[2002] EWCA Civ 54; 2002 WL 45274

Southampton Port Health Authority v Seahawk Marine Foods Limited

Case No: C/2001/0909
Court of Appeal (Civil Division)
31 January 2002

Before: Lord Justice Mummery Lord Justice Buxton and Lord Justice Longmore
Thursday 31st January, 2002

On Appeal from the Administrative Court (Newman J)

Representation

Mr Martin Howe QC (instructed by Southampton City Council for the Appellant).
Mr Rhodri Thompson (instructed by Messrs DJ Freeman for the Respondent).

JUDGMENT

Lord Justice Buxton:

Introduction

1. The claimant [Seahawk] sought to import into the United Kingdom, and accordingly into the territory of the European Union, a cargo of frozen cooked shrimps from Vietnam, intended for human consumption. The cargo was rejected on landing at Southampton and prohibited from entry into the area of the EU by the defendant [the Health Authority], purporting to carry out its duties in the protection of public health under national and Community law. In these proceedings Seahawk contends that the Health Authority had no lawful basis for rejecting the shrimps. It claims a declaration to that effect, the quashing of the Health Authority's order and, in the event that this appeal fails, substantial damages.

2. Seahawk prevailed before Newman J, who quashed the Health Authority's decision. The Health Authority appeals to this court. Newman J further ordered that the shrimps should nonetheless not be admitted into the United Kingdom until the Health Authority had had an opportunity to carry out further tests on them, and made detailed provision for that to be done. We are not directly concerned with that part of his order, though some reference will need to be made to it a later stage of the judgment. The further process of enquiry has, we were told, given rise to further intractable disputes between the parties and, we were sorry to hear, further and separate judicial review proceedings. Again, we are not concerned with those subsequent developments.

3. The failure of the parties to agree upon the working-out of Newman J's order has meant that the shrimps have never entered this jurisdiction. They having first arrived here in September 2000, it has been necessary for them to have been long since disposed of by re-export outside the EU. This appeal is, however, far from academic. Seahawk's damages claim depends on its holding Newman J's order; and the Health Authority seeks guidance as to whether its powers are indeed limited in the manner alleged by Sewhawk. Nor is it possible for the court to avert its gaze from what must be the huge amount of costs already expended in the dispute, liability for which remains unresolved.

The Notice

4. The Health Authority forbad the entry of the shrimps by a notice to Seahawk dated 5 October 2000 [the Notice], which read:

> "In my opinion the consignment … does not comply with the animal or public health conditions relating to import in that:—the conditions specified in Council Directive 91/493/EEC and Commission Decision 99/83/EC [*vere* 99/813/EC] specific to Vietnam have not been satisfied in that the aerobic colony counts observed following microbiological examination for counts 31/40 and 51/60 exceed the standard specified in Commission Decision 93/51/EEC."

5. The Notice was on a standard form. The form went on to say:

> "In my opinion the consignment described in the schedule below constitutes a risk to animal or human health in that:—"

In the Notice that section had been struck out.

The national Regulations

6. The format of the standard form is explicable by its having been issued under regulation 25(1) of the Products of Animal Origin (Import and Export) Regulations 1996 [the national Regulations]. Regulation 25(1) reads as follows:

> 25.—
>
> (1) Subject to paragraphs (2) and (3) below, where checks at the border inspection post reveal that a consignment of products of animal origin does not comply with animal or public health conditions relating to import or, in the opinion of the official veterinary surgeon, constitutes a risk to animal or human health, an official veterinary surgeon or person acting under his supervision, after consulting the importer or his representative, may serve on the importer or his agent a notice—
>
> (a) permitting the use of the products for purposes other than human consumption if that is authorised under rules made under Article 16(2) of Directive 90/675
>
> (b) ordering the re-dispatch of the consignment outside the European Community
>
> (c) ordering the destruction of the consignment."

In our case, Seahawk was told in the Notice that it must take one of the three steps (a)–(c) provided for by regulation 25(1).

7. This having been the provision under which the disputed power purported to be exercised, it is remarkable that it is nowhere mentioned in Newman J's judgment. That is no doubt because the argument before him was largely or entirely taken up with investigation of the Community provisions which form the relevant "conditions relating to import" referred to in regulation 25(1). To those we will have to come. It will however put that discussion in context if something is first said about the national Regulations under which the disputed power was in fact exercised.

