 882/2004 of the European Parliament and of the Council dated 29 April 2004, on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules": the 2004 Regulation

"Council Regulation (EC) No. 1099/2099 dated 24 September 2009, on the protection of animals at the time of killing": the 2009 Regulation

"The Welfare of Animals at the Time of Killing (England) Regulations 2015": WATOK.

2. The issue with which this decision is concerned is whether the inspectors in these appeals were properly appointed under regulation 34 of WATOK and whether the FSA was the competent authority for the purposes of appointing the OVs under regulation 34 for the purposes of issuing the WENs which are the subject of the appeals.

The Legislation

The 2004 Regulation

3. The 2004 Regulation provides, so far as material

> "**Recitals**
>
> …
>
> (5) Animal health and animal welfare are important factors that contribute to the quality and safety of food, to the prevention of the spreading of animal diseases and to a humane treatment of animals. The rules covering these matters are laid down in several acts. These acts specify the obligations of natural and legal persons with regard to animal health and animal welfare as well as the duties of the competent authorities.
>
> (6) The Member States should enforce feed and food law, animal health and animal welfare rules and monitor and verify that the relevant requirements thereof are fulfilled by business operators at all stages of production,

processing and distribution. Official controls should be organised for that purpose.

…

(41) Breaches of feed and food law and of animal health and animal welfare rules may constitute a threat to human health, animal health, and animal welfare. Such breaches should therefore be subject to effective, dissuasive and proportionate measures at national level throughout the Community.

…

(45) The rules contained in this Regulation underpin the integrated and horizontal approach necessary to implement a coherent control policy on feed and food safety, animal health and animal welfare. There should be room however to develop specific control rules where required, for example with regard to the setting of maximum residue levels for certain contaminants at EC level. Likewise, more specific rules existing in the area of feed and food and animal health and animal welfare controls should be kept in place.

These include in particular the following acts: Directive 96/22/EC, Directive 96/23/EC, Regulation (EC) No .../..., Regulation (EC) No 999/2001, Regulation (EC) No 2160/2003, Directive 86/362/EEC, Directive 90/642/EEC and the implementing rules resulting therefrom, Directive 92/1/EEC, Directive 92/2/EEC, and acts on the control of animal diseases such as foot-and-mouth disease, swine fever etc., as well as requirements on the official controls on the welfare of animals.

…

Article 2.1

The following definitions shall also apply:

(1) “official control” means any form of control that the competent authority or the Community performs for the verification of compliance with feed and food law, animal health and animal welfare rules

(2) "verification" means checking, by examination and the consideration of objective evidence, whether specified requirements have been fulfilled

…

(4) "competent authority" means the central authority of a Member State competent for the organisation of official controls or any other authority to which that competence has been conferred; it shall also include, where appropriate, the corresponding authority of a third country

…

(10) "non-compliance" means non-compliance with feed or food law, and with the rules for the protection of animal health and welfare …

…

Article 54

Action in case of non-compliance[1]

1. When the competent authority identifies non-compliance, it shall take action to ensure that the operator remedies the situation. When deciding which action to take, the competent authority shall take account of the nature of the non-compliance and that operator's past record with regard to non-compliance.

2. Such action shall include, where appropriate, the following measures:

(a) the imposition of sanitation procedures or any other action deemed necessary to ensure the safety of feed or food or compliance with feed or food law, animal health or animal welfare rules;

(b) the restriction or prohibition of the placing on the market, import or export of feed, food or animals;

(c) monitoring and, if necessary, ordering the recall, withdrawal and/or destruction of feed or food;

(d) the authorisation to use feed or food for purposes other than those for which they were originally intended;

[1] With emphasis added.

(e) the suspension of operation or closure of all or part of the business concerned for an appropriate period of time;

(f) the suspension or withdrawal of the establishment's approval;

(g) the measures referred to in Article 19 on consignments from third countries;

(h) any other measures the competent authority deems appropriate".

The 2009 Regulation

4. The 2009 Regulation provides, so far as material

"**Recitals**

…

(9) Official controls in the food chain have also been reorganised by the adoption of Regulation (EC) No 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules and Regulation (EC) No 854/2004 of the European Parliament and of the Council of 29 April 2004 laying down specific rules for the organisation of official controls on products of animal origin intended for human consumption.

…

(54) Regulation (EC) No 882/2004 provides for certain action to be taken by the competent authority in case of non-compliance, in particular with regard to welfare rules. Accordingly, it is only necessary to provide for the additional action to be taken that is specific to this Regulation.

…

Article 2
Definitions

For the purposes of this Regulation, the following definitions shall apply

…

(i) 'standard operating procedures' means a set of written instructions aimed at achieving uniformity of the performance of a specific function or standard

…

(q) 'competent authority' means the central authority of a Member State competent to ensure compliance with the requirements of this Regulation or any other authority to which that central authority has delegated that competence

…

Article 3
General requirements for killing and related operations

1. Animals shall be spared any avoidable pain, distress or suffering during their killing and related operations.

2. For the purposes of paragraph 1, business operators shall, in particular, take the necessary measures to ensure that animals:

…

(e) do not suffer from prolonged withdrawal of feed or water

…

Article 5
Checks on Stunning

(1) Business operators shall ensure that persons responsible for stunning or other nominated staff carry out regular checks to ensure that the animals do not present any signs of consciousness or sensibility in the

period between the end of the stunning process and death.

Those checks shall be carried out on a sufficiently representative sample of animals and their frequency shall be established taking into account the outcome of previous checks and any factors which may affect the efficiency of the stunning process.

When the outcome of the checks indicates that an animal is not properly stunned, the person in charge of stunning shall immediately take the appropriate measures as specified in the standard operating procedures drawn up in accordance with Article 6(2).

(2) Where, for the purpose of Article 4(4), animals are killed without prior stunning, persons responsible for slaughtering shall carry out systematic checks to ensure that the animals do not present any signs of consciousness or sensibility before being released from restraint and do not present any sign of life before undergoing dressing or scalding.

(3) For the purpose of paragraphs 1 and 2, business operators may use checking procedures as described in the guides to good practice referred to in Article 13.

(4) Where appropriate, in order to take account of the high level of reliability of certain stunning methods and on the basis of an opinion of EFSA, derogations from the requirements laid down in paragraph 1 may be adopted in accordance with the procedure referred to in Article 25(2).

Article 6
Standard Operating Procedures

(4) Business operators shall make available to the competent authority their standard operating procedures upon request.

Article 7
Level and Certificate of Competence

(1) Killing and related operations shall only be carried out by persons with the appropriate level of competence

to do so without causing the animals any avoidable pain, distress or suffering.

(2) Business operators shall ensure that the following slaughter operations are only carried out by persons holding a certificate of competence for such operations, as provided for in Article 21, demonstrating their ability to carry them out in accordance with the rules laid down in this Regulation:

(a) the handling and care of animals before they are restrained;

(b) the restraint of animals for the purpose of stunning or killing;

(c) the stunning of animals;

(d) the assessment of effective stunning;

(e) the shackling or hoisting of live animals;

(f) the bleeding of live animals;

(g) the slaughtering in accordance with Article 4(4).

(3) Without prejudice to the obligation set out in paragraph 1 of this Article, the killing of fur animals shall be carried out in the presence and under the direct supervision of a person holding a certificate of competence as referred to in Article 21 issued for all the operations carried out under his supervision. Business operators of fur farms shall notify the competent authority in advance when animals are to be killed.

Article 8
Instructions for the Use of Restraining and Stunning Equipment

Products marketed or advertised as restraining or stunning equipment shall only be sold when accompanied by appropriate instructions concerning their use in a manner which ensures optimal conditions for the welfare of animals. Those instructions shall also be made publicly available by the manufacturers via the Internet.

