Cases, Updates & Materials

Case Comment: *Centraal Israëlitisch Consistorie van België and Others*

Introduction

Championed as necessary to reduce animal suffering by their defenders and denounced as discriminatory restrictions on religious liberty by their opponents; there are few issues as contentious in animal welfare law as non-stun slaughter bans. Recently the European Court of Justice (ECJ) has adjudicated this delicate matter, concluding that Member States can mandate blanket pre-stunning requirements for all slaughter without contravening EU law.

1. The Facts

In 2017 the Flemish regional Parliament in Belgium issued a decree prohibiting all slaughter of animals without prior stunning. Before the decree came into effect, religious slaughter was exempted from the general requirement of pre-stunning due to the beliefs of observant Jews and many Muslims that the consumption of pre-stunned meat is incompatible with their religious beliefs. To strike a balance between protecting animal welfare and religious freedom, the decree permits the use of reversible, non-lethal stunning for religious slaughter.

Several Jewish and Muslim associations brought proceedings before Belgium's Constitutional Court, seeking to get the Flemish decree annulled on the ground that, **inter alia**, it infringes parts of EU Council Regulation on the protection of animals at the time of killing ('the Regulation').[1] According to article 4(1) of the Regulation, 'animals shall only be killed after stunning'. However, article 4(4) creates a derogation from this obligation for 'particular methods of slaughter prescribed by religious rites'. Article 26(2)(c) permits Member States to adopt more extensive protection of animals than those mandated by the Regulation, including in relation to religious slaughter.

The applicants argued that article 4(4) would be rendered meaningless if Member States could rely on article 26(2)(c) to mandate pre-stunning for all slaughter practices. Conversely, the intervening Flemish and Walloon Governments argued that article 26(2)(c) empowers Member States to depart from Article 4(4).

Belgium's Constitutional Court decided to stay the proceedings and refer three questions to the ECJ for a preliminary ruling:

> (1) Does article 26(2)(c) of the Regulation permit Member States to prohibit non-stun slaughter in the way that the Flemish decree did?
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> (2) If the answer to (1) is 'yes', does article 26(2)(c) infringe the right to manifest religious beliefs under article 10(1) of the EU Charter of Fundamental Freedoms ('The Charter')?
>
> (3) If the answer to (1) is 'yes', does article 26(2)(c) infringe the principles of equality, non-discrimination and religious diversity, guaranteed in Articles 20, 21 and 22 of the Charter respectively?

2. The Ruling

(a) Does Article 26(2)(c) permit non-stun slaughter bans?

On the first question, the ECJ affirmed that article 26(2)(c) does permit non-stun slaughter bans such as the Flemish decree. In arriving at this decision, the ECJ notes that the general require-

1 Council Regulation (EC) NO 1099/2009, L 303/1.

ment for pre-stunning contained in article 4(1) is based on scientific evidence that this technique least compromises animal welfare at the time of killing (para.41). Prior stunning therefore satisfies 'the primary objective' of the regulation, which is the promotion of animal welfare (para.42). The derogation authorised by article 4(4) functions 'solely in order to ensure observance of freedom of religion' (para.43).

The article 4(4) derogation is understood by the court in light of recital 15 of the Regulation which stresses the need to respect Member States' 'legislative or administrative provisions' and 'customs… relating, in particular, to religious rites, cultural traditions and regional heritage' in their formulation and implementation of EU policies. Furthermore, recital 18 states that 'it is important that derogation from stunning animals prior to slaughter should be maintained, leaving, however, a certain level of subsidiarity to each Member State'. Finally, Article 26(2)(c) permits Member States to adopt more extensive protections for animals in 'slaughtering and related operations'. Related operations are defined under article 2(b) as including 'stunning' (paras.44-46).

Reading these provisions as a whole, and in light of Article 13 of the Treaty on the Functioning of the EU and article 10(1) of the Charter, the ECJ held that article 26(2)(c) grants a certain level of subsidiarity to Member States to determine how they transpose the Regulation into domestic law. In other words, the Regulation does not dictate how Member States should balance competing considerations of animal welfare and religious freedom, it merely provides a framework in which Member States can achieve a reconciliation between these two values (para.47). The imposition of a total ban on non-stun slaughter is within the permissible range of options under the Regulation, provided that it respects the fundamental rights enshrined in the Charter. It is that issue we turn to next.

(b) Does Article 26(2)(c) Infringe Freedom to Manifest Religion?

In finding that the Flemish regional government in Belgium had not breached EU law by man-

dating reversable pre-stunning for religious slaughter, the Court then addressed the issue of whether the Regulation – and article 26(2)(c) in particular – infringes article 10(1) of the Charter by permitting such bans.

The Court acknowledged that prohibitions on non-stun slaughter do entail a limitation on the exercise of religious freedom (para.55). It next considered whether this limitation is permitted under the Charter. For a limitation on a Charter right to be permitted, it must satisfy four requirements. First, it must be provided by law. Second, the restriction must respect the essence of the right being limited. The Court found that the essence of freedom of religion is respected by non-stun slaughter bans because such bans only limit one aspect of the specific ritual act of slaughter – i.e. the non-stunning component - and not ritual slaughter altogether. Third, the limitation of the right must genuinely meet an objective of general interest. The Court found that non-stun slaughter bans, such as the Flemish decree, exist to protect animal welfare, a general interest recognised by the European Union (paras.60-63).

