Neutral Citation Number: [2018] EWCA 909 (Crim)

Case No: T201702458 B3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
AN APPEAL UNDER PART 1 OF THE CRIMINAL APPEAL ACT 1968
ON APPEAL FROM DERBY CROWN COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 April 2018

Before:

LORD JUSTICE LEGGATT
MRS JUSTICE MCGOWAN DBE
and
SIR PETER OPENSHAW

- -

Between:

	M NAJIB & SONS LIMITED	**Appellant/Defendant**
	- and –	
	CROWN PROSECUTION SERVICE	**Respondent/ Prosecutor**

- -
- -

Mr Stephen Hockman QC and Mr David Hercock (instructed by **SAS Daniels LLP**) for the **Appellant**
Mr Richard Wright QC and Mr Howard Shaw (instructed by the **Crown Prosecution Service**) for the **Respondent**

Hearing date: 19 April 2018

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Judgment Approved

Lord Justice Leggatt (giving the judgment of the court):

1. The appellant company operates a slaughterhouse and cutting plant for sheep. It appeals against its conviction of an offence under regulation 17(1) of the Transmissible Spongiform Encephalopathies (England) Regulations 2010 (SI 2010/801) of failing to give an inspector assistance required to take samples.

Background

2. The European Parliament and Council of the European Union have enacted a regulation which lays down rules for the prevention, control and eradication of certain transmissible spongiform encephalopathies (TSEs). The full title of the regulation is Regulation (EC) No 999/2001 of the European Parliament and of the Council of 22 May 2001, but we will refer to it for short as the "EU TSE Regulation". TSEs are a group of infectious

diseases which affect the nervous system (including the brain) of many animals. The best known of these diseases is bovine spongiform encephalopathy (or BSE), popularly known as "mad cow disease", which occurs in cattle; but there are other TSEs, such as scrapie, which affect sheep.

3. The EU TSE Regulation imposes obligations on member states which include, at article 6, an obligation on each member state to "carry out an annual monitoring programme for TSEs based on active and passive surveillance in accordance with Annex III". Annex III, Chapter A, Part II, deals with monitoring in "ovine and caprine animals" – better known as sheep and goats – and contains certain rules to which we will return.

4. It is matter for each member state to make such provision in its own national law as is necessary to comply with and enforce the EU TSE Regulation. In the UK, statutory regulations have been made for this purpose. Those applicable in England are the Transmissible Spongiform Encephalopathies (England) Regulations 2010, which we will refer to simply as "the Regulations".

5. Regulation 12(1) of the Regulations gives the Secretary of State the power to appoint inspectors "for the purposes of enforcing these Regulations". Regulation 14 confers on inspectors various powers, which include at (1)(f) a power to "take any samples". Regulation 17(b) provides that a person is guilty of an offence if that person:

> "without reasonable cause, fails to give to an inspector acting under these Regulations any assistance or information or to provide any facilities that the inspector may reasonably require that person to give or provide for the performance of the inspector's functions under these Regulations;"

Pursuant to regulation 18, a person convicted of such an offence on indictment is liable to a fine or to imprisonment to a term not exceeding two years (or both).

6. It is of such an offence that the appellant company was convicted on indictment at Derby Crown Court on 5 May 2017. The particulars of the offence charged were that between 25 September 2014 and 29 January 2016 the company, without reasonable cause, failed to give an inspector the assistance that he required in order to take samples. The company was prosecuted by the Crown Prosecution Service, on behalf of the Department of the Environment, Food and Rural Affairs (DEFRA), the government department responsible for enforcing the Regulations.

DEFRA's TSE monitoring programme

7. DEFRA conducts a monitoring programme for TSEs in sheep each year which involves taking samples from the brain tissue of between 5,000 and 10,000 healthy animals aged over 18 months when they are slaughtered for human consumption and testing the samples for TSEs. The approach taken by DEFRA has been to obtain and analyse data recording the number of sheep slaughtered each month and to identify those slaughterhouses which had the highest throughputs in the previous calendar year. Subject to ensuring that the monitoring programme includes at least one plant in Wales

and one in Scotland, only slaughterhouses which had throughputs above a certain level are required to provide samples for testing. In 2014, the cut-off point was 39,000 animals; the slaughterhouses with throughputs above this cut-off point accounted for over 80% of the total number of sheep slaughtered in Great Britain for human consumption in the previous year.

8. The appellant company was first selected to provide samples for testing in 2004 and participated in DEFRA's TSE monitoring programme every year thereafter until 2014. From May 2014 onwards, however, the company refused to make samples available for testing. Its objections were based on what it claims was the excessive financial burden of compliance and the fact that, in its view, this burden is not spread fairly amongst slaughterhouses because samples are only required from those with the highest throughputs. In addition, the company has complained about the time taken for test results to be returned. Until a sample has been tested and a negative result obtained, the animal from which the sample was taken cannot be sent to market and this delay is said to have caused loss to the appellant's business because the weight of the carcass reduces with time, as does its shelf-life, making it less valuable. In a witness statement made for the purpose of the Crown Court proceedings the appellant's General Plant Manager has estimated that the weekly loss sustained by the company when it carries out TSE sampling is £472.50 a week, which equates to over £24,500 a year. This estimate assumes that the test results are returned in time to send the carcass to market on the day after slaughter. On occasions when test results are not returned in time to achieve this, the loss is greater.