Those instructions shall in particular specify:

(a) the species, categories, quantities and/or weights of animals for which the equipment is intended to be used;

(b) the recommended parameters corresponding to the different circumstances of use, including the key parameters set out in Chapter I of Annex I;

(c) for stunning equipment, a method for monitoring the efficiency of the equipment as regards compliance with the rules laid down in this Regulation;

(d) the recommendations for maintenance and, where necessary, calibration of the stunning equipment.

Article 9
Use of Restraining or Stunning Equipment

(1) Business operators shall ensure that all equipment used for restraining or stunning animals is maintained and checked in accordance with the manufacturers' instructions by persons specifically trained for that purpose.

Business operators shall draw up a record of maintenance. They shall keep those records for at least one year and shall make them available to the competent authority upon request.

…

Article 14
Layout, Construction and Equipment of Slaughterhouses

…

(2) For the purposes of this Regulation, business operators shall, when requested, submit to the competent authority referred to in Article 4 of Regulation (EC) No 853/2004 for each slaughterhouse at least the following:

(a) the maximum number of animals per hour for each slaughter line;

(b) the categories of animals and weights for which the restraining or stunning equipment available may be used;

(c) the maximum capacity for each lairage area.

The competent authority shall assess the information submitted by the operator in accordance with the first subparagraph when approving the slaughterhouse.

…

Article 16
Monitoring Procedures at Slaughterhouses

(1) For the purposes of Article 5, business operators shall put in place and implement appropriate monitoring procedures in slaughterhouses.

(2) The monitoring procedures referred to in paragraph 1 of this Article shall describe the way the checks referred to in Article 5 have to be carried out and shall include at least the following:

(a) the name of the persons responsible for the monitoring procedure;

(b) indicators designed to detect signs of unconsciousness and consciousness or sensibility in the animals; indicators designed to detect the absence of signs of life in the animals slaughtered in accordance with Article 4(4);

(c) criteria for determining whether the results shown by the indicators referred to in point (b) are satisfactory;

(d) the circumstances and/or the time when the monitoring must take place;

(e) the number of animals in each sample to be checked during the monitoring;

(f) appropriate procedures to ensure that in the event that the criteria referred to in point (c) are not met, the stunning or killing operations are reviewed in order to identify the causes of any shortcomings and the

necessary changes to be made to those operations.

(3) Business operators shall put in place a specific monitoring procedure for each slaughter line.

(4) The frequency of the checks shall take into account the main risk factors, such as changes regarding the types or the size of animals slaughtered or personnel working patterns and shall be established so as to ensure results with a high level of confidence.

(5) For the purpose of paragraphs 1 to 4 of this Article, business operators may use monitoring procedures as described in the guides to good practice referred to in Article 13.

(6) Community guidelines concerning monitoring procedures in slaughterhouses may be adopted in accordance with the procedure referred to in Article 25(2).

Article 17
Animal Welfare Officer

…

(5) The animal welfare officer shall keep a record of the action taken to improve animal welfare in the slaughterhouse in which he/she carries out his/her tasks. This record shall be kept for at least one year and shall be made available to the competent authority upon request.

…

Article 20
Scientific Support

(1) Each Member State shall ensure that sufficient independent scientific support is available to assist the competent authorities, upon their request, by providing:

…

(b) scientific opinions on the instructions provided by manufacturers on the use and maintenance of restraining and stunning equipment …

Article 21
Certificate of Competence

…

(2) The competent authority may delegate the final examination and the issuance of the certificate of competence to a separate body or entity which:

(a) has the expertise, staff and equipment necessary to do so;

(b) is independent and free from any conflict of interest as regards the final examination and the issuance of the certificates of competence.

The competent authority may also delegate the organisation of the training courses to a separate body or entity which has the expertise, staff and equipment necessary to do so.

The details of bodies and entities to which such tasks have been delegated shall be made publicly available by the competent authority via the Internet.

Article 22
Non-compliance

1. *For the purpose of Article 54 of Regulation (EC) No 882/2004, the competent authority may in particular*[2]:

(a) require business operators to amend their standard operating procedures and, in particular, slow down or stop production;

(b) require business operators to increase the frequency of the checks referred to in Article 5 and amend the monitoring procedures referred to in Article 16;

(c) suspend or withdraw certificates of competence issued under this Regulation from a person who no

[2] With emphasis added.

longer shows sufficient competence, knowledge or awareness of his/her tasks to carry out the operations for which the certificate was issued;

(d) suspend or withdraw the delegation of power referred to in Article 21(2);

(e) require the amendment of the instructions referred to in Article 8 with due regard to the scientific opinions provided pursuant to Article 20(1)(b).

…

Annex III
Operational Rules For Slaughterhouses

1. The arrival, moving and handling of animals

…

1.6. Mammals, except rabbits and hares, which are not taken directly to the place of slaughter after being unloaded, shall have drinking water available to them from appropriate facilities at all times.

…

3. Bleeding of animals

…

3.2. In case of simple stunning or slaughter in accordance with Article 4(4), the two carotid arteries or the vessels from which they arise shall be systematically severed. Electrical stimulation shall only be performed once the unconsciousness of the animal has been verified. Further dressing or scalding shall only be performed once the absence of signs of life of the animal has been verified."

WATOK

5. WATOK provide, so far as material

"**Interpretation**

3(1) In these Regulations—

…

"competent authority" has the meaning given in regulation 4

"EU Regulation" means Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing

…

"inspector" means a person appointed under regulation 34 or an inspector appointed under section 51 of the Animal Welfare Act 2006

The competent authority

4(1) The Food Standards Agency is the competent authority for the purposes of—

(a) Part 2 (certificates, temporary certificates and licences), unless specified otherwise;

(b) approving restraining pens in accordance with paragraph 3 of Schedule 3; and

(c) in relation to the killing of animals in a slaughterhouse—

(i) receiving and assessing documents, records or information in accordance with Articles 6(4), 9(1), 14(2) and 17(5);

(ii) receiving and assessing other documents, records or information in accordance with the EU Regulation or these Regulations; and

(iii) taking action in the event of any non-compliance with the EU Regulation or these Regulations *in accordance with Article 22(1)*[3].

(2) Otherwise, the Secretary of State is the competent authority, and acts as the member State, for the purposes of the EU Regulation and these Regulations.

[3] Again with emphasis added.

(3) The Secretary of State may act as the competent authority in relation to—

(a) the suspension or revocation of certificates, temporary certificates or licences under Part 2; and

(b) the appointment of inspectors in accordance with regulation 34.

…

Inspectors

34. The competent authority or a local authority may appoint inspectors for the purpose of enforcing the EU Regulation and these Regulations.

Enforcement notices

38(1) An enforcement notice is a notice in writing—

(a) requiring a person to take specified steps to remedy a contravention of the EU Regulation or these Regulations;

(b) requiring a person to reduce the rate of operation to such extent as is specified in the notice until that person has taken specified steps to remedy a contravention of the EU Regulation or these Regulations; or

(c) prohibiting a person from carrying on an activity, process or operation, or using facilities or equipment, specified in the notice until the person has taken specified steps to remedy a contravention of the EU Regulation or these Regulations.

(2) An inspector who is of the opinion that a person has contravened or is contravening the EU Regulation or these Regulations may serve on that person an enforcement notice.

…

Schedule 1

Part 5 Stunning and killing operations

Bleeding or pithing

31(1) A person engaged in the bleeding or pithing of an animal which has been simple stunned must ensure that the animal is bled or pithed without delay after it has been simple stunned.