8. The two contingencies addressed in regulation 25(1), non-compliance with public health conditions on the one hand and risk to human health on the other, are stated disjunctively, separated by the word "or". Seahawk correctly adopted that construction in paragraph 46 of its Grounds for Relief. Such an arrangement is not surprising, indeed it fits in with normal methods of protecting public health. The overall objective is the

protecting of public health, but because of difficulties of proof, and the teaching of experience, it is customary to prohibit the sale or consumption not only of foods that can be positively shown to be a risk to human health; but also foods that have been manufactured or handled in conditions which experience indicates to have a tendency to produce foods that pose such a risk. Hence, in any food-related regulations there will be found elaborate codes of hygenic practice, breach of which in relation to any goods will lead to the condemnation of those goods whether or not, in the given case, the potential risk to health can be shown to have eventuated. A good example of such a code is the twenty-page Annex to Council Directive 91/493/EEC on health conditions for the production and the placing on the market of fishery products, which prohibits the marketing of any fishery product produced other than under the conditions specified in that Annex.

9. Seahawk did not contend before the judge that the national regulations are either *ultra vires* or inconsistent with Community law, though that position became less clear as argument progressed before us. What, however, is not in dispute is that the Health Authority had power and indeed a duty to proceed under the first limb of regulation 25(1), non-compliance with public health conditions. Those conditions are now to be found in Community law, and need to be set out and analysed in detail. In so doing, however, it will be necessary to keep in mind the contrast drawn in regulation 25(1) between goods that infringe the conditions and goods that actually constitute a risk to human health, since as will be demonstrated below the judge seems to have been led into a misunderstanding of that point.

The Community provisions

10. Justice cannot be done to the arguments before us without setting out a substantial part of the Community provisions on which they were based, lengthy and detailed though they are. The provisions form a trail or progression through Community law, though the point of departure for domestic law is part IV of SI 1998 No 994, regulation 42 of which provides:

> **"General restriction on importing fishery products**
>
> 42. Subject to regulation 46, no person shall import any fishery products which are for human consumption unless they are products in respect of which —
>
> (a) the applicable requirements of the Fishery Products Directive , the Fishing Vessels Directive , the Live Bivalve Molluscs Directive and the Fishery Products Decisions are satisfied (the requirements of these Directives and Decisions which are capable of being applicable in these circumstances are those mentioned in Part IV of Schedule 1); and
>
> (b) any additional conditions imposed under regulation 43 are satisfied."

and regulation 56 provides:—

> **"Enforcement of Part IV**
>
> 56 For the purposes of the Products of Animal Origin (Import and Export) Regulations 1996 (in this paragraph referred to as 'the Import and Export Regulations') —
>
> (a) The conditions set out in Part IV shall be treated as health conditions (whether or not they are health conditions as defined in the Import and Export Regulations); and
>
> (b) those conditions shall be enforced as health conditions —

(i) by a local authority or the Minister (or by an authorised officer of the local authority or the Minister), which ever has the responsibility under the Import and Export Regulations for enforcing health conditions in the particular circumstances of the case,

(ii) in accordance with the procedures set out in the Import and Export Regulations , and

(iii) subject to the penalties and other sanctions set out in the Import and Export Regulations ."

and Part IV of the Schedule provides:—

"PART IV **Applicable requirements relating to imported fishery products**

As respects imported fishery products, the requirements of the Fishery Products Directive , the Fishing Vessels Directive , the Live Bivalve Molluscs Directive and the Fishery Products Decisions which are capable of being applicable are —

(a) in relation to fishery products other than aquaculture products or processed bivalve molluscs, echinoderms, tunicates or marine gastropods, those set out in —

(i) articles 3.1(a) to (g), 3.2, 4, 5 and 6.1 of the Fishery Products Directive ,

(ii) article 1 of the Fishing Vessels Directive

(iii) articles 1 to 4 of Commission Decision 93/51/EEC."

11. The " Fishery Products Directive " is Council Directive 91/493/EEC , already referred to in paragraph 8 above. That explains in its recitals the danger of freshly caught fishery products being subsequently contaminated by micro-organisms through unhygenic handling and treatment and refers, inter alia, to the system of veterinary checks on products entering the Community from third countries. It then proceeds, as we have already seen, to lay down a detailed code for the treatment of fishery products. By Article 3 of the Directive it is forbidden to place on the market anywhere in the Community fishery products whose handling and production have not complied with those requirements.