The Crown Court proceedings

9. When the prosecution was brought, the company sought a preliminary ruling on certain legal issues. In particular, it argued that the facts alleged did not amount to an offence within the scope of the Regulations; that the way in which DEFRA had sought to implement its TSE monitoring programme for sheep was unlawful; and that the relevant inspector did not have authority under the terms of his appointment to require the company to participate in the programme. On 12 January 2017 His Honour Judge Egbuna gave a detailed written ruling in which he rejected the company's arguments. Following that decision, the company pleaded guilty to the charge. In doing so, it submitted a written plea which stated that the company expressly reserved the right to seek permission from the Court of Appeal to appeal against conviction and the judge's legal ruling. When the guilty plea was entered on 5 May 2017, the judge asked for it to be noted that he did not agree with the written plea. He observed that the company was not, as a consequence of his ruling, prevented from advancing a defence before the jury because there was a potential defence that the company had "reasonable cause" to act as it did which could have been aired before the jury.

10. When sentence was passed on 22 May 2017, the company was fined £7,000 and ordered to pay prosecution costs in a sum of £5,770.75.

11. The company applied for permission to appeal against its conviction. Permission was refused by the single judge but was granted when the application was renewed orally before the full court.

The plea of guilty

12. The single judge considered that the company had no right to appeal against its conviction because it had pleaded guilty to the offence. At the hearing of the appeal the respondent did not seek to support that view; but, as this was the main basis on which permission to appeal was initially refused, we will explain why we are satisfied that the company's guilty plea is not a bar to an appeal.

13. In *R v Asiedu* [2015] EWCA Crim 714, at para 19, Lord Hughes (giving the judgment of this court) referred to the general rule that, once a defendant has admitted facts which constitute the offence charged by an unambiguous and deliberately intended plea of guilty, there cannot then be an appeal against his conviction. Lord Hughes explained that this is:

> "for the simple reason that there is nothing unsafe about a conviction based on the defendant's own voluntary confession in open court. A defendant will not normally be permitted in this court to say that he has changed his mind and now wishes to deny what he has previously thus admitted in the Crown Court."

Lord Hughes went on to say (at para 20) that it does not follow that a plea of guilty is always a bar to the quashing of a conviction. Leaving aside equivocal or unintended pleas, he identified two principal cases in which it is not. He explained that the first is:

> "where the plea of guilty was compelled as a matter of law by an adverse ruling by the trial judge which left no arguable defence to be put before the jury. So, if the judge rules as a matter of law that on the defendant's own case, that is on agreed or assumed facts, the offence has been committed, there is no arguable defence which the defendant can put before the jury. In that situation he can plead guilty and challenge the adverse ruling by appeal to this court. If the ruling is adjudged to have been wrong, the conviction is likely to be quashed. Contrast the situation where an adverse ruling at the trial (for example as to the admissibility of evidence) renders the defence being advanced more difficult, perhaps dramatically so. There, the ruling does not leave the defendant no case to advance to the jury. He remains able, despite the evidence against him, to advance his defence and, if convicted, to challenge the judicial ruling as to admissibility by way of appeal. If he chooses to plead guilty, he will be admitting the facts which constitute the offence and it will be too late to mount an appeal to this court."

14. Lord Hughes derived that distinction from *R v Chalkley* [1998] QB 848, where defendants charged with conspiracy to rob argued that certain evidence relied on by the prosecution should be excluded under section 78 of the Police and Criminal Evidence Act 1984. When the judge rejected that application, they pleaded guilty and explicitly admitted the conspiracy which was charged. The Court of Appeal held that the defendants' appeals against their convictions failed because, in circumstances where they intended to admit and had admitted their guilt, their convictions were safe. Auld LJ said

(at p864):

> "Thus, a conviction would be unsafe where the effect of an incorrect ruling of law on admitted facts was to leave an accused with no legal escape from a verdict of guilty on those facts. But a conviction would not normally be unsafe where an accused is influenced to change his plea to guilty because he recognises that, as a result of a ruling to admit strong evidence against him, his case on the facts is hopeless. A change of plea to guilty in such circumstances would normally be regarded as an acknowledgment of the truth of the facts constituting the offence charged."

15. The second situation identified by Lord Hughes in the *Asiedu* case (at para 21) in which a plea of guilty will not prevent an appeal is where, even if on the admitted or assumed facts the defendant was guilty, there was a legal obstacle to his being tried for the offence. Lord Hughes said that this will be true in those rare cases where the prosecution would be stayed on the grounds that it is offensive to justice to bring the defendant to trial. We think it clear that the present case is not a case of this kind, and therefore leave this second category to one side.

16. In refusing permission to appeal, the single judge took the view that this case also does not come within the first category referred to by Lord Hughes. That was because in the Crown Court the judge's preliminary ruling on the law still left it open to the company to defend the case before the jury on the basis that it had reasonable cause for failing to give the inspector the assistance he required in order to take samples. Hence the company was not compelled as a matter of law by the judge's adverse ruling to plead guilty. There was still an arguable defence which the company could advance.

17. In their skeleton argument counsel for the appellant company suggested that, given the judge's ruling, arguing a "reasonable cause" defence before the jury was not legally possible. They submitted that, once the judge rejected the company's complaints about the way in which DEFRA implemented its monitoring programme and ruled that its approach was lawful, the company could not realistically rely on the same complaints to argue that it had reasonable cause not to assist the inspector. We do not accept this argument. Whether the request for assistance was unlawful is a different question from whether the company had reasonable cause to withhold assistance. The former question was one of law for the judge and the latter question would have been treated as one of fact for the jury. It is clear that the company was not compelled by the rejection of its legal arguments to abandon the attempt to persuade a jury that it had reasonable cause for failing to give assistance required by the inspector. It chose to do so.