(2) A person engaged in the bleeding of an animal which has been simple stunned must ensure that the bleeding is—

(a) rapid, profuse and complete; and

(b) completed before the animal regains consciousness.

(3) Without prejudice to the generality of paragraph 3.2 of Annex III, if an animal is bled after simple stunning, no person may cause or permit any further dressing procedure or any electrical stimulation to be performed on the animal before the bleeding has ended and in any event not before the expiry of—

…

(d) in the case of sheep, goats, pigs and deer, a period of not less than 20 seconds.

Schedule 3

…

2. No person may kill an animal in accordance with religious rites without prior stunning unless it is a sheep, goat, bovine animal or bird killed in a slaughterhouse in accordance with this Schedule.

…

> **Part 2 Sheep, goats and bovine animals**
>
> …
>
> Handling of sheep, goats and bovine animals during killing
>
> 6(1) The business operator and any person engaged in the killing of a sheep, goat or bovine animal in accordance with religious rites without prior stunning must ensure that—
>
> (a) it is not placed in restraining equipment unless the person who is to carry out the killing is ready to make the incision immediately after it is placed in the equipment …".

Background

6. JPS, a business operator, operates a slaughterhouse at Low Green Farm, 40 Leeds Road, Leeds, West Yorkshire, LS19 6NU, under approval number 2285.

7. EQL operates a business as a lamb slaughterhouse at Euro House, Dale Street, Craven Arms, Shropshire, SY7 9PA, under approval number 4451.

8. The FSA is an independent government agency set up under the Food Standards Act 1999. The FSA's main role is to protect public health and consumer interests in relation to food safety and to conduct "official controls" in approved premises to verify the compliance of food business operators with EU and national hygiene regulations.

9. The FSA employs veterinarians and contracts veterinary services from Eville & Jones to ensure that approved slaughterhouses, cutting plants and game handling establishments are staffed by OVs and Meat Hygiene Inspectors. They are authorised officers and inspectors under various pieces of legislation, including WATOK and the EU Food Hygiene Regulations.

10. The OVs in these appeals were appointed by the FSA. The appointment letters state

> "I am enclosing an updated authorisation; appointing/ authorising/confirming your appointment/authorisation of an Official Veterinarian, authorised officer, authorised person, inspector, enforcement officer to act in matters arising under the legislation attached."

The legislation referred to includes the 2004 Regulation, the 2009 Regulation and WATOK.

Appeal Reference WA/2019/0017

11. Pursuant to regulation 38(2) of WATOK and the 2009 Regulation, a WEN (reference no MN/2285/WEN/19/04) dated 21 June 2019 was served on JPS. The WEN stated that JPS had not met the provisions of Article 3, paragraph 1 and paragraph 2(e) and Annex lll, point 1.6 of the 2009 Regulation.

12. The WEN required JPS to take the following steps to remedy the contravention:

> "Ensure that animals which are not taken directly to the place of slaughter after being unloaded and are lairaged, have drinking water available to them from appropriate facilities at all times, in particular that there are water drinking facilities in each partition of the pens to ensure that animals do not suffer from prolonged withdrawal of water when being lairaged."

Appeal Reference WA/2019/0026

13. Pursuant to regulation 38(2) of WATOK and the 2009 Regulation, a second WEN (reference no CT/2285/WEN/19/05) dated 26 July 2019 was served on JPS. The WEN stated that JPS had not met the provisions of Article 3.1 and Annex lll, point 3.2 of the 2009 Regulation and Schedule 1, Part 5, paragraph 31(3)(d) of WATOK.

14. The WEN required JPS to take the following steps to remedy the contravention:

> "Ensure the dressing procedures, including cervical dislocation, of sheep after simple stunning is only performed once the absence of signs of life of the sheep has been verified, the bleeding has ended and in any event not before the expiry of a period of not less than 20 seconds."

Appeal Reference WA/2019/0029

15. Pursuant to regulation 38(2) of WATOK and the 2009 Regulation, a third WEN (reference no CT/2285/WEN/19/06) dated 19 August 2019 was served on JPS. The WEN stated that JPS had not met the provisions of Article 3, paragraph 1 and paragraph 2(e) and Annex lll, point 1.6 of the 2009 Regulation.

16. The WEN required JPS to take the following steps to remedy the contravention:

> "Ensure that animals which are not taken directly to the place of slaughter after being unloaded and are lairaged, have drinking water available to them from appropriate facilities at all times."

Appeal Reference WA/2019/0023

17. Pursuant to regulation 38(2) of WATOK and the 2009 Regulation, a WEN (reference no 4451/JC/WEN/19/02) dated 21 March 2019 was served on EQL. The WEN stated that EQL had not met the legal provisions of Schedule 3, Part 2, Paragraph 6(1)(a) of WATOK and Articles 9(3) and 15(2) of the 2009 Regulation.

18. The WEN required EQL to remedy the contravention as follows:

> "Modify your system for restraining ovine and caprine animals slaughtered by religious rites without prior stunning by ensuring that each ovine and caprine animal is placed in restraining equipment only when the person

> who is carry out the killing is ready to make the incision immediately after it is placed in the equipment."

The Decision of the First-tier Tribunal

19. The appeal originally came before the First-Tribunal Tribunal on 3 July 2020 for a case management hearing. Although the four appeals raised other issues, principally of mixed fact, law and expertise, Judge Findlay considered that it would be appropriate to determine the common legal issues in the first instance at a joint preliminary hearing.

20. In her decision of 13 October 2020 (as amended on 1 February 2021) Judge Findlay held that the FSA was not the competent authority to take action in the event of non-compliance with WATOK, except when taking action in relation to those activities specifically itemised, namely activities set out in regulation 4(1)(a), (b) and (c)(i), (ii) and (iii) of WATOK and Article 22(1) of the 2009 Regulation. The WENs were accordingly cancelled.

21. So far as material, she held that

> "78. In my view the FSA is not the competent authority to take action in the event of non-compliance with the EU Regulation or take action in the event of non-compliance with WATOK except when taking action in relation to those activities specifically itemised, namely activities set out in regulation 4(1)(a) (b) and (c) (i) (ii) and (iii) of WATOK and Article 22(1) of the EU Regulation.
>
> 79. I agree with the Respondent [the FSA] that Recital 5 of Regulation 882/2004 provides that the rules covering, inter alia, the humane treatment of animals are laid down in several acts and these acts specify the obligations of natural and legal persons with regard to animal health and animal welfare as well as the duties of the competent authorities (page 251).
>
> 80. I agree with the Respondent that Article 2, Definitions of Regulation 882/2004 (page 260) defines 'official control' as meaning any form of control the competent authority performs for the verification of compliance with animal health and animal welfare.

'Verification' means checking by examination and the consideration of objective evidence whether specified requirements have been fulfilled.

81. I agree with the Respondent that Article 54 of the Regulation 882/2004 (pages 298 and 299) deals with the action to be taken in the case of non-compliance. Article 54(2) states that such action shall include a list of non-exhaustive measures (a) to (g) with a catch-all measure: (h) any other measure the competent authority deems appropriate.

82. I agree with the Respondent that Regulation 882/2004 is the over-arching code for the enforcement of animal welfare rules. However, none of these points assist the Respondent.

83. I agree with the Respondent that Recital 9 of the EU Regulation (page 220) states that the official controls have been organised by the adoption of Regulation 882/2004.

84. [Recital] 54 of the EU Regulation (page 224) states:

> Regulation (EC) No 882/2004 provides for certain action to be taken by the competent authority in case of non-compliance, in particular with regard to welfare rules. Accordingly, it is only necessary to provide for the additional action to be taken that is specific to this Regulation.

