

THE HIGH COURT

2008 496 JR

BETWEEN

Castletown Fisheries Limited

and

Pesquera Baqueiro S.A.

Applicants

And

Minister for Transport and Marine,
 Minister for Agriculture, Fisheries and Food,
 Ireland
 and
 Attorney General

Respondents

Judgment of O'Neill J. delivered the 15th day of May, 2009.

1. Reliefs Sought

1.1 This Court (Peart J.) granted leave on the 28th April, 2008, to seek these reliefs as follows, by way of judicial review:-

1. An order of *certiorari* quashing the decision of the first named respondent contained in a letter dated the 5th November, 2007, and orally on the 16th April, 2008, that a certificate of equivalent competency issued by the competent authority within the United Kingdom of Great Britain and Northern Ireland is not within the provisions of Article 2 of the Merchant Shipping (Recognition of British Certificates of Competency) Order 1995 (S.I. No. 228 of 1995) ("the Order of 1995").
2. A declaration that a certificate of equivalent competency issued by the competent authority within the United Kingdom of Great Britain and Northern Ireland complies with the designation of "*certificates of competency...for the grant of which provision is made by the Government of the United Kingdom of Great Britain and Northern Ireland*" for the purpose of Article 2 of the Order of 1995.
3. A stay or in the alternative an interim or interlocutory injunction restraining the respondents from treating declaration that a certificate of equivalent competency issued by the competent authority within the United Kingdom of Great Britain and Northern Ireland as being outside the provisions of Article 2 of the Order of 1995.
4. Damages including aggravated and exemplary damages.
5. Damages for breach of directly applicable provisions of E.C. law.

2. Application to amend the proceedings

2.1 During the course of the hearing of these proceedings, Mr. O'Reilly S.C, for the applicant, applied to amend the proceedings, to enable the applicant to rely on regulation 10(1) (a) of the Fishing Vessels (Certification of Deck Officers and Engineers Officers) Regulations 1988 (S.I. No 289 of 1988) ("the Manning Regulations of 1988"), as an additional ground for the relief sought. He submitted that the respondents had met the substance of the claim on this ground. He relied on the principle enunciated in *Henderson v. Henderson* (1843) 3 Hare 100, followed by the Supreme Court in *A.A. v. The Medical Council* [2003] 4 I.R. 302, which is, that there was an obligation on both parties to bring all matters before the Court so that all matters in dispute can be determined by the Court. For the respondents, Ms. Barrington B.L. submitted that it was well established in judicial review proceedings that the rule in *Henderson v. Henderson* (1843) 3 Hare 100 does not obviate the need to seek leave for specific reliefs.

2.2 In the interests of doing justice between the parties and having regard to the well established principle in *Henderson v. Henderson* (1843) 3 Hare 100, I was satisfied that this application should be granted, in the knowledge that the respondents were not prejudiced, having dealt with this argument in written submissions.

3. Facts

3.1 The first named applicant is an Irish registered, Spanish owned limited liability company, engaged primarily in fishing. The second named applicant is a limited liability company incorporated in Spain and it formed the first named applicant on the 2nd November, 2004. The first named applicant is controlled by the second named applicant. The assets of the second named applicant at the commencement of these proceedings included three sea fishing vessels on the Irish register, the M.F.V. *Castletown*, the M.F.V. *Dunboy* and the M.F.V. *Dinish*.

3.2 The first named applicant employs Spanish officers, all of whom hold Spanish qualifications for the functions they perform on board vessels. These officers applied for and obtained certificates of equivalent competency from the competent authority in the U.K, pursuant to its Merchant Shipping Act 1995. These U.K. certificates of equivalent competency entitle them to skipper British sea-fishing boats against British quotas under the common fisheries policy. Article 2 of the Order of 1995 provides for the recognition of "certificates of competency", issued by the competent authority in the U.K., in this jurisdiction.