12. Of particular interest in the present context are the special rules laid down in paragraph 7 of Chapter V of the Annex in relation to "cooked crustacean and molluscan shellfish products"; the Community legislators no doubt having been alert to the well-known health hazards attaching to such products if not properly handled. Those rules are as follows

"Cooked crustacean and molluscan shellfish products

Crustaceans and molluscan shellfish must be cooked as follows:

(a) any cooking must be followed by rapid cooling. Water used for this purpose must be drinking water or clean seawater. If no other method of preservation is used, cooling must continue until the temperature approaching that of melting ice is reached.

(b) shelling or shucking must be carried out under hygienic conditions avoiding the contamination of the product. Where such operations are done by hand, workers must pay particular attention to the washing of their hands and all working surfaces must be cleaned thoroughly. If machines are used, they must be cleaned at frequent intervals and disinfected after each working day.

After shelling or shucking, cooked products must immediately be frozen or kept chilled at a temperature which will preclude the growth of pathogens, and be stored in appropriate premises;

(c) every manufacturer must carry out micro-biological checks on his production at regular intervals, complying with the standards to be fixed in accordance with Chapter V, Section 4 of this Annex.

Under rule (c) above, we were told that no such standards have in fact been promulgated by the EU Commission, on whom that responsibility falls. That part of the Directive was nonetheless relied on as part of the *vires* of a subsequent Commission Decision 93/51/EEC. We have already seen this referred to in SI 1998 No 994, set out in paragraph 10 above. The Decision plays a significant part in this case, and it is therefore again necessary to set out a substantial part of it.

"Commission Decision of 15 December 1992 on the microbiological criteria applicable to the production of cooked crustaceans and molluscan shellfish (93/51/EEC) Having regard to the Treaty establishing the European Economic Community;

Having regard to Council Directive 91/493/EEC of 22 July 1991 laying down the health conditions for the production and the placing on the market of fishery products (OJ No L 268. 24.9.1991 p.15), and in particular Chapter V (II) (4) of the Annex thereto;

Whereas, in accordance with Chapter IV (Iv) (7) (c) of the Annex to Directive 91/493/EEC, manufacturers of cooked crustacean and molluscan shellfish products must carry out microbiological checks on their production at regular intervals in compliance with the standards to be laid down pursuant to Chapter V (II) (4) of that Annex;

Whereas with a view to protecting public health, a bacterial contamination limit should be set beyond which the results may not be regarded as acceptable without the product being regarded in any way as toxic; whereas, where the acceptability limit is exceeded, manufacturers must investigate the causes thereof and establish corrective procedures in order to prevent any further occurrence;

Whereas the methods of analysis will be laid down later in the light of the studies undertaken; whereas until then internationally recognized methods should be applied;

Whereas the measures laid down in this Decision are in accordance with the opinion of the Standing Veterinary Committee **Article 1**

The microbiological standards applicable to the production of cooked crustaceans and molluscan shellfish provided for in Chapter IV (IV) (7) (c) of the Annex to Directive 91/493/EEC are laid down in the Annex hereto.

Article 2

The microbiological standards shall be checked by the manufacturer during the manufacturing process and before the crustacean and molluscan shellfish products cooked in the processing plant approved in accordance with Article 7 of Directive 91/493/EEC are placed on the market.

Article 3

1. Sampling programmes shall be established by the managerial staff of the

processing plant in relation to the nature of the products (whole, shelled or shucked), the temperature and time of cooking and the risk evaluation, and shall meet the requirements of Article 6 of Directive 91/493/EEC.

2. The programmes referred to in paragraph 1 shall contain, in the event of failure to comply with the standards laid down under headings 1 and 2 of the Annex hereto, an undertaking:

• to notify the competent authorities of the findings made and the actions taken with regard to unsatisfactory batches, as well as the measures provided for in the second indent below

• to review the methods of supervising and checking the critical points so as to identify the contamination source, and to carry out analyses more frequently

• not to market for human consumption batches found to be unsatisfactory on account of the discovery of pathogens or where the M value for *Staphylococcus* provided for under heading 2 of the Annex is exceeded.

Article 4

Pending the establishment of Community methods of microbiological analysis, the methods of analysis used to verify the microbiological standards laid down in the Annex hereto shall be scientifically recognized at international level and tested in practice. The method of analysis used must be recorded with the corresponding results.