85. In other words it is not necessary to set out again the measures to be taken in the case of non-compliance as set out in Article 54(2) of Regulation 882/2004. They are a given and available to the competent authority. I accept the Respondent's submission on this point, however, this does not assist the Respondent.

86. In my view what is of pivotal importance in considering which is the 'competent authority' is Article 2 of the EU Regulation - Definitions - which provides that the identity of the competent authority is a matter for the Member State (page 226). It states:

> 'competent authority' means the central authority of a Member State competent to ensure compliance with the requirements of this Regulation or any other authority to which that central authority has delegated that competence.

87. It was clearly intended that the competent authority would be identified by a Member State in its national legislation. It was intended that there would be wide powers to enable enforcement for non-compliance but it was left to the Member S[t]ate to decide which body would exercise particular powers and which body would be appointed to take action for which areas of non-compliance. That is precisely the purpose of WATOK.

88. WATOK identifies two competent authorities and gives a clear indication of which body is the competent authority for which activity.

89. In my view the meaning of regulation 4 of WATOK is simple and obvious and there is no need to go beyond it.

90. As shown above there was an onus on [P]arliament to introduce regulations to identify the 'competent authority.' WATOK satisfied that legislative obligation and WATOK makes clear it was [P]arliament's intention that there should be two 'competent authorities.'

91. Parliament intended in regulation 4 to set out in which circumstances the FSA would be the 'competent authority' and in which circumstances the Secretary of State would be the 'competent authority.'

92. Regulation 4 is clear and unambiguous. The FSA is the 'competent authority' for the purposes set out in regulation 4(1)(a) (b) and (c) and "Otherwise the Secretary of State is the competent authority."

93. Regulation 4(1)(c)(iii) could have stated that the FSA is the competent authority for the purposes of taking action in the event of any non-compliance with the EU Regulation or these Regulations. However, Regulation 4(1)(c)(iii) includes the qualification *in accordance with Article 22(1).* In my view this must have been intended.

94. In relation to the interpretation of WATOK the meaning of the legislation is simple and obvious, the language is clear and consistent with the purpose of the provision and the overall legislative context.

95. In my view it would be wrong to attempt to introduce additional purposes for which the FSA is the competent authority and there is no need to do so because the

meaning of the legislation is clear. The Respondent's position seeks to deny the plain language of the legislation and is a strained and unnecessary interpretation of the statutory framework.

96. Regulation 4 relates to certificates and licences, the receiving and assessing of documents, records and information. Article 22 activities relate to standard operating procedures, checks, monitoring procedures, the suspension and withdrawal of certificates and the amendment of instructions. These activities are of a similar nature which supports the view that it was the intention of [P]arliament to limit[...] the FSA as the competent authority to a particular set of circumstances which were similar in nature.

97. On the basis that regulation 4 should be read without importing additional words or implied powers the subject matter of the WENs did not come within the statutory competence of the FSA. In accordance with regulation 4 of WATOK the statutory competence was with the Secretary of State – "Otherwise, the Secretary of State is the competent authority, and acts as the member State, for the purposes of the EU Regulation and these Regulations".

98. Regulation 34 provides that either the competent authority or a local authority may appoint inspectors for the purpose of enforcing the EU Regulation and these Regulation[s]. Regulation 4(3) provides that the Secretary of State may act as the competent authority for appointment under regulation 34. It is not mandatory. It was clearly anticipated that it could be the Secretary of State or the FSA. However, taking action in the event of non-compliance in relation to all activities not set out in regulation 4 and Article 22 falls to the Secretary of State. In particular, actions relating to Enforcement Notices pursuant to regulation 38 fall to the Secretary of State and the appointment in these circumstances of an inspector as defined would have to be by the Secretary of State.

99. For the reason stated above, the WENs are cancelled."

The Appeal

22. Judge Findlay granted permission to appeal to the Upper Tribunal on 12 February 2021. I made further direction for the service of submissions in the appeal on 6 August 2021. EQL and JPS responded on 6 September 2021 and the FSA replied on 24 September 2021. I directed an oral hearing of the appeal on 29 October 2021, which I heard on the morning of 28 January 2022. The FSA was represented by Mr Adam Heppinstall of counsel and EQL and JPS respectively by Mr Ian Thomas and Mr David Hercock, both of counsel, all three of whom had appeared below. (Mr Hercock made the submissions for JPS and EQL, which Mr Thomas supported.) I am indebted to them for their concise and economical submissions, both written and oral.

The FSA's Submissions

23. For the FSA Mr Heppinstall submitted that it is clear from the wording of regulation 4 of WATOK and the relevant EU Regulations that the FSA has the power to appoint inspectors. The OVs in the present case were properly appointed.

24. It was agreed between the parties that, when construing the language of an EU instrument, the Recitals in the preamble identify the purpose of the reasons for the instrument and help to explain the content.

25. The 2004 Regulation was the overarching EU Regulation which provides for the methods of enforcement of feed and food law, animal health and animal welfare rules throughout the Union.

26. Recitals 6 and 41 of the 2004 Regulation make clear that it is for Member States to organise official controls to enforce animal welfare rules.

27. Recital 45 makes clear that general official control rules are to be found in the Regulation, but it also makes clear that there are "specific control rules" in "particular" acts dealing with, amongst other things animal welfare.

28. Article 54 of the 2004 Regulation is non-prescriptive; it gives a non-exhaustive list of possible measures and ends with the "catch all": "any other measure the competent authority deems appropriate."

29. The 2009 Regulation is exactly one of those "specific" and "particular" acts relating to the "official controls on the welfare of animals" mentioned in Recital 45 of the 2004 Regulation.

30. Recital 9 of the 2009 Regulation acknowledges that

> "Official controls in the food chain have also been reorganised by the adopted of Regulation (EC) No 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules"

and recital 54 makes it very clear that there is no need for this Regulation to repeat the content of the 2004 Regulation, because the 2004 Regulation sets out that

> "Accordingly, it is only necessary to provide for the additional action to be taken that is specific to this Regulation."

In other words, in taking action in relation to non-compliance with animal welfare rules, the competent authority has all of the powers set out in article 54 and the "additional action" specifically set out in "this Regulation." This "additional action" is set out in article 22 of the 2009 Regulation

31. Put another way one can interpose these possible enforcement measures between (g) and (h) of Article 54 of the 2004 Regulation, as being specific examples of enforcement measures which could be taken "for the purposes of article 54". There is nothing whatsoever, in the 2009 Regulation (or elsewhere), which takes away the competent authority's power under Article 54(2)(h) to take "any other measure the competent authority deems

appropriate" to remedy non-compliance with animal welfare rules. There is nothing in Article 22 which could restrict a competent authority's powers to exercise the five example enforcement actions set out in Article 22. To suggest that only those five actions can be taken by an FSA appointed inspector, and the rest fall to be deployed only by a Secretary of State appointed inspector is extraordinary. This would require the nonsense of separate authorisations (perhaps to the same inspector) from two different competent authorities in order to ensure that an inspector had available the full suite of enforcement powers as provided for by Article 54.

32. Article 2(q) of the 2009 Regulation states that the competent authority who can use these Article 54 powers to enforce is the

> "central authority of a Member State competent to ensure compliance with the requirements of this Regulation or any other authority to which that central authority has delegated that competence".

33. Regulation 3(1) of WATOK defines "EU Regulation" as the 2009 Regulation. Regulation 4(1) designates the FSA as the competent authority for the "taking action in the event of any non-compliance with the EU Regulation or these Regulations in accordance with Article 22(1)".