18. This is not, however, a case of the same kind as *Chalkley* where the defendant, after unsuccessfully attempting to keep out evidence, admitted facts which – whether the judge's ruling was right or wrong – constituted the offence charged. By tendering its guilty plea, the company admitted the facts alleged by the prosecution – that is, that without reasonable cause it failed to give an inspector the assistance that he required in order to take samples. But it expressly reserved the right to contend on appeal that, as a matter of law, those facts did not give rise to an offence. We can see no good reason why a defendant should not be allowed to follow such a course. It would hardly be in

the public interest to require a defendant to contest at a trial facts which he is willing to admit, just so as to preserve the ability to appeal on a point of law which arises whether or not those facts are admitted. In the *Asiedu* case the Court of Appeal expressly recognised that, if the judge rules that as a matter of law, on facts agreed by the defendant, the offence charged has been committed, the defendant can plead guilty and challenge the adverse ruling by appeal. If the company in this case had admitted the absence of reasonable cause before the judge ruled on its legal arguments, this case would have fallen squarely within that category. It cannot make a difference in principle that the admission was made after the judge's ruling was given.

19. The Court of Appeal in the *Asiedu* case was not directly concerned with a case of the present kind but, in our view, the situation in this case is analogous to the first situation referred to by Lord Hughes and similar reasoning applies. This is not a case in which an appellant is now, by challenging the conviction, by implication seeking to deny facts which have previously been admitted. The appellant is seeking only to argue that, on facts which it has admitted (once and for all), it is not as a matter of law guilty of the offence. If that argument is correct, the conviction is unsafe. The short point is that a conviction is unsafe if the facts admitted by the defendant do not in law amount to a criminal offence.

20. Turning then to the substantive grounds of appeal, these track the arguments which were rejected in the court below.

Is there an obligation to assist an inspector in taking samples?

21. The appellant first contends that, under the Regulations, there was no legal obligation on the company to make samples available for testing when requested by an inspector to do so as part of DEFRA's annual TSE monitoring programme for sheep and that, in these circumstances, failure to give an inspector such assistance is not within the scope of regulation 17(b) and does not constitute an offence in law.

22. Regulation 17(b), quoted earlier, applies only when the inspector who requires the assistance is "acting under these Regulations" and where the assistance is required for "the performance of the inspector's functions under these Regulations". What are the functions of an inspector under the Regulations? That question is answered by regulation 12, which identifies the purposes for which inspectors may be appointed as "the purposes of enforcing these Regulations". It follows that a request for assistance made by an inspector only falls within regulation 17(b) if the request is made for the purpose of enforcing the Regulations.

23. In their skeleton argument for this appeal counsel for the respondent sought to resist this conclusion by submitting that, in regulation 12(1), the words "the Secretary of State … may appoint inspectors for the purposes of enforcing these Regulations" mean that the Secretary of State may appoint inspectors for the purposes of enforcing the Regulations and the EU TSE Regulation. Similarly, they argued that in regulation 17(b) the phrase "an inspector acting under these Regulations" means an inspector acting under the Regulations and the EU TSE Regulation.

24. In his oral submissions on behalf of the respondent Mr Wright QC did not seek to sustain this argument. He was wise not to do so, as it is obviously unsustainable. The phrase "these Regulations", where it is used in any provision of the Regulations, can only reasonably be understood to refer to the Regulations in which the provision appears. Those are not the EU TSE Regulation, which is a different instrument. If confirmation is needed for that plain meaning, it is provided by regulation 1 which states:

> "These Regulations—
>
> (a) may be cited as the Transmissible Spongiform Encephalopathies (England) Regulations 2010;
>
> (b) apply in England; and
>
> (c) come into force on 6th April 2010."

In addition, regulation 2 (headed "Interpretation") begins with the words "In these Regulations" and then sets out a series of definitions. One of those definitions is:

> "'EU TSE Regulation' means Regulation (EC) No 999/2001 of the European Parliament and of the Council laying down rules for the prevention, control and eradication of certain transmissible spongiform encephalopathies…"

Regulation 2(2) states:

> "Expressions that are not defined in these Regulations and occur in the EU TSE Regulation have the same meaning in these Regulations as they have for the purposes of the EU TSE Regulation."

Regulation 6(1) states:

> "The Secretary of State must grant an approval, authorisation, licence or registration under these Regulations if the Secretary of State is satisfied that the provisions of the EU TSE Regulation and these Regulations will be complied with."

25. All these (and other) provisions show very clearly that the phrase "these Regulations", where it appears in the instrument, refers to the national Regulations in which the phrase appears and does not refer to Regulation (EC) No 999/2001 of the European Parliament and of the Council, for which the separate expression "EU TSE Regulation" is used. In those circumstances it is impossible to read the references in regulations 12(1) and 17(b) to "these Regulations" as encompassing the EU TSE Regulation.