Annex

1. Pathogens Type of pathogen	Standard
Salmonella spp	Absent in 25g N - 5 c - 0
In addition, pathogens and toxins thereof which are to be sought according to the risk evaluation, must not be present in quantities such as to affect the health of consumers. 2. Organismus indicating poor hygiene (shelled or shucked products) Type of organism	Standard (per g)
Staphylococcus aureus either: Thermotolerant coliform (44° C on solid medium) or: *Escherichia coli* (on solid medium)	m - 100 M - 1000 n - 5 c - 2 m - 10 M - 100 n - 5 c - 2 m - 10 M - 100 n - 5 c - 1

Where parameters n, m, M and c are defined as follows:

n— number of units comprising the sample.

m— limit below which all results are considered satisfactory.

M— acceptability limit beyond which the results are considered unsatisfactory

c— number of sampling units giving bacterial counts of between m and M

The quality of a batch is considered to be:

(a) satisfactory where all the values observed are 3m or less;

(b) acceptable where the values observed are between 3m and 10m (=M) and where c/n is 2/5 or less.

The quality of a batch is considered to be unsatisfactory:

- in all cases where the values are above M.
- where c/n is greater than 2/5.

3. Indicator organisms (Guidelines) Type of organism	Standard (per g)
Mesophilic aerobic bacteria (30° C) (a)	Shelf-life products with the exception of those mentioned below: 500 000 n - 5 c - 2 m - 100 000 M - 1 000 000 n - 5 c - 2

These guidelines are to help manufacturers decide whether their plants are operating satisfactorily and to assist them in implementing the production monitoring procedures."

13. Also of importance in the present case is Commisison Decision 93/13/EEC, concerning procedures for veterinary checks at Community border inspection posts on products from third countries. Annex C to the Decision lays down detailed rules for physical checks on products. Paragraphs 4 and 5 of the Annex provide as follows:

"Each lot submitted to a physical examination to verify, after opening of the packaging, wrapping or envelope, that the conditions foreseen for the product concerned in the vertical Directives or, where none exist, the relevant national legislation are satisfied.

With this aim in view an organoleptic examination, particularly visual examination, must be carried out on each consignment to check for abnormalities rendering the product unfit for the use given on the veterinary certificates or accompanying documents: these examinations shall be carried out on in principle 1% of the items or packages of the consignment, with a minimum of two and a maximum of 10. For loose products, the examination shall be made on at least five separate samples distributed throughout the consignment.

At any time, during the examination of the products, the official veterinarian may derogate from the maximum laid down above.

In addition to the physical checks referred to above, public health inspection of products intended for human consumption must include:

—measurement of the temperature of the product, if Community or , where applicable, national rules so require,

—checks for abnormalities in appearance, consistency, colour, smell, and, where appropriate, taste; for frozen or deep-frozen products, inspection shall be carried out after thawing of the products.

In addition, the veterinarian shall, whenever he deemed necessary, require any additional examinations to be carried out to verify compliance with Community or national legislation governing imports of or trade in these products."

The "vertical Directive" relevant to the present case is Directive 91/493.

Free movement of goods

14. It will be convenient to interpose here an argument that played some considerable part in the submissions of Seahawk in the court below, but perhaps less so before us. It is, however, of importance in putting the dispute into a general Community context.

15. Seahawk drew attention in its Grounds to the common rules for imports into the Community that are contained in Regulation (EC) 3285/94, and emphasised two aspects of them. First, that quantitative restrictions on imports are forbidden. Second, that although by article 24 of the Regulation member states are permitted to introduce measures on grounds of protection of public health, by Article 25.2 that liberty is not available to them where, as in the case of fishery products, Community legislation has provided a complete code to regulate hygienic control of the type of imports in question. I am content to assume for the purposes of the present appeal that these two contentions are correct, though I would not necessarily go as far as did the judge in paragraph 7 of his judgment in describing some further implications that were thought to follow from them.

16. What is, however, clear is that the "right to import" asserted by Seahawk must be subject at least to the *Community* requirements as to public health. That is not in issue in this appeal. What is contested is that the Community provisions relied on by the Health Authority did not authorise the action that it took. It is therefore time to return to the Notice and the complaints made about it.

The Health Authority's decision

17. In issuing the Notice, the Health Authority must have been acting under the powers conferred on it by Annex C to Decision 93/13 (see paragraph 13 above). No other power has been suggested within the obligations to respect Community rules referred to in paragraph 15 above, while at the same time it is not suggested that the Health Authority had no power to intervene at all.