34. Therefore the competent authority which may take the actions listed in article 54 of the 2004 Regulation, as augmented by the examples in Article 22 of the 2009 Regulation, for the purposes of enforcing the animal welfare rules set out in the 2009 Regulation, is the FSA. Under regulation 34 the FSA may appoint inspectors for the purposes of such enforcement and under regulation 38 those inspectors may, if they are of the opinion that the 2009 Regulation has been contravened or is being contravened, serve an enforcement notice in writing requiring a person to, amongst other things, "take specified steps to remedy a contravention of" the 2009 Regulation.

35. An FSA appointed inspector may serve an enforcement notice for continuing or completed non-compliance with the 2009 Regulation, requiring any one of the example specified steps to be taken set out in Article 54 of the 2004 Regulation (as augmented by the examples in Article 22 of the 2009 Regulation) or, as also provided in Article 54, "any other measure the competent authority deems appropriate" to remedy non-compliance with the 2009 Regulation. The WENs here at issue clearly fall within that power.

36. As an appendix to his skeleton argument, Mr Heppinstall set out several paragraphs dealing with the interpretation of EU law, which he submitted supported his case.

37. The starting point to any interpretive exercise must be that, where the meaning of the legislation is simple and obvious, the Court (or Tribunal) will usually only reach for that answer and not go beyond it: "where the language used is tolerably clear and apparently consistent with the purpose of the provision and the overall legislative context, the Court may simply remark that the true meaning follows from the words used…"[4].

38. But if the Court is compelled to go beyond that and consider interpretive maxims, that exercise must be rooted in a holistic and contextual understanding of the legislation[5]. It is important not to focus too closely on axiomatic principles and in doing so lose sight of this: "a careful search through the cases is therefore capable of dredging up all manner of dicta or apparent statements of principle that can be used to support the most diverse approaches to the problem of construction of legislative texts; and many of those statements may appear to be mutually inconsistent"[6].

[4] KPE Lasok QC and Timothy Millett, *Judicial Control in the EU; Procedures and Principles* at [658]
[5] And thus the Court must consider in relation to an EU instrument: "not only its wording, but also the context in which it occurs and the objectives pursued by the rules of which it is part" – see ***Sociedad General de Autores y Editores de Espana v Rafael Hoteles SA*** C-306/05 [2006] ECR I-11519 ECLI:EU:C:2006:764 at [34].
[6] KPE Lasok QC and Timothy Millett, *Judicial Control in the EU; Procedures and Principles* at [658]

39. The purposive approach is consistently held up as "the basic rule of interpretation, which has been frequently reiterated by the CJEU"[7]. A (then-serving) Judge of the CJEU and former Attorney-General (writing extra-judicially) has described it as "the characteristic element in the Court's interpretive method"[8]. Thus, the literal meaning of the words takes no precedence over context and purpose. A literal meaning may well be required to yield to the purposive approach, or to be excluded altogether[9]. Indeed, "of the four methods of interpretation – literal, historical, schematic and teleological – the first is the least important and the last the most important."[10] A full, modern and accurate account of the EU principles of interpretation, reflecting the primacy of this principle, is contained in *Understanding Legislation* (Potter & Low, Hart 2018) at §§12.34-12.55.

40. This approach is also supplemented by a number of other principles, in particular:

(a) effet utile: this has been described as "the principle corollary… to the teleological method."[11] The doctrine provides that "once the purpose of a provision is clearly identified, its detailed terms will be interpreted so "as to ensure that the provision retains its effectiveness... [the Court will] seek above all, effectiveness, consistency, and uniformity in its case law and in the application of Community law. Consequently, the Court either reads in necessary provisions regarding cooperation or the furnishing of information to

[7] Per Arnold J in ***Twentieth Century Fox Film Corporation & ors v British Telecommunications plc*** [2011] EWHC 1981 (Ch) [2012] Bus LR 1461. This statement of the law has been repeated several times by Arnold J; see most recently e.g. ***Vehicle Control Services Ltd v HMRC*** [2016] UKUT 0316 at [17]
[8] N Fennelly *Legal Interpretation at the European Court of Justice* Fordham Int LJ [1997] 656 at 664
[9] See Lasok, *Judicial Control*, at [661]: *"the literal meaning of a provision must be discarded if it is inconsistent with the purpose, general scheme and the context in which it is to be applied"*.
[10] See ***Shanning International Ltd v Lloyds TSB Bank plc*** [2001] UKHL 31 [2001] 1 WLR 1462 per Lord Steyn at [24], quoting with approval from *Cross on Statutory Interpretation*
[11] N Fennelly *Legal Interpretation at the European Court of Justice* Fordham Int LJ [1997] 656 at 674

the Commission, or bends or ignores literal meanings. Most shockingly of all to the common lawyer, the Court fills in lacunae which it identifies in legislative or even EC Treaty provisions."[12] Thus, provisions which seek to derogate from important principles of EU Law, or which specify exceptions to such general principles, will be interpreted strictly[13].

(b) recitals and headings: the texts produced by the EU legislative process are by their nature far sparer and less detailed than their domestic counterparts. Accordingly, the content of both recitals and headings can be extremely helpful in interpreting the purpose and meaning of an instrument[14].

(c) uniform interpretation: there is an obvious need to preserve the "orderly development" of EU law[15]. If new legislation is to be effectively integrated into an EU regime designed to produce uniform and coherent effects throughout the EU, it is imperative that any construction produces meaningful and useful protection against the risks it is supposed to guard against.

41. The FSA therefore submitted that the appeal should be allowed.

The Submissions of JPS/EQL

42. For JPS and EQL Mr Hercock and Mr Thomas submitted that the OVs who served the WENs in these cases had not been properly appointed to do so. The OVs had been appointed by the FSA, whereas in order to serve the WENs which were served by the OVs in these cases, the OVs were required to have been appointed by the Secretary of State.

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[12] N Fennelly *Legal Interpretation at the European Court of Justice* Fordham Int LJ [1997] 656 at 674

[13] Potter & Low, *Understanding Legislation*, at 12.41 which notes that this has been specifically applied to a provision which sought to derogate from community rules for the protection of consumers.

[14] See Potter *Understanding Legislation* at 12.46 and 12.48 and Lasok *Judicial Control* at [663]-[666]

[15] See Potter, *Understanding Legislation*, at 12.36 and 12.40. This is particularly important given that the same provision will need to be translated into a myriad of different languages which may have different literal construction but all need to achieve the same end: see Potter, *Understanding Legislation*, at 12.36

43. In order for the OVs to be empowered to serve the WENs, they had to have been appointed as “inspectors” by the Secretary of State, not the FSA.

44. None of the WENs served came within the powers or functions of the FSA. The subject matter of the WENs did not come within the statutory competence of the FSA. In accordance with regulation 4 of the WATOK the statutory competence was with the Secretary of State.

45. The FSA could not statutorily appoint the OVs in this case as “inspectors” for the purposes of serving the WENs. The subject matter of the WENs fell outside the FSA’s remit as a competent authority, as defined in regulation 4 of WATOK and accordingly, the OVs had no lawful power to serve the WENs.

46. Under WATOK there are two types of bodies which may appoint inspectors: local authorities (which are not relevant to these appeals) and the “competent authority.”

47. Under WATOK, there are two competent authorities: the Secretary of State and the FSA. The Secretary of State is the competent authority for some statutory purposes and the FSA is the competent authority for other statutory purposes. In other words, WATOK draw an express statutory distinction between the powers and functions of the Secretary of State and the powers and functions of the FSA.

48. A competent authority cannot confer powers on an inspector, through a statutory appointment, greater than the competent authority itself has under the legislation. Put another way, the competent authority can only appoint an inspector to exercise powers and functions which are within the scope of the competent authority’s statutory competence.

