

Examiner of Statutory Rules

**Report of the
Examiner of Statutory Rules
to
the Assembly
and
the Appropriate Committees**

**23 April 2010
Report: NIA 54/09/10R**

Committee for Agriculture and Rural Development	S.R. 2010 Nos. 99, 124, 125
Committee for Education	S.R. 2010 Nos. 135, 136, 137
Committee for the Environment	S.R. 2010 Nos. 130, 131
Committee for Health, Social Services and Public Safety	S.R. 2010 Nos. 127, 148, 149
Committee for Regional Development	S.R. 2009 No. 95, 126, 128, 141
Committee for Social Development	S.R. 2010 Nos. 106, 108, 111, 118, 119, 120, 121, 122, 123, 129, 138, 144

1. In accordance with the delegations in respect of the technical scrutiny of statutory rules under Standing Order 41(4)(b) (now renumbered as Standing Order 43(4)(b)) given to the Examiner of Statutory Rules by the appropriate Committees on 11, 16, 17 and 18 May 2007, I submit my report on the statutory rules listed in the Appendix.
2. My terms of reference are essentially set out in Standing Order 43(6) (taken with the delegations under Standing Order 43(4)(b)). They are as follows:
 - “(6) In scrutinising an instrument the appropriate Committee shall inter alia consider the instrument with a view to determining and reporting on whether it requires to be drawn to the special attention of the Assembly on any of the following grounds, namely, that –
 - (a) it imposes a charge on the public revenues or prescribes the amount of any such charge;
 - (b) it contains provisions requiring any payment to be made to any Northern Ireland department or public body in respect of any approval, authorisation, licence or consent or of any service provided or to be provided by that department or body or prescribes the amount of any such payment;
 - (c) the parent legislation excludes it from challenge in the courts;
 - (d) it purports to have retrospective effect where the parent legislation confers no express authority so to provide;
 - (e) there appears to have been unjustifiable delay in the publication of it or in the laying of it before the Assembly;
 - (f) there appears to be a doubt whether it is intra vires or it appears to make some unusual or unexpected use of the powers conferred by the parent legislation;
 - (g) it calls for elucidation;
 - (h) it appears to have defects in its drafting;

or on any other ground which does not impinge on its merits or the policy behind it.”.

Statutory rules to which attention is drawn in this report

The Eggs and Chicks Regulations (Northern Ireland) 2010 (S.R. 2010/125)

3. **I draw the attention of the Committee for Agriculture and Rural Development and the Assembly to the Eggs and Chicks Regulations (Northern Ireland) 2010 (S.R. 2010/125) on the ground that Regulations, as made, fail to address a point previously made in two reports of the Examiner of Statutory Rules on the question of appeals: see Examiner of Statutory Rules, Thirteenth Report of Session 2007-2008 and Seventh Report of 2008-2009.**
4. I return to this point in this report, all the more so because it seemed that the Department had addressed the point in its consultation draft of the Regulations (July 2009) by including in regulation 22 an appeal to a magistrates’ court: this would have largely addressed my previous point about having an appeal to an independent and impartial tribunal (matching the provision for England, for Scotland and for Wales) rather than what is in the Regulations — in reality little more than an administrative review by the Department of the Department’s initial decision dressed as an appeal.
5. I mentioned this to the Department, only to be told that reference to and the appeal to a magistrates’ court in the consultative draft was “inadvertent” (which of itself must surely have some potential for raising eyebrows). I was further told that “the industry is clear that it wishes to retain the independent appeal mechanism contained in regulation 17 of SR 2008 No. 98 and regulation 22 of SR 2008 No. 125”. I was referred to the Department’s previous replies and was told that the Department had no further comments.

6. My comment, leaving on one side arguments about compatibility or otherwise with Article 6 ECHR and taking this down to general first principles of administrative law, practice and procedure (*nemo iudex in causa sua debet esse and audi alteram partem*, at the core of general natural justice administrative law principles and Article 6 ECHR, come readily to mind), is that this is not in fact an appeal in the proper sense in that it lacks full independence, since the Department is both, in most cases, the initial and the ultimate decision-maker. There is a person appointed by the Department to receive written representations from the person aggrieved by the initial decision and make a report to the Department, on which basis the Department makes its “final determination and the reasons for it”; but that is not an appeal in the proper sense. To address this point, one of two approaches commends itself: either the person appointed by the Department should have the power to make the determination on appeal (having heard, or other otherwise received, oral or written representations — exchanged between the parties so that one party can see and challenge or respond to the other’s case — on behalf the person aggrieved and on behalf of the Department); or, as in England, in Scotland and in Wales, the appeal should lie to a court in summary proceedings — in Northern Ireland terms, to a court of summary jurisdiction; the latter has the important advantage that it is an established public tribunal rather than one appointed, albeit to act independently and impartially, by the Department — “[it] is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.” per Lord Hewart CJ in *R v Sussex JJ, ex p. McCarthy* [1924] 1 KB 256.

7. **I report accordingly, and recommend that the Department of Agriculture and Rural Development revisit this aspect of the Regulations** — as it almost did (albeit inadvertently, it seems) in the consultation draft of July 2009. The Department uses the person appointed administrative review mechanism in many cases and has sought to justify some of its uses against the criteria set out in *Tsfayo v United Kingdom*. But this seems to be a case for providing a truly independent and impartial appeal mechanism alongside that in England, Scotland and Wales. This may seem to be a case of over-egging the pudding, but there are important, nay fundamental or basic, principles involved – ones that go far beyond the scope of these Regulations.