18. It will be recalled from the terms of the Notice set out in paragraph 4 above that the Health Authority rejected the shrimps on the ground that the health requirements of Directive 91/493 (see paragraphs 11 and 12 above) had not been satisfied "in that" the aerobic colony counts in the condemned product exceeded the standard specified in Decision 93/51/EEC. The "aerobic colony counts" so referred to are the tests to be found in paragraph 3 of the Annex to Decision 93/51/EEC, set out at the end of paragraph 12 above. Seahawk's short point is that the terms of the Decision make it clear that the paragraph 3 criteria are indeed only guidelines, intended to help manufacturers in deciding whether they need to review their manufacturing procedures. It was simply not open to the Health Authority to act on them, it would seem at all; and certainly not open to it to act on the guidelines in order to refuse the goods entry on health grounds.

19. Expert evidence about the process of testing was given by Ms Melody Greenwood,

who is Director of the Southampton General Hospital Public Health Laboratory. She has 29 years experience in public health microbiology and, amongst many other important qualifications and appointments, is Chairwoman of the BSI committee on food microbiology. In paragraphs 6–10 of her evidence she said of the instant consignment, and of raised levels of aerobic bacteria:

> "In my view the raised counts for mesophilic aerobic bacteria indicate general poor hygiene at the plant or undercooking and thus indicate an increased likelihood of pathogens being present in product from that plant. ICMSF statistics indicate that when examining five samples from a batch for salmonella, there is for example a 33% probability (at the 95% confidence level) of accepting the batch when 20% of the batch is contaminated with salmonella.
>
> It is, therefore, valid and indeed desirable to examine for other indicator organisms which are not themselves pathogens in making an assessment of microbiological quality and safety. It would not be feasible to test specifically for every possible pathogen, and for statistical reasons pathogens present within a batch could well be missed. Therefore a raised count of indicator organisms is valuable in providing a warning of increased risks of pathogens within the batch. Our risk assessment based on these results indicates a greater risk associated with these batches than with most other batches received for importation …
>
> It would appear that the manufacturers are not applying, or properly implementing, an 'own checks' due diligence system. If they are, they are failing to remedy the problem of elevated mesophilic aerobic bacteria counts. Alternatively, there has been some temperature abuse during transport that has allowed an increase in levels. Therefore, my conclusion is that the elevated counts indicate that the manufacturer's plant and/or systems for ensuring the continuing fitness of the product during transportation is not operating satisfactorily.
>
> If the elevated counts are as a result of inadequate time/temperature combinations for cooking this indicates an increased risk of the likelihood of pathogens being present, for example, *Vibrio parahaemolyticus* , which is not sought when we examine against the standards set out in the Decision. If the elevated counts are due to poor hygiene at the processing stage the possibility of cross-contamination from raw to cooked product arises. If the manufacturers are performing their own checks and complying with their obligations under the relevant Directive why are these levels higher than expected?"

20. That evidence was unchallenged. It may be noted that early in the proceedings Seahawk did file a statement contesting the observations of Ms Greenwood, but Mr Thompson very properly told us that he did not feel able to rely on that evidence. The Health Authority confirmed that it had relied on Ms Greenwood's conclusions as to poor hygiene controls and an increased likelihood of the presence of pathogens in reaching its decision to reject the shrimps.

21. Some further important evidence was given by Mrs Sandra Westacott, a Principal Environmental Health Officer employed by the Health Authority who has appropriate qualifications and many years experience in food safety matters. She described the further considerations that the Health Authority brought to bear on deciding what action it should take in the face of a raised aerobic colony count, and said in particular of goods of the nature involved in this case:

> "The product is a cooked seafood which is likely to be subject to no further cooking and therefore the potential for bacteriological development following defrosting is significant with a risk for considerable proliferation of micro-organisms before consumption"

I have no doubt at all that the Community legislators had similar considerations in mind when they imposed the stringent requirements as to the cooking and handling of crustacean products that are set out in paragraph 12 above. The Community health inspector is therefore justified in being particularly alert for, and concerned about, signs that that regime is not being obeyed.

The Judge's conclusion

22. The judge rejected, effectively as *ultra vires* , the way in which the Health Authority had proceeded. He said in paragraphs 19–20 of his judgment:

> On analysis the defendant's position does not rest upon the fact that the aerobic colony counts on some samples exceeded the standard specified in Decision 93/51/EEC. It has rejected the whole consignment because it maintains that there may have been non-compliance with the processing requirements or there may have been a failure to carry out the "own checks" procedures or may have been a failure to implement the results of the "own checks" procedures. It does not, because the evidence would not permit it, state that there has been non-compliance with any particular requirement, nor is it able to state whether the results indicate a particular failure as opposed to indicating one or more of a number of possible failures. It cannot justify its action in rejecting the shrimp by pointing to the existence of an express power to reject in the given circumstances. Indeed, the established given circumstances fall within a contingency, which is deliberately excluded from a circumstance of rejection and for which a consequence is expressly provided (see heading 3 Decision 93/1/EC).
>
> In my judgment where a competent authority is satisfied that there has been a failure on the part of manufacturer/processor to carry out own checks procedures or to implement results or to process hygienically, a breach of condition will arise justifying measures being taken to prevent the product being marketed for human consumption. Proof of such a breach of condition will give rise to a risk to public health or suggest the existence of such a risk. A purposive reading of the provisions demonstrates that a rejection of a product is grounded in the risk it presents to public health. The insufficiency of the defendant's present position is that no risk or suggestion of risk to public health can be made out. The highest case that can be put is that action has been taken which is considered necessary in connection with public health considerations, as is necessary "to minimize the risk to public health" or is necessary to prevent the continuation of lax practices by a processor, such being considered necessary on the ground that there are indicators that one or other of the needs exist."

23. I am not able to agree with the judge that a necessary condition of any action against particular goods is that they must be shown to constitute an actual risk to public health. So to hold is inconsistent with the structure of regulation 25(1), referred to in paragraph 8 above. It is also inconsistent with the general methods of protecting public health that are referred to later in that paragraph. Further, it is impossible to understand why there are, for instance, the elaborate rules set out in the Annex to Directive 91/493 if the whole issue for a public health inspector collapses into the actual hazard presented by any particular goods.

24. I have not overlooked that it was Mr Thompson's argument that because of the provisions of Regulation 3285/94 (see paragraph 15 above) it was not open to the Health Authority to introduce what might be termed its own health criteria, based on actual danger to public health, over and above the conditions laid down in the Community legislation. I revert below to whether that is what has been done in this case. But the

argument is irrelevant to the point that attracted the judge, because he held, not that the health authority could *not* rely on an independent assessment of actual danger to public health; but that the authority could *only* act when such a danger was demonstrated.

25. I am therefore not able to agree with the judge's reasons for quashing the Notice. There are, however, other objections raised to the Notice and to the Health Authority's procedures, with which I must now deal.

Other objections

26. The basic objection raised by Seahawk was that it simply was not open to the Health Authority to rely on aerobic counts of the type referred to in paragraph 3 of the Annex to Decision 93/51/EEC, without more, in order to reject the shrimps. As the Decision made clear, those counts were not authorised by it as a basis for prohibiting goods to be put on the market; rather, they were simply guidelines for manufacturers, who had a perfect right in Community law to market product emanating from factories that the counts suggested might require further review from the point of view of hygiene. By relying on this criterion for rejection, the Health Authority had impermissibly introduced its own, national, test for admission to the EU, in place of the tests laid down by the Community legislation.

27. I would immediately reject the latter complaint. Whatever else the Health Authority did, it always purported to be acting under the requirements of Community legislation, and there has been no attempt to challenge its evidence to that effect. More to the point is whether under that Community legislation the Health Authority had the *vires* to do what it did.

28. Not merely the Health Authority's powers but also its duties are set out in Annex C to Decision 93/13 (see paragraph 13 above). We were shown nothing to suggest that the Health Authority might not, under paragraph 5 of that Annex, require a broad range of checks or examinations to verify compliance with the Community conditions. It was argued by Seahawk that such checks can only be carried out if the "organoleptic" (visual) checks envisaged by paragraph 4 are unsatisfactory. That does not follow from the construction of the Annex; and in any event such a provision could only be laid down by very clear wording in the case of frozen product such as the cooked shrimps, where visual inspection is almost certain to be a waste of time, but the product has been identified in Community legislation as requiring special attention from the point of view of public health (see paragraph 12 above). Nor can it be correct, as Seahawk further argued, that paragraph 5 checks can only be carried out to see if the goods are fit for human consumption. That is precisely what paragraph 5 does not say: quite apart from the general objections to that view that are set out in paragraph 23 above.

29. The expert evidence in this case (see paragraph 19 above) indicates how the checks used by the Health Authority in this case illuminate the possibility of breaches of the requirements set out in Directive 91/493. That was the reason why the Health Authority undertook the checks, and in my view it plainly had *vires* to do so. Indeed, if Seahawk are right, a Health Authority could never reject a consignment on the basis of its aerobic bacteria count, however gross were the breaches of Community regulations that the count indicated.