26. Given that the only purposes for which inspectors may be appointed are the purposes of enforcing the Regulations, the next question is: what provision of the Regulations was the inspector enforcing in this case when he required the assistance of the appellant in order to take samples for TSE testing? The appellant submits that the answer to that question is none. That is because, when one looks in Schedule 2 to the Regulations which contains provisions for TSE monitoring, there is no provision which it can be

said, even arguably, that an inspector is enforcing when requiring assistance from the occupier of a slaughterhouse in taking samples for testing as part of DEFRA's TSE monitoring programme for sheep slaughtered for human consumption.

27. Most of Schedule 2 is concerned with bovine animals. The schedule contains a number of provisions regulating the slaughter, sampling and testing for TSEs of such animals. These include, at paragraph 8, an obligation on the occupier of a slaughterhouse in which a bovine animal is slaughtered for human consumption to take a sample from the animal's brain stem for testing and arrange for the sample to be delivered to an approved testing laboratory. But there is no equivalent provision in relation to sheep. The only provision of Schedule 2 which says anything about monitoring for TSEs in sheep is paragraph 14. Paragraph 14(1) states:

> "In relation to any sheep or goats selected for sampling, the occupier of a slaughterhouse … must –
>
> (a) for the purposes of point 7(3) of Part II of Chapter A of Annex III to the EU TSE Regulation, retain the carcass and all parts of the body (including the blood and the hide) pending receipt of the test result…; and
>
> (b) in the event of a positive result, immediately dispose of the carcass and all parts of the body (including the blood and the hide) in accordance with point 7(4) of that Part."

That obligation only applies, however, where a particular animal has been selected for sampling and a sample taken. It does not apply to the earlier stage at which in this case the inspector was seeking assistance from the appellant.

28. In the Crown Court, the judge nevertheless held that the Regulations impose an obligation on a slaughterhouse operator to "comply with monitoring". The nub of the judge's reasoning is contained paragraphs 60 and 61 of his ruling, where he said that:

> "the [Regulations] contemplate and enact that a monitoring programme should be in place in respect to ovine animals. To give effect to the intention of Parliament as illustrated in the explanatory notes and Schedule 2 of the [Regulations] an obligation is created on a slaughterhouse operator to comply with the [Regulations]. If an obligation did not exist and the [Regulations] were limited to investigation and non-compliance it would run contrary to the intention of Parliament and the EU TSE Regulation. If the submissions advanced by the defence were correct the administration of the [Regulations] in respect of monitoring would be effectively otiose as any slaughterhouse operator could withdraw from sampling, which in my view would defeat the intention of Parliament.
>
> I conclude that the legislative words used confer on an inspector … the authority to obtain samples from a slaughterhouse. Furthermore, as set out within the Regulations and explanatory notes, a slaughterhouse operator who fails to comply with the

> taking of samples, which I consider on an analysis of the Regulations includes obligations on a slaughterhouse operator to comply with monitoring, is committing an offence under regulation 17."

29. Nowhere in this passage, or elsewhere in the ruling, however, does the judge identify any specific provision of the Regulations which imposes the obligation on a slaughterhouse operator which he claims to discern from an analysis of the Regulations to comply with monitoring and the taking of samples. That is evidently because there is no such provision.

30. The judge referred to the explanatory note to the Regulations, which includes a statement that Schedule 2, paragraph 14, "provides for TSE sampling in sheep, goats and deer". However, the explanatory note expressly states that it is "not part of the Regulations". It has no legal force itself and at most could be used as an aid to interpret any language in Schedule 2, paragraph 14, which is ambiguous. It cannot be used to read into paragraph 14 a provision which is not actually to be found there. The judge also referred in general terms to Schedule 2, but the only reference in Schedule 2 to TSE monitoring of sheep is in paragraph 14 which (as just discussed) does not contain a relevant obligation. It is in these circumstances not sufficient to say that, if there were no obligation to comply with monitoring, any slaughterhouse operator could withdraw from sampling, which would defeat the intention of Parliament. It seems likely that the failure to include in the Regulations any provision which imposes such an obligation is an oversight on the part of the Secretary of State. But only the legislature has the power to repair that omission. It is not permissible for courts to fill gaps in legislation by creating obligations which do not otherwise exist.

31. In his well-focused oral submissions on behalf of the respondent, Mr Wright QC accepted that the Regulations do not impose a positive obligation on the occupier of a slaughterhouse to take a sample or arrange for a sample to be taken for TSE testing from the brain stem of any sheep slaughtered for human consumption. But he submitted that there is nevertheless a negative obligation not to obstruct or fail to assist an inspector who wishes to take such samples. Mr Wright took as his starting-point regulation 13(1), which gives inspectors a right to enter any premises "for the purpose of ensuring that these Regulations and the EU TSE Regulation are being complied with". He submitted that, in view of the reference here to the EU TSE Regulation, the purposes for which an inspector is empowered by this provision to enter premises must include the purpose of ensuring compliance with the obligation imposed on the UK by the EU TSE Regulation to carry out an annual monitoring programme for TSEs in sheep slaughtered for human consumption. Mr Wright argued that an inspector who has entered premises for this purpose must then be entitled to exercise the power given to inspectors by regulation 14(1)(f) to "take any samples". If then the occupier of the premises, without reasonable cause, fails to give to the inspector any assistance that the inspector has reasonably required the occupier to give for that purpose, the occupier is guilty of an offence under regulation 17(b).