49. Under regulation 4 of WATOK, the FSA has restricted powers and functions, with the remainder falling to the Secretary of State. The Secretary

of State also has an overarching power to appoint inspectors in accordance with regulation 34 of WATOK.

50. It follows from regulation 4 of WATOK that the FSA's powers and functions are confined to:

(1) Part 2 of WATOK (i.e. functions in relation to certificates of competence and licences).

(2) the approval of restraining pens in accordance with paragraph 3 of Schedule 3 of WATOK.

(3) receiving and assessing documents, records or information in accordance with:

(a) Article 6(4) of the 2009 Regulation (standard operating procedures);

(b) Article 9(1) of the 2009 Regulation (records of maintenance for restraining and stunning equipment);

(c) Article 14(2) of the 2009 Regulation (information on maximum number of animals per hour for each slaughter line, categories of animals and weights for which the restraining or stunning equipment available may be used and maximum capacity for each lairage area); and

(d) Article 17(5) of the 2009 Regulation (animal welfare officer's record of the action taken to improve animal welfare in the slaughterhouse).

(4) taking action in the event of non-compliance in accordance with Article 22(1) of the 2009 Regulation.

51. Article 22(1) of the 2009 Regulation is confined to particular actions, none of which are relevant to the WENs served in this case.

52. Article 22(1) of the 2009 Regulation identifies five actions, none of which are relevant to the WENs served these appeals:

(1) Requiring the amendment of standard operating procedures and, in particular, slowing down or stopping production. It is to be noted that Article 2(i) of the 2009 Regulation defines "standard operating procedures" as: "standard operating procedures means a set of written instructions aimed at achieving uniformity of the performance of a specific function or standard".

(2) Requiring an increase in the frequency of the checks on stunning and amending the monitoring procedures (i.e. Articles 5 and 16 of the 2009 Regulation).

(3) Suspending or withdrawing certificates of competence (i.e. certificates of competence as referred to in Articles 7 and 21 of the 2009 Regulation).

(4) Suspending or withdrawing the delegation of power referred to in Article 21(2), i.e. the delegation by the competent authority of the final examination and the issuance of the certificate of competence to a separate body or entity.

(5) Requiring the amendment of instructions for the use of restraining and stunning equipment (i.e. Article 8 of the 2009 Regulation).

53. The subject matter of the WENs did not come within the statutory competence of the FSA. In accordance with Regulation 4 of WATOK, the statutory competence was with the Secretary of State.

54. The FSA could not therefore statutorily appoint the OVs in this case as "inspectors" for the purposes of serving the WENs which were served in these cases. The subject matter of the WENs fell outside the FSA's remit as a competent authority as defined in regulation 4 of WATOK. Accordingly, the OVs had no lawful power to serve the WENs which were served.

55. For completeness, it can be no answer for the FSA to contend that the Secretary of State has delegated its statutory powers and functions to it. The legislation clearly designates two distinct competent authorities and draws an express distinction between the powers and functions of the FSA and those of the Secretary of State. There is no room for delegation; it would be contrary to the statutory scheme and the express statutory distinction.

56. The FSA contends that the use of "in particular" in Article 22(1) of the 2009 Regulation somehow has the effect that the reference to Article 22(1) of the 2009 Regulation in Regulation 4(1)(c)(iii) of WATOK is, in effect, supplanted by Article 54 of the 2004 Regulation.

57. It contends that Article 54 of the 2004 Regulation is "expansive" and Article 54(2)(h) allows the competent authority to take any measures it deems appropriate in the event of identifying non-compliance. It suggests, therefore, that Regulation 4(1)(c)(iii) of WATOK provides that the FSA is the competent authority for the purposes of taking any action which the FSA "deems appropriate" in the event of any non-compliance with the regulations.

58. In relation to national law, regulation 4(1)(c)(iii) of WATOK expressly relates to the actions set out in Article 22(1) of the 2009 Regulation. Article 22(1) identifies the five actions which have been set out above. The FSA's attempt to ignore the statutory language and to treat Article 22(1) of the 2009 Regulation as being synonymous with Article 54 of the 2004 Regulation, thereby conferring a power on the competent authority to take such measures as it deems appropriate pursuant to the power in Article 54(2)(h), is wholly misconceived. The FSA's position seeks to deny the clear language of the legislation. Regulation 4(1)(c)(iii) of WATOK clearly and expressly relates to Article 22(1) of the 2009 Regulation. It does not relate to Article 54 of the 2004 Regulation.

59. This is consistent with the fact that the purpose of WATOK is to provide for the administration and enforcement of the 2009 Regulation (see the explanatory notes to WATOK). WATOK do not provide for the execution and enforcement of the 2004 Regulation. It follows, therefore, that the FSA's contention that, by virtue of regulation 4(1)(c)(iii) of WATOK, the FSA is the competent authority for taking any action which it deems appropriate under the power in Article 54(2)(h) of the 2004 Regulation cannot be maintained. As the explanatory notes to WATOK clearly show, the provisions in WATOK do not execute and enforce the provisions in the 2004 Regulation. The FSA is therefore advancing an interpretation of Regulation 4(1)(c)(iii) which is ultra vires.

60. The FSA's position would also render otiose the words in regulation 4(1)(c)(iii) of WATOK - "in accordance with Article 22(1)". On the FSA's approach the provision in regulation 4(1)(c)(iii) of WATOK could have simply read that the FSA is the competent authority for the purposes of "taking action in the event of any non-compliance with the [2009] Regulation or these Regulations", i.e. it could have omitted the words "in accordance with Article 22(1)". However, the provision is not expressed in that way. The language of regulation 4(1)(c)(iii) of WATOK further confines the parameters of the provision by the use of the words "in accordance with Article 22(1)". This further limitation to the scope of the provision must take effect; it cannot be ignored.

61. Adopting a similar interpretative exercise, it can be seen that regulation 4(1)(c)(iii) of WATOK expressly and specifically refers to "in accordance with Article 22." It is not possible to rewrite regulation 4(1)(c)(iii) so as to read "in accordance with Article 54 of the 2004 Regulation". Regulation 4(1)(c)(iii) of the national WATOK is not expressed in that way. Instead, the provision refers to "in accordance with Article 22(1)". The language is clear. The legislator has expressed the parameters of regulation 4(1)(c)(iii) of the national WATOK by reference to Article 22(1) of the 2009 Regulation; not by

reference to Article 54 of the 2004 Regulation. The provision is therefore confined to the actions set out in Article 22(1).

62. In relation to the provisions of EU law, Article 22(1) of the 2009 Regulation is not synonymous with Article 54 of the 2004 Regulation. Article 22(1) of the 2009 Regulation is a separate and distinct provision from that in Article 54 of the 2004 Regulation. They cannot be conflated. Indeed, the purpose of Article 22(1) of the 2009 Regulation is to provide for actions additional to those provided for in Article 54 of the 2004 Regulation and which are specific to the 2009 Regulation. This is clear from Recital 54 of the 2009 Regulation.

63. It is well established that Recitals to an EU Regulation demonstrate the legislative intent and the objects of the provisions of the EU Regulation. Article 22(1) of the 2009 Regulation is not designed so as to incorporate all the powers referred to in Article 54 of the 2004 Regulation. Indeed, this is also reflected in the language of Article 22(1) of the 2009 Regulation which clearly does not have the effect of incorporating all of the powers in Article 54 of the 2004 Regulation. As matter of ordinary language, the words “in particular” cannot reasonably be said to have the effect of incorporating all of the powers in Article 54 of the 2004 Regulation into Article 22(1) of the 2009 Regulation.