3.3 Prior to the acquisition by the second named applicant of the M.F.V. *Castletown* in May 2005 that vessel, together with the M.F.V. *Dunboy* and the M.F.V. *Dinish* (both of which were acquired by the second named applicant in June 2006), were owned by Eiranova Fisheries Limited for some twenty five years. From the time Spain became a full member of the European Community in 1986, those three vessels were manned, for the most part, by Spanish officers and crew who held Spanish qualifications. Periodic surveys were carried out by the Marine Survey Office over those years with no issue as to manning requirements being raised.

3.4 On the 21st December, 2006, the Marine Survey Office, in its report of the survey/ inspection on the M.F.V. *Castletown*, found that the vessel was not correctly manned, on the basis that the first named respondent did not recognise the holders of certificates of equivalent competency, issued by the U.K., as being ships' officers for the purpose of domestic legislation. The vessel was subsequently detained on the 18th January, 2007. The precise nature of the deficiency was outlined in the following terms in the survey/inspection report:-

"Having been given a deficiency on the 2006.12.21 Item number 20 that the MFV Castletown must be manned in accordance with S.I. 289 of 1988 the Castletown proceeded to sea on 26th December 2006 not correctly manned.

The Castletown must be manned with the required number of officers holding qualifications set out in S.I. 289 of 1988 (as amended).

Failure to be manned correctly is an offence under the Merchant Shipping Act 1979."

3.5 On the 6th February, 2007, the District Court ordered the release of the vessel without determining the relevant manning requirements. In a letter dated the 26th October, 2007, the applicants' solicitors claimed that the Spanish qualified officers who had their qualifications recognised by the U.K. and to whom certificates of equivalent competency had been issued by the U.K. authorities were entitled to rely upon the provisions of the Order of 1995. The effect of the Order, it was claimed, was to require the Irish authorities to recognise as equivalent, for the purposes of Irish law, certificates of equivalent competency granted by the U.K. authorities. By letter dated the 5th November, 2007, the Marine Survey Office advised the applicants' solicitors that a certificate of equivalent competency is not the same as a certificate of competency and that the policy of the first named respondent was in compliance with the said Order of 1995.

3.6 In January 2008, the first named applicant then made an application for the recognition of the Spanish certificates of competency of three of its crew members pursuant to the European Communities (Second General System for the Recognition of Professional Education and Training) Regulations 1996 (S.I. No. 135 of 1996), ("the Order of 1996"), colloquially referred to as the mutual recognition of qualifications regime. This application was assessed by the Marine Survey Office. In a memorandum dated the 4th April, 2008, it found that the information supplied by the three individuals was not sufficient to determine that the equivalency of the education and training received by them in Spain corresponded to that required in Ireland for the issuance of a certificate of competence for a skipper. A specific area of weakness, inter alia, identified in the memo, was their knowledge of the English language and it was noted that no evidence of knowledge of Irish legal and administrative processes had been given. As a result, their Spanish qualifications were not recognised.

3.7 At a meeting with the Marine Survey Office on the 16th April, 2008, the applicants' solicitor was informed by Captain Miley of the Marine Survey Office that the decision reached concerning certificates of equivalent competency in the letter dated the 5th November, 2007, was final. No further information was supplied in support of the applications for mutual recognition of qualifications.

3.8 Some years previously, on the 5th August, 2004 a tragedy occurred on the M.F.V. *Castletown*. A man lost his life having fallen overboard. The Marine Casualty Investigation Board carried out an inquiry into this man's death and it recommended in its report dated the 1st September, 2005, that the Manning Regulations of 1988 be strictly enforced on Irish fishing vessels. Pursuant to these regulations the Marine Survey Office requires, inter alia, all deck officers to have a sufficient knowledge of English, which is considered by it to be a vital safety issue, and also knowledge of Irish legal and administrative processes.

