

Examiner of Statutory Rules

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

**10 May 2013
NIA 113/11-15R**

Committee for Agriculture and Rural Development	S.R. 2013 Nos. 107,117
Committee for Culture, Arts and Leisure	S.R. 2013 No.119
Committee for Employment and Learning	S.R. 2013 No. 120
Committee for the Environment	Draft S.R.: Pollution Prevention and Control (Industrial Emissions) Regulations (Northern Ireland) 2013 S.R. 2013 No. 115
Committee for Health, Social Services and Public Safety	S.R. 2013 No. 114
Committee for Justice	S.R. 2013 No. 102

1. In accordance with the delegations in respect of the technical scrutiny of statutory rules under Standing Order 43(4)(b) given to the Examiner of Statutory Rules by the appropriate Committees on 25, 26 and 31 May and 1 June 2011 for this mandate of the Assembly, 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 Goods Vehicles (Community Licences) Northern Ireland 2013 (S.R. 2013/115)

3. **I draw the attention of the Committee for the Environment and the Assembly to the Goods Vehicles (Community Licences) Regulations (Northern Ireland) Regulations (S.R. 2013/115) on the ground that, as drafted, they raise a question relating to the Convention rights and their compatibility with Article 6 ECHR. That of course raises a question as to vires by virtue of section 24 of the Northern Ireland Act 1998. At the very least, they are defectively drafted in characterising a mere administrative review (by the same authority as the original decision maker) as an appeal.**
4. Regulation 7(1) and (3) give a person aggrieved with the decision on the Department of the Environment to issue a licence a “right of appeal” to the Department of the Environment. Regulation 7(2) and (3) and 8(1) and (2) and (3) similarly provide for a “right of appeal” from other decisions of the Department of the Environment to the Department of the Environment. As a matter of first impression, that looks very odd indeed – even contrary to common sense perhaps – to say the least. (Contrast it with the position under the previous UK-wide 1992 Regulations (SI 1992/3077), where appeals in Great Britain lay to the Transport Tribunal and appeals in Northern Ireland lay to the Northern Ireland Operator and Vehicle Licensing Review Body, which, I am told was an independent panel set up to consider appeals; contrast it also with the more recent 2012 Regulations for Great Britain (SI 2011/ 258), to which these Regulations correspond, where the corresponding appeals lie to the Upper Tribunal.)

5. The first thing to say is that the “right of appeal” in regulations 7 to 9 of these Regulations is not a right of appeal at all, even if these Regulations purport to call it a right of appeal. It is rather a mere administrative review by the Department of its own decision. That is as plain as the proverbial pikestaff.

6. In correspondence with me the Department labels this at one point as “an internal review process”. Elsewhere, the Department states that:

“the main task is to establish procedural safeguards at the administrative review stage which are sufficiently fair to ensure that judicial review is an adequate and proportionate means of complying with Article 6 ECHR. It was not fatal to the review [the administrative review thinly dressed as an appeal, presumably, I observe] that the persons conducting it were not fully independent of DOE [in this case, DOE is reviewing decisions of DOE so that there is not the slightest suggestion of either independence or impartiality, I observe]. At the very least, basic procedural fairness must be followed viz a person must have the right to know the case against him and respond to it and sufficient disclosure of material facts must be made within a reasonable time to enable him to respond [audi alteram partem, I observe, but what about nemo iudex in causa sua, that other great foundation block of both the rules of natural justice in general administrative law and Article 6 ECHR?]. Article 6 does not require a particular procedural format to secure compliance with it (Re Tiernan [2003] NI 60 – Weatherup J at para 12).”.

7. With respect, I do not find this particularly cogent (and I do not think that anything in Re Tiernan particularly assists the Department here). The Department’s thinking may have become a bit garbled, and of course I have added my own annotations in square brackets. Leaving that aside, the result in regulations 7 to 9 seems to be an administrative review by the Department of the Department’s decision with the possibility of an application for judicial review (assuming there are grounds for such an application) where the aggrieved person remains aggrieved with the Department’s decision following the administrative review of the decision. I also observe, and this may be hinted at in the passage above, that the administrative review is perhaps useful to the Department in allowing itself an opportunity to put its house in order (if there is something glaringly wrong with its original decision) in advance of any application for judicial review. But it is certainly not an appeal in the proper sense. And nor for that matter is an application for judicial review.

8. The Department did point me in the direction of the right of appeal to the Upper Tribunal under section 35 of the Goods Vehicles (Licences of Operators) Act (Northern Ireland) 2010, which was a special right of appeal requiring negotiation with the Upper Tribunal and adjustments to the Tribunal’s rules of procedure. Some of the issues may be slightly different under these Regulations, but it seems that from what the Department has told me that there are issues in common.

9. I have suggested to the Department, which is undertaking further research (including, it seems, research into relevant case law) on the matters raised in our exchange on the Regulations, that it should consider amending regulations 7 and 8 to provide a proper independent and impartial appeal mechanism, perhaps expressly linking it to the right of appeal under section 35 of the Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010. In that case regulation 9 would seem to have no place and should be omitted also.

10. It seems to me that the Department should consider early amendments which would allay concerns about compatibility with Article 6 ECHR and provide for a proper (independent and impartial) right of appeal against its decisions. And looking at this in the round, against the background of the 1992 Regulations and 2012 Regulations for Great Britain, I question whether the Department would do itself any real service by clinging rigidly to what it has enacted in regulations 7 to 9, even if it were to come up with cogent and compelling arguments by way of justification for the present position.

11. **Accordingly, I draw attention to these Regulations: the purported rights of appeal as set out in regulation 7 to 9 raise questions about their compatibility with Article 6 ECHR; and they are, at the very least, defectively drafted in that they are not rights of appeal (properly so-called) in the first place.** It seems to me that early amendment of what is in regulations 7 and 9 is inevitable if the Regulations are to remain in place; and it might be better if the Department were to revoke and re-enact them with proper (independent and impartial) rights of appeal from decisions of the Department. It does not seem satisfactory in this case to place reliance on judicial review in place of a proper appeal.

W G Nabney

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Appendix

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

Draft statutory rule requiring the approval of the Assembly

Draft S.R.: The Pollution, Prevention and Control (Industrial Emissions) Regulations (Northern Ireland) 2013

Statutory rules subject to negative resolution

The Attorney General's Human Rights Guidance (Protection of Life) Order (Northern Ireland) 2013 (S.R. 2013/102)

Agriculture (Student Fees) Regulations (Northern Ireland) 2013 (S.R. 2013/107)

The Appointment of Consultants (Amendment) Regulations (Northern Ireland) 2013 (S.R. 2013/114)

The Goods Vehicles (Community Licences) Regulations (Northern Ireland) 2013 (S.R. 2013/115)

The Northern Ireland Poultry Health Assurance (Scheme) (Fees) (Amendment) Order (Northern Ireland) 2013 (S.R. 2013/117)

The Prohibition of the Sale of Rod Caught Salmon Regulations (Northern Ireland) 2013 (S.R. 2013/119)

The Student Fees (Amounts) (Amendment) Regulations (Northern Ireland) 2013 (S.R. 2013/120)



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