Fourth, limitations on rights must satisfy the principle of proportionality. This requires that the limitation on the right is appropriate, necessary to attain the objective, the least onerous interference with the right and that the disadvantage to the rights holders is not disproportionate to the aims pursued. The court stated that the scientific evidence shows that prior stunning is the optimal means of reducing animal suffering at the time of killing, meaning a requirement for pre-stunning is an appropriate and necessary means to achieve the objective and no lessor measure could have achieved the objective as well (paras.64-74).

Turning last to the issue of whether the disadvantages caused by the limitation were proportionate the aim of protecting animal welfare, the Court made three points. First, it noted the Flemish decree requires a reversible method of stunning for religious slaughter, ensuring both that the stun does not kill the animal, to address religious concerns, whilst also protecting animal welfare (paras.75-76). Second, they noted, drawing on the jurisprudence of the EHCR, that the Charter is a 'living instrument' which must be interpreted in the light of present-day conditions. Animal welfare has been attached increasing importance for a number of years. In the light of this change, animal welfare may be taken into account to a greater extent in the context of ritual slaughter (para.77). Finally, non-stun slaughter bans such as the Flemish one do not prevent Muslims and Jews residing there from consuming imported meat that has been slaughtered in accordance with their religious requirements (para.78). Taking these factors into account, the court concluded that measures such as the Flemish decree allow 'a fair balance to be struck between the importance attached to animal welfare and the freedom of Jewish and Muslim believers to manifest their religion' (para.80).

Accordingly, article 26(2)(c) does not infringe article 10(1) of the Charter by virtue of it permitting non-stun slaughter bans such as the one in Belgium.

(c) Does Article 26(2)(c) infringe the principles of equality, non-discrimination and cultural, religious and linguistic diversity in the Charter?

The last issue the court considered was whether article 26(2)(c) was compatible with the rights to equality, non-discrimination and cultural, religious and linguistic diversity in the EU Charter. The issue raised by the referring court was that the Regulation provides only a conditional exception for religious slaughter from the requirements of prior stunning whilst it excludes the killing of animals during hunting, recreational fishing, and sporting and cultural events from its scope entirely.

The Court held that this is not unlawful discrimination. The purpose of the Regulation is to lay down rules for the killing of animals bred or kept for food or clothing. Hunting, recreational fishing and cultural or sporting events either don't involve breeding or keeping animals for food or clothing or only marginally do, which justifies the Regulation treating them differently (paras.82-95).

3. Comment

The Regulation has been in effect for over a decade. In that period there has been considerable divergence in how Member States have trans-

posed it into domestic law, with most derogating from the requirement to pre-stun animals for religious slaughter, but a sizeable minority either prohibiting or limiting non-stun slaughter.[2] We now have a ruling that affirms that non-stun slaughter bans are compatible with the Regulation and do not necessarily contravene the Charter.

On the compatibility of non-stun slaughter bans with the Regulation, the ECJ offers a plausible construction of an ambiguous set of norms. It arrived at the opposite conclusion from Advocate General (AG) Hogan in his earlier advisory opinion, which held that such a construal of article 26(2)(c) would undermine the entire rationale of the derogation in article 4(4), i.e. to ensure freedom of religion.[3] Instead, AG Hogan opined, article 26(2)(c) should be read as permitting Member States in introduce stricter controls on religious non-stun slaughter, for example requiring the presence of a qualified veterinarian at all times during the slaughter.[4] The AG's interpretation of the Regulation is equally valid. However, given the Regulation's underdetermination on the permissibility of religious slaughter bans, the Court's decision to afford Member States a fairly wide margin of appreciation in achieving the balance between animal welfare and religious freedom is the better view, especially given the lack of consensus on the subject amongst Member States.

In respect of the ruling that non-stun slaughter bans can be compatible with religious freedom, the Court took a middle path between two earlier approaches. The first was that of the European Court of Human Rights (ECtHR), which concluded in 2000 that denying individuals the ability to certify and practice religious slaughter did not interfere with the freedom to manifest religious beliefs under the European Convention.[5] The second was that of the Polish Constitutional Court, which ruled in 2014 that the domestic non-stun slaughter ban was contrary to the constitutional guarantee of freedom of religion and Article 9 of the European Convention.[6] In between these two positions, the ECJ ruled that non-stun slaughter bans do limit religious rights, but do not necessarily infringe them, a view that this author has defended elsewhere.[7]

From an animal welfare perspective, the case is significant not only for affirming the permissibility of non-stun slaughter bans under EU law, but also for holding that animal welfare can justify placing limits on fundamental human rights. Also of note, the ECJ recognises that the increased importance afforded to animal welfare in recent years means it is now easier to justify restrictions on human rights on animal welfare grounds than in the past. Whilst this is symbolically significant, the immediate impact of the judgement is more questionable, as individuals living in the Flemish region can still import non-stunned meat from other jurisdictions (and indeed are not permitted, per article 26(4) of the Regulation, to restrict such imports from other EU countries).