32. In response to this argument, Mr Hockman QC submitted that, on the proper interpretation of regulation 13(1), the only purpose for which the right to enter premises may be exercised by an inspector is that of ensuring that the Regulations and the EU TSE Regulation are being complied with by the occupier of the premises. As the EU

TSE Regulation does not impose any obligation directly on the occupier of any slaughterhouse, but only imposes obligations on member states, it is only for the purpose of ensuring that the national Regulations are being complied with that the right of entry can in practice be exercised. It seems to us that the use of the words "are being complied with" (our emphasis) supports this interpretation. These words suggest that the purpose for which the right of entry is exercised cannot be that of ensuring that the UK complies with any obligation imposed on the UK and can only be the purpose of ensuring that one or more obligations contained in the Regulations or the EU TSE Regulation are already being complied with by somebody else. It is true that on this interpretation the reference to the EU TSE Regulation is otiose. But that must be the case in any event since, pursuant to regulation 12, the only purposes for which inspectors may be appointed are the purposes of enforcing the Regulations and it is only therefore for such purposes that inspectors may exercise the power of entry given to them in regulation 13.

33. Furthermore, even if regulation 13(1) can be construed in the way contended for by the respondent, this does not overcome the problem for the respondent's case that the powers conferred on inspectors by regulation 14, which include the power to take any samples, can only be exercised for the purposes for which the inspector is appointed – that is to say, the purposes of enforcing the Regulations. Nor does it overcome the fundamental problem that it is only an offence under regulation 17(b) to fail to give assistance to an inspector where the inspector is "acting under these Regulations" and the assistance is required "for the performance of the inspector's functions under the Regulations". True it is that the Regulations include regulation 13(1), which in turn refers to the EU TSE Regulation. But regulation 13(1) only gives an inspector a right to enter premises. It does not create an obligation which an inspector is enforcing when he or she requests assistance from the occupier of a slaughterhouse with the taking of samples. An inspector who requests such assistance is not asking to be provided with samples for the purpose of enforcing a right of entry to any premises. The purpose of the request is to obtain samples to test whether the sheep from which the samples were taken were infected with a TSE. Regulation 13 does not impose any obligation on the occupier of a slaughterhouse to assist with the taking of samples for the purpose of such testing. Nor for that matter does the EU TSE Regulation which, as discussed, only imposes obligations on member states and not on individual operators.

34. As there is no provision of the Regulations which an inspector can be said to be enforcing when requiring the occupier of a slaughterhouse to assist in the taking of samples for testing, it is not an offence for the occupier to fail to provide such assistance.

35. We would add that it is a salutary principle of the law of this country, and an important one, that a person is not to be prosecuted or exposed to criminal penalties except on clear legal authority: see e.g. *Dorset County Council v House* [2010] EWCA Crim 2270; [2011] 1 WLR 727; Bennion on Statutory Interpretation (6th Edn, 2013) Part XVII, s271. A corollary of that principle is that statutory provisions which create criminal offences should be strictly construed: see e.g. *Tuck & Sons v Priester* (1887) 19 QBD 629, 649; *R v Allen* [1985] AC 1029, 1034; *Bogdanic v Secretary of State for the Home Department* [2014] EWHC 2872 (QB), paras 47-48. In this case, however, the appellant has no need to invoke that principle. In our view, the language of the Regulations is simply not capable of being interpreted as imposing an obligation on a slaughterhouse operator to comply with a request from an inspector to assist in the taking of samples from sheep slaughtered for human consumption as part of a programme for TSE

monitoring. It follows that the facts relied on by the prosecution and admitted by the appellant do not constitute a criminal offence.

The inspectors' powers

36. The company's first ground of appeal therefore succeeds. It is closely connected with the third ground of appeal, which in our view is also well-founded. The argument pursued by that ground is that the inspector in this case had no power to require the appellant to provide assistance in taking samples from sheep slaughtered for human consumption. That follows from the conclusion already reached. As discussed, the only purposes for which inspectors may be appointed under regulation 12 are the purposes of enforcing the Regulations. As the Regulations make no provision for any sampling or monitoring for TSEs of sheep slaughtered for human consumption, enforcing compliance with a monitoring programme is outside the functions which inspectors may be appointed to perform.

37. A further and separate point was taken by the appellant regarding the terms of appointment of inspectors. The relevant appointment letter, which was dated 22 April 2013 and signed on behalf of the Secretary of State, said:

> "Pursuant to regulation 12(1) of the Regulations, the persons in Annex A and Annex B are appointed as inspectors for the purposes of enforcement of the Regulations, in particular Schedule 2 thereof.
>
> The persons in Annex A are authorised, on behalf of the Secretary of State (DEFRA) as follows:
>
> - To approve the Required Method of Operation ("RMOP") for, and the occupier of, a slaughterhouse on behalf of the Secretary of State (DEFRA) in accordance with paragraph 12(1) and 12(3) of Schedule 2 of the Regulations;
> - To amend and suspend an RMOP on behalf of the Secretary of State (DEFRA) as provided for in regulation 8 of the Regulations;
> - To revoke an RMOP approval for a slaughterhouse as provided for in regulation 9 of the Regulations;
> - To grant a derogation in writing as laid down in paragraph 13(5) of Schedule 2 of the Regulations.
>
> The persons in both Annex A and Annex B are authorised, on behalf of the Secretary of State (DEFRA) as follows:
>
> [Two more matters are then listed in bullet points] …"

The inspector who dealt with the appellant was one of the persons listed in Annex A but not Annex B.