64. Article 22(1) of the 2009 Regulation and Article 54 of the 2004 Regulation are separate and distinct. Article 22(1) of the 2009 Regulation provides for actions additional to those in Article 54 of the 2004 Regulation and which are specific to the 2009 Regulation. Regulation 4(1)(c)(iii) of WATOK refers only to “in accordance with Article 22(1)”. The provision is therefore concerned merely with the actions in Article 22(1) of the 2009 Regulation. Thus, by reference to regulation 4(1)(c)(iii) of WATOK, the FSA is the competent authority for taking the actions in Article 22(1) of the 2009 Regulation. It does not confer a statutory competence wider than this.

65. The provisions are required to be interpreted strictly and, if the provisions are reasonably capable of two interpretations, then the interpretation most favourable to JPS and EQL should be adopted. Indeed, the question of statutory construction in this case relates to provisions which have the effect of empowering public officials to take enforcement action interfering with the rights and interests of business operators. Such intrusive powers can only be conferred on a particular body or person if the legislation clearly provides for this. Clear statutory authority is required to countenance interference with a person's economic interests (Bennion on Statutory Interpretation, section 27.8) and interference with the fundamental rights applicable to the carrying on of a business. Any ambiguity is therefore to be resolved in favour of JPS and EQL.

66. Accordingly JPS and EQL submitted that the appeal should be dismissed, with the result that the OVs who served the WENs were not properly appointed to do so under WATOK and the WENs should be cancelled.

Analysis

67. The question which falls for decision is whether it is the FSA or the Secretary of State who is the competent authority for the appointment of the inspectors under regulation 34 of WATOK and in particular what is the correct interpretation of regulation 4(1)(c)(iii) which provides that the FSA is the competent authority "for the purpose of taking action in the event of any non-compliance with the 2009 Regulation or these Regulations in accordance with Article 22(1)".

68. I agree with Mr Hercock that WATOK is the key document and that regulation 4(1)(c)(iii) is the key provision, but neither WATOK nor regulation 4(1)(c)(iii) exist in isolation. They must be considered in their context. Indeed the text of regulation 4(1)(c)(iii) itself specifically refers to the 2009 Regulation and Article 22(1) thereof. It is equally apparent that the 2009 Regulation does not exist in isolation either. Article 22(1) of the 2009 Regulation itself refers

back to Article 54 of the 2004 Regulation and must be considered in that context.

69. Article 54 of the 2004 Regulation is a fully comprehensive, but non-exhaustive, provision which states that

> "1. When the competent authority identifies non-compliance, it shall take action to ensure that the operator remedies the situation. When deciding which action to take, the competent authority shall take account of the nature of the non-compliance and that operator's past record with regard to non-compliance.
>
> 2. Such action shall *include*, where appropriate, the following measures:
>
> …
>
> (h) any other measures the competent authority deems appropriate".[16]

70. Recital 54 of the 2009 Regulation expressly states that

> "Regulation (EC) No 882/2004 provides for certain action to be taken by the competent authority in case of non-compliance, in particular with regard to welfare rules"

[16] The French text is to the same effect and equally non-exhaustive:

> "Mesures en cas de manquement
>
> 1. Lorsque l'autorité compétente relève un manquement, elle prend les mesures nécessaires pour que l'exploitant remédie à cette situation. Lorsqu'elle détermine les mesures à prendre, l'autorité compétente tient compte de la nature du manquement et des antécédents de cet exploitant en matière de manquements.
>
> 2. Ces mesures *comprennent*, le cas échéant, les dispositions suivantes:
>
> (h) prendre toute autre mesure jugée appropriée par l'autorité compétente".

and that

> "Accordingly, it is only necessary to provide for the *additional* action to be taken that is specific to *this Regulation*".[17]

It is therefore expressly stated that it is only necessary to provide for the *additional* action to be taken that is specific to the 2009 Regulation. There is nothing in the recital to the Regulation to suggest that anything therein is intended to circumscribe, derogate from or otherwise limit the powers conferred by the comprehensive, but non-exhaustive, Article 54 of the 2004 Regulation.

71. Article 22 of the 2009 Regulation provides that

> "1. For the purpose of Article 54 of Regulation (EC) No 882/2004, the competent authority *may in particular*[18]
>
> (a)-(e) …"

72. The precise reason for the enactment of Article 22(1) is not clear and neither side could provide an explanation as to why it was thought necessary either to enact Article 22(1) in the form in which it exists in the 2009 Regulation or why it was not sufficient simply to say that "For the purposes of this Regulation, the competent authority shall have all of the powers conferred by Article 54 of the 2004 Regulation".

73. What is important for present purposes, however, is that Article 22(1) is not a free-standing provision. It provides 5 particular powers. They are not standalone powers, but are provided for the purposes of Article 54 of the parent regulation. The language of Article 22(1) is permissive, not mandatory.[19] It provides that, for the purposes of the Article 54 of the 2004

[17] Again with emphasis added.
[18] Again with emphasis added.
[19] The French text is similarly permissive and refers to the 2004 Regulation:

Regulation, the competent authority "may" do certain things. It is a provision of exemplification or augmentation, not of limitation, since the competent authority may "in particular" do certain things, but does not preclude the doing of other things. What it does not do is to stipulate that, for the purposes of Article 54 of the 2004 Regulation, the competent authority "shall only" do the quintet of stipulated actions and no others. Recital 54 of the 2009 Regulation states that Article 54 of the parent regulation provides for certain action to be taken by the competent authority in case of non-compliance, in particular with regard to welfare rules. That recital states that accordingly it is only necessary to provide for the *additional* action to be taken that is specific to the 2009 Regulation.

74. There is nothing in Article 22(1), any more than there is in Recital 54, to suggest that it is intended in any way to circumscribe, derogate from or limit the powers conferred by the comprehensive, but non-exhaustive, Article 54 of the 2004 Regulation.

75. It is in the light of the foregoing that one then turns to consider WATOK. Mr Heppinstall QC argued that the decision of the Tribunal led to a bifurcated enforcement of animal welfare in the UK between the Secretary of State and the FSA, but as I pointed out in argument the bifurcation was inherent in the terms of WATOK itself and indeed in article 2(q) of the 2009 Regulation. That there is such a bifurcation is the inevitable result of the terms in which regulation 4 is drafted. Why the line of bifurcation and the division of competence was drawn precisely where it was was again something which neither side could explain. One could see the policy behind the division of responsibility between the FSA and the Secretary of State if regulation 4 had

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"Non-respect des dispositions

1. Aux fins de l'article 54 du règlement (CE) no 882/2004, l'autorité compétente *peut notamment*:

(a)-(e) …".

been limited to regulation 4(1)(a) and regulation 4(1)(c)(i)-(ii), since that would have confined the competence of the FSA merely to receiving and assessing documents. However, the competence of the FSA is cast in wider terms than that in that its competence includes the matters within regulation 4(1)(b) and regulation 4(1)(c)(iii), both of which involve the taking of action.

76. I agree with Mr Hercock that WATOK was not enacting the 2004 Regulation, but the 2009 Regulation, as the text of WATOK and its explanatory notes make clear[20], but that does not assist the Respondents in making out their case on the construction of regulation 4(1)(c)(iii).

77. I do not accept, as JPS and EQL contend, that the FSA's submission and reliance on the use of the words "in particular" in Article 22(1) of the 2009 Regulation has the effect that the reference to Article 22(1) in regulation 4(1)(c)(iii) of WATOK is somehow illegitimately "supplanted" by Article 54 of the 2004 Regulation. As stated in paragraphs 73 and 74 above, Article 22(1) is not a free-standing provision. It provides 5 particular powers. They are not standalone powers, but are provided for the purpose of Article 54 of the parent regulation. The language of Article 22(1) is permissive, not mandatory. It is a provision of exemplification or augmentation, not of limitation. It is not a case of Article 22(1) being in any sense "supplanted" by Article 54 of the 2004 Regulation. It is a case of the correct interpretation of WATOK recognising that Article 22(1) must be read as the offspring of the parent regulation Article 54 of the 2004 Regulation and that nothing in Article 22(1) circumscribes those powers.