The ruling will also undoubtedly raise alarm bells for sections of the Muslim and Jewish communities for whom non-stun slaughter bans feel like an attack on their way of life and an unfair singling out of minority groups.[8] This is the third case concerning non-stun slaughter that has been heard before the ECJ in as many years.[9] It is hard to shake off the worry that much of the political fixation with non-stun slaughter in Europe might be motivated by things other than animal welfare concerns, especially given the magnitude of other forms of animal suffering within the EU.[10]

2 See Law Library of Congress, 'Legal Restrictions on Religious Slaughter in Europe' (2018) https://www.loc.gov/law/help/religious-slaughter/religious-slaughter-europe.pdf.

3 Opinion of Advocate General Hogan on **Centraal Israëlitisch Consistorie van België and Others**, Case C-336/19, para.75.

4 ibid, para.69.

5 **Cha'are Shalom Ve Tsedek v France** Application No. 27417/95.

6 Judgment of 10 Dec. 2014, Ref. No. K52/13.

7 Joe Wills, 'The Legal Regulation of Non-stun Slaughter: Balancing Religious Freedom, Non-discrimination and Animal Welfare' (2020) 41 Liverpool Law Review 145.

8 See e.g. James Mendesohn, 'A Looming Threat? A Survey of Anti-Shechita Agitation in Contemporary Britain' (2020) 3(2) Journal of Contemporary Antisemitism 39.

9 **Liga van Moskeeën en Islamitsche Organisaties Provincie Antwerpen VZW and Others v Vlaams Gewest**, Case C-426/16 (all non-stun slaughter must take place in a slaughterhouse); **Œuvre d'assistance aux bêtes d'abattoirs (OABA) v Ministre de l'Agriculture et de l'Alimentation, Bionoor, Ecocert France, Institut national de l'origine et de la qualité** Case C-497/17 (denying the possibility of placing the EU Organic logo on products derived from non-stun slaughter).

10 See e.g. 'EU revealed to be world's biggest live animal exporter' (**The Guardian**, 27 January 2021) https://www.theguardian.com/environment/2021/jan/27/eu-revealed-to-be-worlds-biggest-live-animal-exporter; 'Cattle stranded at sea for two months are likely dead or 'suffering hell' (**The Guard-**

Compounding this concern, both the ECtHR and the ECJ have in recent years upheld policies that have disproportionately adversely affected Muslims and other religious minorities, for example, prohibitions on religious dress at work and in the public sphere.[11] It is understandable that some will regard the ECJ's permissive stance towards non-stun slaughter bans as just one further example of Europe's human rights regime not taking religious discrimination seriously. This highlights a challenging terrain for animal lawyers who situate animal protection within a broader framework of social justice.[12]

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ian, 24 February 2021) https://www.theguardian.com/environment/2021/feb/24/cattle-stranded-at-sea-for-two-months-are-likely-dead-or-suffering-hell?CMP=share_btn_tw.

11 See e.g. **S.A.S v France**, Application no. 43824/11; **Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV** Case C-157/15; **Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA** Case C-188/15.

12 Joe Wills, 'The Troubling Case of Non-Stun Slaughter: A Comment on the Opinion of Advocate General Hogan in **Centraal Israëlitisch Consistorie van België and Others**. (**UK Centre for Animal Law**, 18 September, 2020) https://www.alaw.org.uk/2020/09/the-troubling-case-of-non-stun-slaughter-a-comment-on-the-opinion-of-advocate-general-hogan-in-centraal-israelitisch-consistorie-van-belgie-and-others/

Case Comment: *Lubrizol and others v European Chemicals Agency*

Facts

These were 14 joined appeals brought by companies manufacturing chemicals known as ZDDP, which are used in hydraulic fluids.

The European Chemicals Agency (ECHA) is the principal regulator of chemical safety in the European Union under Regulation (EC) No 1907/2006 (known as 'REACH'). Under REACH, companies wishing to manufacture in or import into the EU chemicals ('substances') in quantities over one tonne a year have to register them with ECHA.

They must provide a significant amount of data relating to the potentially hazardous nature of the substances. The precise nature of the data depends on the tonnage at which a substance is marketed in the EU (there are bands between one and 10 tones, 10 and 100 tonnes, 100 and 1000 tonnes and over 1000 tonnes). At Annex IX and X levels, registrants have to make a testing proposal if they wish to use animals. That applied here. ECHA can run a compliance check at all tonnages.

Many of the 'endpoints', as they are called, involve animal tests. However, there is a key principle under REACH that animal tests must only be carried out as a last resort and registrants have a duty to provide equivalent data via non-animal approaches (or approaches which involve fewer animals or less suffering than the stipulated test).

One of these approaches is known as read-across: where the registered substance has a similar chemical structure to another substance and is expected to have a similar toxicological profile, one can read across data from the other substance to the registered substance and thereby avoid having to carry out another animal test. Animal protection organisations believe that ECHA places the similarity bar too high.

The animal tests in the present appeal were (i) a subchronic toxicity study (90 days) in rats; and