38. On behalf of the appellant Mr Hockman QC submitted that the appointment letter should be read in the context of regulation 12(3), which states that the appointment of an inspector may be limited to powers and duties specified in the appointment. He argued that the natural reading of the letter is that the powers and duties of the inspectors appointed by it are limited to the particular matters specified in the bullet points in the letter. All those matters relate to bovine animals and none of them relates to any TSE monitoring or sampling of sheep. Mr Hockman further submitted that it is irrational to interpret the first paragraph of the letter as appointing inspectors to exercise all the functions for which inspectors may be appointed under the Regulations without limitation since, if that were the intention, the bullet points would have been entirely superfluous.

39. It is hard to think of any reason why DEFRA would wish to restrict the role of all the inspectors whom it appoints to dealing with a handful of particular matters, being those specified in the bullet points in the letter, rather than giving inspectors a wider mandate to enforce the Regulations generally, as regulation 12 envisages and permits. Moreover, if the intention were to restrict the role of the inspectors in that way for some reason, one would expect the letter simply to say that the inspectors are appointed for the limited purposes of exercising the powers specified in the bullet points, rather than appearing in the first paragraph to give the inspectors a general enforcement role, only then to restrict it drastically by what follows.

40. In fact, as Mr Wright QC pointed out, when consideration is given to the particular provisions of the Regulations referred to in the bullet points, it can be seen that the first paragraph of the letter and the subsequent paragraphs perform different functions and that the bullet points are not superfluous. The first paragraph appoints the persons named in Annex A and Annex B as inspectors and does so for the purposes of enforcement of the Regulations, pursuant to regulation 12. The subsequent paragraphs then give the inspectors authority which they require to act on behalf of the Secretary of State in relation to various matters. So, to take the first bullet point as an example, paragraph 12(1) and 12(3) of Schedule 2 of the Regulations provide:

> "(1) It is an offence for the occupier to use a slaughterhouse to slaughter for human consumption a bovine animal that, in accordance with point 2 of Part I of Chapter A of Annex III to the EU TSE Regulation, requires BSE testing at slaughter, unless the Secretary of State has approved the Required Method of Operation ("RMOP") for that slaughterhouse and that occupier.
>
> …
>
> (3) The Secretary of State must approve the RMOP if satisfied that all the requirements of the EU TSE Regulation and these Regulations will be complied with …"

Simply appointing an inspector for the purposes of enforcement of the Regulations would not confer on the inspector authority to approve the RMOP for a slaughterhouse, and the occupier of that slaughterhouse, on behalf of the Secretary of State; or at the very least it would be open to argument that the inspector did not have such authority if it was not expressly conferred by the appointment letter.

41. The same point applies to the authorisations given in each of the other bullet points in the letter. Each of the bullet points refers to a provision of the Regulations which requires or empowers the Secretary of State to do something – such as to grant or revoke an approval or to give or receive a notification. We agree with Mr Wright QC that, properly understood, the function of the bullet points is to give inspectors the authority which they need to act on behalf of the Secretary of State in relation to the specified matters. We accordingly reject the appellant's argument that this part of the letter limits the provisions of the Regulations which the inspectors are appointed by the opening paragraph to enforce.

42. This conclusion, however, simply brings one back to the fundamental problem that the Regulations, and in particular Schedule 2 which deals with TSE monitoring, fail to make provision for the occupier of a slaughterhouse to assist in taking samples for TSE monitoring from sheep slaughtered for human consumption.

Alleged unlawfulness of the monitoring programme

43. As we are allowing the appeal on the grounds already discussed, it is not strictly necessary for us to deal with the company's second ground of appeal. But since we have received full submissions on this issue, which could be relevant in a future case, we will indicate the reasons why we reject the argument pursued by this ground.

44. The essence of the appellant's argument is that DEFRA acted unlawfully and contrary to the EU TSE Regulation in the way that it selected slaughterhouses to provide samples for its TSE monitoring programme, with the consequence that the act of requiring the appellant company to do so was unlawful and invalid. For the purpose of this argument it must be assumed that, contrary to our earlier conclusions, the Regulations do impose an obligation on a slaughterhouse operator to assist in the taking of samples as part of a TSE monitoring programme for sheep slaughtered for human consumption.

45. As mentioned in paragraph 3 above, the obligations imposed on member states to monitor sheep for TSEs are set out in Annex III, Chapter A, Part II of the EU TSE Regulation. Point 2(a) of that part of the EU TSE Regulation states:

> "Member States in which the population of ewes and ewe lambs put to the ram exceeds 750,000 animals shall test, in accordance with the sampling rules set out in point 4, a minimum annual sample of 10,000 ovine animals slaughtered for human consumption;"

We understand that the relevant population of ewes and ewe lambs in the UK has exceeded 750,000 animals at all relevant times, so that the UK has been required to carry out testing in accordance with the sampling rules set out in point 4 of Annex III, Chapter A, Part II of the EU TSE Regulation. (A derogation at point 2(c) permits up to 50% of the minimum sample size to be replaced by testing animals killed for a purpose other than human consumption.)

46. The sampling rules set out in point 4 include the following:

> "The sample selection shall be designed with a view to avoid the over-representation of any group as regards the origin, age, breed, production type or any other characteristic.
>
> The sampling shall be representative for each region and season. Multiple sampling in the same flock shall be avoided, wherever possible. Member States shall aim their monitoring programmes to achieve, wherever possible, that in successive sampling years all officially registered holdings with more than 100 animals and where TSE cases have never been detected are subject to TSE testing."