4. The applicants' submissions

4.1 Counsel for the applicants, Mr. O'Reilly S.C. submitted that the Order of 1995 and the Manning Regulations of 1988 must be interpreted in the light of directly applicable provisions of E.U. law and the common fisheries policy. If so interpreted, this would mean, in his submission, that a certificate of equivalent competency granted by the U.K. competent authority is to be regarded as a certificate of competency for the purposes of Article 2 of the Order of 1995 and that the Manning Regulations of 1988 would be interpreted as they once were for Eiranova Fisheries Limited. He contended that the Marine Survey Office is making it practically impossible or excessively difficult for the Spanish officers to operate in Ireland, in violation of the E.U. principles of equivalence and effectiveness. He submitted that the other relevant E.U. principles, upon which the applicants had relied for many years and which were being breached, included equality, freedom of establishment, the right to provide services, the free movement of workers and the solidarity principles in Article 5 and 10 of the Treaty Establishing the European Community (as amended). He argued that, if necessary to give effect to E.U. law, the national court must, where necessary, refrain from applying the normal national legal rules in order to secure the full effectiveness of Community law.

4.2 He highlighted the fact that the M.F.V. *Castletown* operated for a period of some twenty seven years without any objection on the part of the respondents to the manning of the ship by an almost exclusively Spanish contingent of officers and crew and he submitted that this inferred that a certificate of competency issued by Spain was treated as satisfying a standard of competency equivalent to the Irish standard under regulation 10 (1) (a) of the Manning

Regulations of 1988. He submitted that although the Minister did not formally issue a certificate equivalent to a certificate of competency, that regulation 10 (1) (a) of the Manning Regulations of 1988, addressing "*other certificates equivalent to a certificate of competency*", covers what occurred over that period, in the sense that the first named respondent can be taken to have specified that the Spanish standard of competency held by the ships officers was equivalent to the required Irish standard of competency. He submitted that such an interpretation is consistent with the principle of equality and the principle of effectiveness and he considered that the interpretation of the Manning Regulations of 1988, prior to the recent notification of the Marine Survey Office on the 21st December, 2006, was in line with Community law.

4.3 Mr. O'Reilly noted the wide interpretation given to licences, in the context of the Licensing Acts 1833 to 2008, in the case of *Attorney General (Butler) v. Sheehan* [1927] I.R. 546 where O'Sullivan P. held that a licence was an authority or permission to carry out the acts described or otherwise act in accordance with such permission. He submitted that if the ratio of that case were followed in this case, a certificate of equivalent competency issued in the U.K. would be interpreted as certifying the bearer to carry out certain functions on board a ship and that it would be the fact of certification as competent, rather than the name of the document, that rendered the document a certificate of competency. He submitted that where legislation concerns two different jurisdictions that the Court cannot attribute a different meaning in one jurisdiction to that applied in the other jurisdiction.

4.4 In addition, he contended that the practice of the Marine Survey Office over a period of some twenty seven years conferred a substantive legitimate expectation on the applicants. He argued that the conduct of the first named respondent during that period amounted to a representation on its part. He referred to the affidavit of Brendan Minihane, managing director of Eiranova Fisheries Limited, who stated that during those years that the crew and officers were in the main Spanish and that no issue as to manning or certificates of competency arose in the surveys carried out. He noted that no issues as to manning had arisen in the survey carried out on the M.F.V. *Castletown* in 2004 and he observed that it was the same inspector who raised the issue of manning in the survey of 2006. He argued that the applicants satisfied the requirements for a substantive legitimate expectation case, in E.U. law and under Irish law and he cited the case of *Power v. The Minister for Social and Family Affairs* [2007] 1 I.L.R.M. 109 in this regard.

4.5 Finally, he submitted that there is no divergence of views as between the applicants and the respondents concerning the importance of safety requirements. However, he submitted that the issue of safety was best addressed through the application of the relevant provisions of Directive 97/70/E.C., given effect to by The Fishing Vessels (Safety Provisions) Regulations 2002 (S.I.No.418 of 2002), the European Communities (Safety of Fishing Vessels) Regulations 2002 (S.I. No. 417 of 2002) and the European Communities (Safety of Fishing Vessels) (Amendment) Regulations 2003 (S.I. No. 72 of 2003) together with the Merchant Shipping (Safety of Fishing Vessels) (15-24 metres) Regulations 2007 (S.I. No. 640 of 2007)..