The Social Security (Claims and Payments) (Amendment) Regulations (Northern Ireland) 2010 (S.R. 2010/129)

8. **I draw the attention of the Committee Social Development and the Assembly to the Social Security (Claims and Payments) (Amendment) Regulations (Northern Ireland) 2010 (S.R. 2010/129) on the ground that Regulations were laid in breach of the 21-day rule, explained by the Department for Social Development on the basis of parity of timing with the Regulations for Great Britain.** I am satisfied that the explanation seems reasonable.

The Misuse of Drugs (Amendment) Regulations (Northern Ireland) 2010 (S.R. 2010/148)

The Misuse of Drugs Designation (Amendment) Regulations (Northern Ireland) 2010 (S.R. 2010/149)

9. **I draw the attention of the Committee for Health, Social Services and Public Safety and the Assembly to the Misuse of Drugs (Amendment) Regulations (Northern Ireland) 2010 (S.R. 2010/148) and the Misuse of Drugs Designation (Amendment) Regulations (Northern Ireland) 2010 (S.R. 2010/149) on the ground that both sets of Regulations were laid in breach of the 21-day rule, explained by the Department of Health, Social Services and Public Safety on the basis of urgency in respect of the supply of the drug commonly known as Mephedrone.** I am satisfied that the explanation seems reasonable.

W G Nabney
Examiner of Statutory Rules

23 April 2010

Appendix

(The attention of the appropriate Committees and the Assembly is drawn to those statutory rules marked in bold)

Statutory rules subject to affirmative resolution

The River Bann (Navigation) Order (Northern Ireland) 2010 (S.R. 2010/126)

The Donaghadee Harbour Order (Northern Ireland) 2010 (S.R. 2010/141)

Statutory rules requiring the approval of the Assembly (confirmatory procedure)

The Social Security Benefits Up-rating Order (Northern Ireland) 2010 (S.R. 2010/118)

The Occupational and Personal Pension Schemes (Automatic Enrolment) Regulations (Northern Ireland) 2010 (S.R. 2010/122)

The Mesothelioma Lump Sum Payments (Conditions and Amounts) (Amendment) Regulations (Northern Ireland) 2010 (S.R. 2010/138)

The Jobseeker's Allowance (Lone Parents) (Availability for Work Regulations (Northern Ireland) 2010 (S.R. 2010/144)

Statutory rules subject to negative resolution

The Cascum Road, Banbridge (Abandonment) Order (Northern Ireland) 2010 (S.R. 2010/95)

The Organic Farming (Amendment) Regulations (Northern Ireland) 2010 (S.R. 2010/99)

The Occupational Pension Schemes (Fraud Compensation Payments) (Amendment) Regulations (Northern Ireland) 2010 (S.R. 2010/106)

The Occupational and Personal Pension Schemes (Miscellaneous Amendments) Regulations (Northern Ireland) 2010 (S.R. 2010/108)

The Occupational Pension Schemes (Employer Debt and Miscellaneous Amendments) Regulations (Northern Ireland) 2010 (S.R. 2010/111)

The Social Security Benefits Up-rating Regulations (Northern Ireland) 2010 (S.R. 2010/119)

The Social Security (Industrial Injuries) (Dependency) (Permitted Earnings) Regulations (Northern Ireland) 2010 (S.R. 2010/120)

The Transfer Values (Disapplication) Regulations (Northern Ireland) 2010 (S.R. 2010/121)

The Employers' Duties (Implementation) Regulations (Northern Ireland) 2010 (S.R. 2010/123)

The Charges for Residues Surveillance Regulations (Northern Ireland) 2010 (S.R. 2010/124)

The Eggs and Chicks Regulations (Northern Ireland) 2010 (S.R. 2010/125)

The Natural Mineral Water, Spring Water and Bottled Drinking Water (Amendment) (No.2) Regulations (Northern Ireland) 2010 (S.R. 2010/127)

The Water Supply (Water Quality) (Amendment) Regulations (Northern Ireland) 2010 (S.R. 2010/128)

The Social Security (Claims and Payments) (Amendment) Regulations (Northern Ireland) 2010 (S.R. 2010/129)

The Smoke Control Areas (Authorised Fuels) (Amendment) Regulations (Northern Ireland) 2010 (S.R. 2010/130)

The Private Water Supplies (Amendment) Regulations (Northern Ireland) 2010 (S.R. 2010/131)

The Education (Levels of Progression for Key Stages 1, 2 and 3) (Transitional) Order (Northern Ireland) 2010 (S.R. 2010/135)

The Teachers' (Compensation for Redundancy and Early Retirement) Regulations (Northern Ireland) 2010 (S.R. 2010/136)

The Teachers' Pensions (Amendment) Regulations (Northern Ireland) 2010 (S.R. 2010/137)

The Misuse of Drugs (Amendment) Regulations (Northern Ireland) 2010 (S.R. 2010/148)

The Misuse of Drugs Designation (Amendment) Regulations (Northern Ireland) 2010 (S.R. 2010/149)



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