47. There is no definition in the EU TSE Regulation of "officially registered holdings", but the term "holding" is defined in article 3(1)(i) as "any place in which animals covered by this Regulation are held, kept, bred, handled or shown to the public". This definition plainly includes any slaughterhouse, being a place in which animals covered by the Regulation are held and handled. The appellant submits that the sampling rules quoted above accordingly require the UK to aim to include in its monitoring programme in respect of sheep slaughtered for human consumption all approved slaughterhouses with a throughput of more than 100 animals a year and where TSE cases have never been detected. It is common ground that, if correct, this in practice means that all approved slaughterhouses must be included in the programme, as it is difficult to envisage a slaughterhouse with a throughput of less than 100 animals a year.

48. As described earlier, DEFRA has not sought to obtain samples for testing from all approved slaughterhouses but only from those with the highest throughputs. This resulted in 2014 and 2015 in only 14 and 15, respectively, out of a total of around 222 slaughterhouses in Great Britain being selected for testing. The appellant argues that limiting the monitoring programme in this way is contrary to the EU TSE Regulation and is also unfair because it imposes the financial burden of providing samples for testing on only a handful of operators, instead of spreading it across the entire industry. Counsel for the appellant submitted that this infringes the principle of equality which is a fundamental principle of EU law (now codified in articles 20 and 21 of the EU Charter of Fundamental Rights) by discriminating between operators without an objective justification for doing so.

49. The primary argument made by Mr Shaw, who made submissions for the respondent on this issue, is that the phrase "officially registered holdings with more than 100 animals" actually means officially registered holdings with a resident flock of more than 100 animals, i.e. farms with more than 100 sheep, and hence does not apply to slaughterhouses. In support of this contention, Mr Shaw emphasised that the relevant sampling rule does not refer to "throughput" or "animals per year" but simply to holdings "with more than 100 animals". He submitted that this wording indicates that the rule is concerned with agricultural holdings with resident flocks of more than 100 animals.

50. The respondent further maintained that DEFRA's approach to the selection of slaughterhouses for TSE testing is lawful and proportionate. It was pointed out that the

costs of taking and analysing the samples are not charged to slaughterhouse operators and that any financial impact on the operator is limited to any loss resulting from the requirement to retain carcasses until the test results are returned. Counsel for the respondent submitted that, insofar as this constitutes a burden, it is fair that it should be borne by the largest operators who (as mentioned earlier) account for more than 80% of all animals slaughtered. In addition, it was argued that DEFRA is entitled to take into account considerations of efficiency and the fact that including smaller slaughterhouses in the monitoring programme would increase the cost to the state of administering the programme.

51. For the appellant, Mr Hockman QC responded that the sampling rules set out in point 4 must be directed at slaughterhouses, as a sample can only be taken for testing once an animal is dead and all animals slaughtered for human consumption must be slaughtered at an approved slaughterhouse. Mr Hockman further submitted that the sampling rules in point 4 must be read in the light of article 6 of the EU TSE Regulation, which requires the member state to carry out an annual monitoring programme in accordance with Annex III, and the requirement in Annex III, Chapter A, Part II, point 2(a) to test a minimum annual sample. He submitted that, read in that light, the requirement in point 4 to aim to include in the monitoring programme all officially registered holdings with more than 100 animals must be interpreted as applying to all approved slaughterhouses which handle more than 100 animals during the relevant sampling year. In other words, all those slaughterhouses with a throughput of more than 100 animals in a year are within the scope of the rule.

52. Mr Hockman QC sought to argue that the phrase "holdings with more than 100 animals" where it appears in point 4 refers only to slaughterhouses at which more than 100 sheep a year are slaughtered and does not even include farms with a flock of more than 100 sheep. That argument is plainly untenable, however, given that the sampling rules in point 4 – as the heading of point 4 explicitly states – apply not only to the animals referred to in point 2 – that is to say, sheep and goats slaughtered for human consumption – but also to the animals referred to in point 3, which relates to animals not slaughtered for human consumption. For the purpose of monitoring animals not slaughtered for human consumption, it would make no sense to aim the monitoring programme at covering slaughterhouses.

53. Point 3 is in the following terms:

> "**Monitoring in ovine and caprine animals not slaughtered for human consumption**
>
> Member States shall test, in accordance with the sampling rules set out in point 4 and the minimum sample sizes indicated in Table A and Table B, ovine and caprine animals which have died or been killed, but which were not:
>
> — killed in the framework of a disease eradication campaign, or
>
> — slaughtered for human consumption."

It would be completely counter-productive, and would make no sense at all, for a member state to design its programme for TSE monitoring in animals which have died

or been killed but which were not slaughtered for human consumption so as only to cover slaughterhouses, which by definition are places where animals are slaughtered for human consumption: see the definition of a slaughterhouse in regulation 2(1) and paragraph 1(16) of Annex I to Regulation (EC) No 853/2004. Indeed, it would make no sense to aim to include any slaughterhouses in such a programme – let alone every slaughterhouse in the country with a throughput of more than 100 animals a year. By contrast, it makes obvious sense to aim the monitoring programme to cover as many farms which might be harbouring infected animals as possible, subject to an exemption for holdings where the number of animals is so small that it would be impractical or unduly burdensome to include them in the programme. That this is the intention of the sampling rules is confirmed by the fact that they include a rule which allows member states to exclude from sampling "remote areas with a low animal density, where no collection of dead animals is organised." That exclusion is clearly directed at agricultural holdings and to the taking of samples from animals which die at such holdings. The exclusion is not apt to apply to slaughterhouses, since the animal density in the area of a slaughterhouse is irrelevant to its throughput and organising the collection of dead animals from a slaughterhouse is a necessary part of its business.

