

Case Name: *National Farmers' Union of England And Wales, R (On the Application Of) v Welsh Ministers* [2022] EWHC 611 (Admin) (23 March 2022)

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Commentary: This was a claim for judicial review of the legality of regulations made by the Defendant known as the Water Resources (Control of Agricultural Pollution) (Wales) Regulations 2021 ("the Regulations"). Sir Wyn Williams sitting as a Judge of the High Court dismissed the claim for judicial review. The Regulations, which came into force on 1 April 2021 consequently remain in place in their current form.

It is useful to know a brief background to the Regulations in question. In December 1991, the European Council issued Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources ("the Nitrates Directive"). In 2013 the Defendant made the Nitrate Pollution Prevention (Wales) Regulations 2013 (as amended in 2015) under a derogation by the European Commission. When the UK left the EU, the derogation described expired on 31 December 2016. In September 2016, the Welsh Government published a consultation document into nitrate pollution ("the Nitrates Review"). The Regulations which consequently came into force in 2021 does not contain the derogation and the entirety of Wales is effectively deemed a Nitrate Vulnerable Zone, introducing closed periods for slurry spreading during the autumn.

The Claimant put forward four discrete grounds of challenge, in addition to seeking a Quashing Order and relief if the Court identified any errors of law (Issues 5 and 6):

- Ground 1: Legitimate expectation;
- Ground 2 and 3: Wednesbury unreasonableness; and
- Ground 4: Well-being and the Welsh language.

Ground 1 was dismissed by the Judge on the basis that the written representations made by or on behalf of the Defendant were not "clear and unambiguous statements devoid of any qualification". Therefore, it was not found that there was a substantive legitimate expectation that the Regulations would contain a derogation. In coming to this conclusion, the Judge acknowledged that the words relied on were included in documents which formed part of a consultation process. He distinguished words and documents included in a consultation process on the basis that the purpose of consultation is to seek views upon proposals which might change.

Ground 2 was originally argued by the Claimant that the basis for making the decision to introduce the Regulations was unreasonable because the Minister for the Environment, Energy and Rural Affairs relied on "purported factual material which, on analysis was based on a view of the evidence that could not be reasonably entertained". However, at the hearing the ground of challenge hinged on the factual accuracy of stating that "at

least 50% of farms [were] not compliant with” the Water Resources (Control of Pollution) (Silage and Slurry) (Wales) Regulations 2010. The Judge found that the Minister believed upon proper grounds that the statement was factually accurate, even though in actuality the legal advice given to her in good faith erroneously led her to give an inaccurate factual statement. The Claimant was also unable to make out that the statement had been a material factor in leading the Defendant to the conclusion that the Regulations should be made before the Senedd. Claim 2 was therefore dismissed.

The Claimant alleged in Ground 3 that it was unlawful, inconsistent with the Environment (Wales) Act 2016 and Wednesbury unreasonable to 1) fail to take account of all relevant evidence, and 2) to take account of irrelevant evidence before taking a final decision to introduce the Regulations. Despite the breadth and detail of points raised by the Claimant under the umbrella of Ground 3, the Judge found the arguments to be merits-based arguments upon which it could not be found that the Defendant had acted unlawfully.

Finally, Ground 4 alleged that the Defendant did not take account either the well-being or the promotion of the Welsh Language, citing the obligations the Welsh Government has under sections 3 and 4 of the Well-Being of Future Generation (Wales) Act 2015. This Ground 4 was also dismissed. Issues 5 and 6 concerning the application for an amendment to the prayer for relief were also refused, with the Judge finding no illegality on the part of the Defendant.

Case summary prepared by Amy Carter