30. There are, however, a number of arguments against that view that I must address.

The right to import

31. I have already touched on this general argument in paragraphs 15–16 above. Whilst the conditional nature of this right was properly acknowledged, it appeared to be suggested before us that there should be a presumption in favour of that right, which was not to be ousted save by clear and direct provisions, and in clear cases. For my part, I do not think that it is profitable, in the absence of any sort of guidance from Communi-

ty legislation, to search for a priority between two fundamental interests of the Community: free trade on the one hand, and the protection of consumer health and safety on the other. The aspirations of articles 152 and 153 of the EC treaty are sufficient demonstration of the importance of the latter values. And it cannot be wrong for a border health authority to have in mind that it is responsible not merely for the safety of the 52 million consumers in the United Kingdom, but also, because of the operation of the internal market, for that of 600 million consumers throughout the Community.

32. The appropriate course, therefore, is to approach the issues and the legislation without preconception as to what Community goals are to prevail when basic interests conflict.

Proportionality

33. Seahawk argued that even if, contrary to their main case, it had been open to the Health Authority to take action on the basis of the aerobic bacteria counts, the reaction of outright rejection was disproportionate. The most that was proper was either an insistence on further tests, to see if any of the pathogens or toxins listed in paragraphs 1 and 2 of the Annex to Decision 93/51 were in fact present; or further enquiry of the producers in Vietnam, to see if Community hygiene rules were in fact being observed.

34. While in some cases it will be possible for a court to reach a conclusion on an issue of proportionality on the basis of commonsense and its own understanding of the process of government and administration, I doubt whether it will often be wise for a court to undertake that task in a case involving technical or professional decision-making without the benefit of evidence as to normal practices and the practicability of the suggested alternatives. That caution is reinforced by reference to the authority relied on by Seahawk in support of a proportionality approach in this case, the speech of Lord Steyn in R(Daly) v Home Secretary [2001] 2 AC 532 , at paragraph 27. Lord Steyn said, in comparing a proportionality approach with the traditional " *Wednesbury* " review, that:

> "the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions … the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relevant weight accorded to interests and considerations"

35. It is difficult to see how, in a case involving decision-making on a technical issue, the court can pursue either of those enquiries, and in particular the first of them, without the benefit of technical evidence. The only evidence in this case, that of Ms Greenwood, was that it was not feasible to test specifically for every possible pathogen, and that in any event pathogens existing within a particular batch might be missed. It is clear, though Ms Greenwood did not say so in terms, that such an operation would be an unjustified strain on public resources, when, in Ms Greenwood's view, sufficient evidence for condemning the batch had already been obtained. It would no doubt have been open to Seahawk, as a participant in the industry, to produce a contradictory view, if such were available. As it is, I find it impossible to make a finding of lack of proportionality that would entail the rejection of the only expert evidence in the case.

36. As to further enquiries in Vietnam, I doubt whether that suggestion was really pursued, but I have no hesitation in saying that the Health Authority would have been fully justified in declining to follow that course had it in fact been proposed in the course of their, lengthy, discussions with Seahawk before the consignment was condemned.

The Vietnamese certificates

37. Commission Decision 99/813/EEC, referred to in the Notice, provides for the

inspection of establishments in Vietnam, and the certification in respect of each consignment that it comes from premises that meet Community health standards. The consignments condemned in this case came with such a certificate. Seahawk argued that it was not open to the Health Authority to reject those goods without demonstrating faults in the certificate, or at least without making further investigations in relation to conditions in Vietnam.

38. To some extent this is a further aspect of the proportionality argument, since it was not argued, and could not have been, that the certificates were conclusive. The possible course of further enquiries in Vietnam was only lightly touched on, and the more that it was explored the more disproportionate it appeared. And, quite apart from that, I do not see that the Health Authority could have any other reaction than to say, as it does, that the tests reveal a sufficiently strong reason for thinking that something may have gone wrong to justify action that, on the face of the certificates alone, would not be called for. If the border authority cannot take such a view, it is difficult to see why border checks are provided for at all in cases where there is a process of certification in the country of origin.

Inconsistency

39. Seahawk presented three separate consignments. Only two of them failed the aerobic bacteria test, and only those were condemned. Seahawk said that since the test was relied on for what it suggested about conditions at the factory, and not as in itself showing the goods to be unfit, all three consignments should have been condemned. That the third consignment was not condemned demonstrated that the test was not in fact being used as an indicator, but, wrongly, as a test of actual unfitness.