54. Plainly, counsel for the appellant are correct that, for the monitoring required by point 2, the samples must be taken at slaughterhouses. But it does not follow that the requirement to aim the monitoring programme to cover all "holdings with more than 100 animals" must include slaughterhouses among those holdings. There is no reason in principle why DEFRA cannot design a programme to monitor sheep slaughtered for human consumption by taking samples at slaughterhouses from animals emanating from all farms with a resident flock of more than 100 animals. Indeed, we think it clear that this is what the sampling rules require, "wherever possible". In principle, the phrase "all officially registered holdings with more than 100 animals", where it appears in point 4, can only have a single meaning. The words cannot mean one thing when sampling is being carried out pursuant to point 3 but yet mean something different when sampling is being carried out pursuant to point 2. Since, for the reasons given, the only interpretation of the phrase which makes sense in the context of the sampling of animals not slaughtered for human consumption required by point 3 is the respondent's interpretation, the phrase must also have that meaning in the context of the sampling of animals slaughtered for human consumption required by point 2.

55. We accordingly consider that, when the sampling rules set out at point 4 are read as a whole and together with the other provisions for monitoring in ovine and caprine animals in Annex III, Chapter A, Part II of the EU TSE Regulation, it is apparent that the aim is to achieve a representative sample which covers as many flocks of sheep (and goats) as reasonably possible. Consistently with this, the interpretation which in our view makes the best sense of the phrase "holdings with more than 100 animals" is that for which the respondent contends – namely, that it refers only to agricultural holdings with a resident flock of more than 100 animals and not to slaughterhouses which have a throughput of more than 100 animals during the year.

56. Mr Hockman QC made a further submission that there is no evidence to suggest that DEFRA has designed its monitoring programme with the aim of including animals from all farms with a resident flock of more than 100 sheep. Nor, he submitted, is there any evidence to suggest that DEFRA has sought to design the sample selection with a view to ensuring that it is representative for each region and season and avoids the over-representation of any group as regards the origin, age, breed, production type or "any

other characteristic", as the sampling rules in point 4 require. Rather, the evidence indicates that (apart from ensuring that the programme includes at least one plant in Wales and one in Scotland) the only criterion used by DEFRA in designing its annual monitoring programme has been to identify slaughterhouses with a throughput above a certain level, wherever they happen to be situated, and to require them each to provide a stipulated number of samples every week.

57. We agree that the evidence served by the prosecution in this case does not show that DEFRA has designed its monitoring programme in a way which satisfies the sampling rules contained in the EU TSE Regulation. Even if the appellant is right, however, that the monitoring programme did not comply with those rules – indeed, even if (contrary to our view) the appellant is right that DEFRA should have included all slaughterhouses in the programme – we do not accept that this has the consequence that it was unlawful to require the appellant to participate.

58. Counsel for the appellant submitted that this conclusion follows from the principle established by the decision of the House of Lords in *Boddington v British Transport Police* [1999] 2 AC 143 and of this court in *R v Searby* [2003] EWCA Crim 190; [2003] 3 CMLR 15. Those cases establish that a defendant in criminal proceedings is entitled to raise in its defence a contention that subordinate legislation or an administrative act undertaken pursuant to it was unlawful and invalid, whether because the subordinate legislation is *ultra vires* (as in *Boddington*) or because it is incompatible with EU law (as in *Searby*).

59. The principle established by those cases is not in doubt. The consequence of the appellant's argument on this ground of appeal, however, is not that it was unlawful for the national authority to require the appellant to provide samples for TSE testing. On the contrary, on the appellant's case as to the meaning of the sampling rules, DEFRA was bound to require the appellant to provide samples for TSE testing. The unlawfulness alleged by the appellant consists in failing to require other, smaller slaughterhouses to provide such samples as well. Mr Hockman argued that, if DEFRA had included all slaughterhouses with a throughput of more than 100 animals a year in its monitoring programme, the appellant company would have been required to provide fewer samples. Even if that would as a matter of fact be so, however, DEFRA would not have been legally obliged to require fewer samples from the appellant: DEFRA could, for example, consistently with the EU TSE Regulation and without breaching the principle of equality, have increased the total number of samples collected from sheep slaughtered for human consumption and have required the appellant to provide the same number of samples, or even more samples, than it was in fact required to provide. In any event an argument that it would, or even that it should, have been required to provide fewer samples does not assist the appellant, since the position that the appellant took at the time was not that it was only willing to provide a smaller number of samples for TSE testing than the number requested by DEFRA but that it refused to provide any samples at all.

60. In short, the unlawfulness alleged by the appellant consists in failing to require other slaughterhouses to participate in the monitoring programme. That complaint, even if well-founded, did not make it unlawful to require the appellant to take part. We therefore reject this ground of appeal.

Conclusion

61. The refusal of the appellant company to assist DEFRA to comply with the UK's obligations under European law in respect of TSE monitoring in sheep may be lamented. But we are satisfied that the company had no legal obligation to cooperate and that its failure to do so did not constitute a criminal offence. Accordingly, for the reasons given, the appeal is allowed and the company's conviction will be quashed.