78. That interpretation does not ignore the statutory language of regulation 4(1)(c)(iii). Nor does it "rewrite" regulation 4(1)(c)(iii) so as to read "in accordance with Article 54 of the 2004 Regulation". Nor is it a matter of Article

[20] "The Regulations make provision in England for the administration and enforcement of Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing (OJ No L 303, 18.11.2009, p1) ("the EU Regulation") and certain national rules maintained or adopted under Article 26(1) and (2) of the EU Regulation".

22(1) of the 2009 Regulation being "synonymous" with Article 54 of the 2004 Regulation. On the contrary, the interpretation of Article 22(1) set out above puts the Article in its correct context and recognises that it must be read subject to that which both precedes and governs it.

79. The provision in regulation 4(1)(c)(iii) of WATOK might perhaps have read simply that the FSA is the competent authority for the purposes of "taking action in the event of any non-compliance with the [2009] Regulation or these Regulations". If it had omitted the words "in accordance with Article 22(1)", the omission would have not had any substantive effect on the competence of the FSA under the provision.

80. In my judgment, the reason why regulation 4(1)(c)(iii) reads "in accordance with Article 22(1)" rather than "in accordance with Article 54 of the 2004 Regulation" (or some other similar formula) is that WATOK was enacting, in domestic form, the 2009 Regulation rather than the 2004 Regulation. It would therefore have been more natural to refer to the 2009 Article rather than the parent 2004 Article, but the effect of the words "in accordance with Article 22(1)" is not, in the context of the two Regulations, when read together, materially different in its effect from the formula "in accordance with Article 54 of the 2004 Regulation" (or some other similar formula).

81. The inclusion of the words "in accordance with Article 22(1)" are simply a reference back to the provision in the 2009 Regulation, which itself refers back to and is governed by the provision in the parent Regulation. The inclusion of the phrase does not, as JPS and EQL contend, impose a limitation to the scope of the WATOK regulation which confers the requisite competence on the FSA. Rather it is an augmentation or clarification of the powers already available to the competent authority under Article 54 of the 2004 Regulation.

82. I accept Mr Heppinstall QC's submission that, correctly interpreted, there is nothing whatsoever, in Article 22(1) of the 2009 Regulation (or elsewhere), which takes away the competent authority's power under Article 54(2)(h) to take "any other measure the competent authority deems appropriate" to remedy non-compliance with animal welfare rules.

83. There is nothing in Article 22 which could restrict a competent authority's powers only to the exercise of the five example enforcement actions set out therein. To suggest that only those five actions can be taken by an FSA appointed inspector and that the rest fall to be deployed only by a Secretary of State appointed inspector is indeed extraordinary. That would require the bizarre result of separate authorisations (in all likelihood to the same inspector) from two different competent authorities in order to ensure that an inspector had available the full suite of enforcement powers as provided for by Article 54. What the policy behind such a bizarre result was Mr Hercock was unable to say, beyond asserting that it was so.

84. Thus, to take but one example. If JPS and EQL are right, if the action taken relates to the requirement to increase the frequency of the checks on stunning, the competent authority for the appointment of the inspector is the FSA, but if the action taken relates to (as in the case of the second WEN in this case) the regulation of the dressing procedures of sheep after simple stunning, such that it is only performed once the absence of signs of life of the sheep has been verified, the bleeding has ended and in any event not before the expiry of a period of not less than 20 seconds, the competent authority for the appointment of the inspector is the Secretary of State. There is no sensible reason why that should be so, particularly if in all likelihood it is exactly the same person who will be appointed the inspector. Again, if the Respondents are right, if the infraction is that the animals have not been adequately watered, it is difficult to see why that can only be remedied by a Secretary of State appointed inspector, but not an FSA appointed inspector.

85. There is in summary no rational reason why certain aspects of "the killing of animals in a slaughterhouse" (to quote the opening words of regulation 4(1)(c)) should be regulated by an inspector appointed by the Secretary of State, but other aspects of the same activity should be regulated by an inspector regulated by the FSA. That bizarre result is avoided if it is the FSA's construction of regulation 4(1)(c)(iii) which is adopted.

86. This is not a case of provisions being reasonably capable of two interpretations, such that the interpretation more favourable to JPS and EQL should be adopted. The provisions are clear, but in the way for which the FSA contends, not the way in which JPS and EQL contend.

87. I am therefore satisfied that Judge Findlay was wrong to reach the conclusion which she did and that her decision was therefore erroneous in law. She failed to construe Article 22(1) in the light of its own terms and in the light of Article 54 of the 2004 Regulation. When she then went on to consider the effect of the reference to Article 22(1) in regulation 4(1)(c)(iii) of WATOK she did so on an erroneous basis.

88. As I explained above in paragraph 75 above, the ambit of regulation 4 is not confined to the matters set out in sub-paragraphs (a) and (c)(i)-(ii). It extends to the matters set out in sub-paragraphs (b) and (c)(iii), the latter of which certainly includes the taking of action. It is not therefore correct to say, as she said in paragraph [96] of her decision that

> "Regulation 4 relates to certificates and licences, the receiving and assessing of documents, records and information".

89. Moreover, to say (as that paragraph continues) that

> "Article 22 activities relate to standard operating procedures, checks, monitoring procedures, the suspension and withdrawal of certificates and the amendment of instructions. These activities are of a

> similar nature which supports the view that it was the intention of Parliament to limit the FSA as the competent authority to a particular set of circumstances which were similar in nature"

is to fail to give effect to the actual terms of Article 22(1), which as I explained in paragraphs 73 and 74 above, is permissive rather than mandatory and which is not intended in any way to circumscribe, derogate from or limit the powers conferred by the comprehensive, but non-exhaustive, Article 54 of the 2004 Regulation.

90. I have reached this conclusion on the basis of domestic principles of legislative interpretation without recourse to EU principles of interpretation. Had it been necessary, however, to consider EU principles of statutory interpretation, I would have accepted the principles set out by Mr Heppinstall QC and would have reached the reached the same conclusion as that which I have reached by the domestic route.

91. I am therefore satisfied that, on the true construction of regulation 4(1)(c)(iii) of WATOK, the FSA was the competent authority for the purposes of appointing the OVs under regulation 34 for the purposes of issuing the WENs which are the subject of the appeals and that the inspectors in these appeals were properly appointed under regulation 34 of WATOK. The addition of the words "in accordance with Article 22(1)" do not have the effect of making the Secretary of State the competent authority for the purposes of appointing the OVs under regulation 34 for the purposes of issuing the WENs which are the subject of the appeals

Conclusion

92. The decision of the First-tier Tribunal sitting at Fox Court dated 13 October 2021 under file references WA.2019.0017, WA.2019.0023, WA.2019.0026 and WA.2019.0029 involves an error on a point of law. The appeal against that decision is allowed and the decision of the Tribunal is set aside.

93. The decision of the Tribunal is remade. The inspectors in these appeals were properly appointed under regulation 34 of The Welfare of Animals at the Time of Killing (England) Regulations 2015 and the Food Standards Agency was the competent authority for the purposes of appointing the Official Veterinarians under regulation 34 for the purposes of issuing the Welfare Enforcement Notices which are the subject of the appeals.

Mark West
Judge of the Upper Tribunal

Signed on the original on 2 March 2022