40. The answer to this complaint was given by Mr Howe QC. The Health Authority simply had no knowledge of the detailed arrangements at the factory, and of whether the different consignments had been produced in different places or by different methods and standards. The only reasonable course was to limit the condemnation to those consignments that did demonstrate an unsatisfactory level of bacteria. That reply seems to me to be conclusive. If Seahawk had wished to reinforce this point, it could of course have produced evidence from its supplier of his detailed practices: which might or might not have met Mr Howe's objection.

Uncertainty

41. In paragraph 21 of his judgment the Judge expressed concern that the if the Health Authority were right uncertainty would be produced. The same microbiological test would, under paragraph 3 of the Annex to Decision 93/51, permit the manufacturer to market the product, but also permit the Health Authority to ban the product. While it is true that failure of the paragraph 3 test does not prevent the manufacturer from marketing the goods actually tested, he must appreciate that he does so at his peril: because he has been warned that he needs to review the operation of the plant from which the goods have come. The *requirements* of Decision 93/51 cannot be read as creating a *licence* to market the goods irrespective of any later public health intervention.

The form of the Notice

42. The Notice states that the ground for rejection is failure to meet the levels of aerobic counts specified in Decision 93/51. It was objected that that misrepresented the real reason for rejection, as demonstrated in the evidence, which was not just a count above the Decision levels, but rather that that count caused the concern explained by Ms Greenwood. I see some force in that objection. I do not, however, think that it is a reason for quashing the Notice, and much less for quashing the decision that it reports. Particularly in matters touching public health, the court should look at the substance,

and not at the form. And, in any event, the quashing of the decision on those grounds would leave the Health Authority free to retake the decision and to reissue a Notice that avoided the present objection.

Reference to the European Court of Justice [ECJ]

43. Neither party sought a reference before the judge, or in their written submissions to this court. In the course of argument, however, Mr Thompson indicated that he would prefer a reference to be made than that the appeal should simply be allowed; and after argument had closed he submitted a list of questions that, he argued, would have to be submitted to the ECJ before the appeal could be determined in any manner other than by its dismissal.

44. I do not consider that an answer to any of these questions is necessary to enable this court to give judgment on the appeal, nor would it be reasonable or proportionate for this court, out of caution, to trouble the ECJ with them. I hope it will not be thought discourteous if I do not set out the questions, which are lengthy, in full, but rather indicate the substance of them, and why I do not seek assistance in respect of them.

45. The first two questions raised issues as to the power of the national authority to impose "national" requirements going beyond those envisaged in the Community legislation. That issue does not arise since, as made clear in paragraph 27 above, neither the Health Authority nor this court proceeds on any basis other than that provided by the Community legislation. The third question sought guidance as to whether, under Annex C to Decision 93/13, microbiological checks are only permitted when organoleptic checks are unsatisfactory. For the reasons given in paragraph 28 above, that point is unarguable in the case of a product such as that here in issue. The fourth question sought guidance as to whether a Health Authority could draw inferences as to breaches of Directive 91/493 from the results of checks falling under the Annex to Decision 93/51. Such a question would of course be unduly narrow, since it should properly ask what is the width of the discretion conferred on the Health Authority when performing its Community law duties under Annex C to Decision 93/13. As again indicated in the preceding judgment, I see no reason to limit the Health Authority's duties in the way argued. Finally, it was sought to submit to the ECJ a very elaborate enquiry as to whether the Health Authority had in this case acted within the principles of legal certainty and proportionality, by reference to the elements in the case relied on by Seahawk and set out in this judgment. The form of this question seemed to me to come dangerously close to asking the ECJ not to interpret principles of Community law, but to apply them to the facts of this case: see Case C-98/94 [1995] ECR I-2559[22] (Schmidt) . However, it would not be appropriate in any event to refer this matter to the ECJ because, for the reasons given in paragraphs 34–35 and 41 above, issues as to proportionality and certainty do not arise on the facts and evidence in this case.

Conclusion

46. I would allow this appeal and restore the decision of the Health Authority.

Lord Justice Longmore:

I agree.

Lord Justice Mummery:

I also agree.

Order: The order we make is in the terms of the draft minute: (1) This appeal is allowed and the order of Newman J of 5th April 2001 set aside; (2) the application for judicial review of the respondent's decision of 5th October 2000 is dismissed; (3) the appellant shall pay the respondent's costs of this appeal and the application of judicial review below, including any costs relating to the issue of damages, such costs to be subject to detailed assessment if not agreed; (4) application for permission to appeal to the House of Lords refused