5. The respondents' submissions

5.1 Ms. Barrington B.L., for the respondents, submitted that the sole issue for this Court to determine is how the Order of 1995 is to be construed, in particular, whether a certificate of competency is the same as a certificate of equivalent competency? She submitted that the applicants could not point to or claim any E.U. based entitlement to sail their Irish registered vessels under their Spanish qualifications and that as a result, the Order of 1995 does not fall to be interpreted in the light of E.U. law. She noted that the title of the Order of 1995 referred to certificates of competency only and consequently, in her submission, had no application to certificates of equivalent competency. This position is reinforced in the preamble to the Order of 1995, in her submission, because the preamble makes it clear that the basis for considering that the U.K. certificates of competency should be of the same force within this State as if they had been granted by the first named respondent is the fact that the U.K. training system and the holding of examinations for the granting of certificates of competency is similar to the Irish system.

5.2 She pointed out that the applicants do not rely upon the Order of 1996 and despite the fact that applications for mutual recognition of qualifications were made by the three Spanish officers employed by the first named applicant in January 2008, these were not pursued. She submitted that if this case concerned a challenge for failure to comply with the mutual recognition directive then substantive E.U. law rights would have to be considered in the manner in which the Irish regulations were operated, but that this did not arise in these proceedings.

5.3 By way of analogy Ms. Barrington drew the attention of the Court to The Merchant Shipping (Training and Certification) (STCW Convention States) Order, 1998 (S.I. No. 555 of 1998), which deals with the recognition of merchant ship officers' foreign qualifications. She submitted that there is express provision in that Convention that there can be no "knock on" recognition, in the sense that one cannot obtain a certificate of equivalent competency from the U.K. and assert it to have the same effect as a domestic certificate of competency.

5.4 It was submitted that the applicants' case concerning regulation 10(1) (a) of the Manning Regulations of 1988 does not appear in the applicants' original statement of grounds or reliefs sought. She questioned its relevance in these proceedings in circumstances where the first named respondent had not made a finding pursuant to it. She further noted that it was not apparent that any relief in respect of legitimate expectation was sought but she accepted that there was some reference to legitimate expectation in para.14 of the statement of grounds. She complained that the applicant should not be entitled to raise these grounds, having not sought leave in respect of them. However, she submitted that if the Court was minded to permit the applicants to make a legitimate expectation claim, there was an absence of an evidential basis for it, as the necessary criteria as set out by Fennelly J. in *Glencar Explorations p.l.c.. v. Mayo County Council (No.2)* [2002] 1 I.R. 84 at p. 162 were absent. In any event, she submitted that it was open to the respondents to change their policy with regard to the enforcement of the Manning Regulations of 1988 and the doctrine of legitimate expectation does not operate to preclude public authorities from exercising their statutory functions.

5.5 Ms. Barrington further submitted that the applicants had delayed in instituting proceedings. She stated that these proceedings were issued a week inside the six month time limit and although the respondents communicated their position by letter dated the 5th November, 2007, with regard to certificates of equivalent competency, the applicants did not engage with the respondents on this point until the meeting of the 16th April, 2008. She urged this Court to adopt the approach of Kearns J. in *O'Brien v. Moriarty* [2006] 2 I.R. 221 at p.244 when he found that the requirement to move promptly under O.84 r.21 (1) of the Rules of the Superior Courts 1986 did not mean the "*outer limits of promptitude are co-terminous with the last date of any period of time specified in the rules for moving judicial review applications.*"

6. Issues

6.1 The first issue that falls to be determined is the status in this jurisdiction of a certificate of equivalent competency,

as issued by the competent U.K. authority. Does a U.K. certificate of equivalent competency come within the description of "certificates of competency" within the meaning of Article 2 of the Order of 1995? That Order must be interpreted in the light of any relevant E.U. Treaty provisions, principles and jurisprudence.

6.2 Secondly, it must be considered whether the Manning Regulations of 1988 are now being interpreted by the first named respondent in a manner contrary to E.U. principles of equality and effectiveness and whether this Court must refrain from applying the normal national legal rules in order to secure the full effectiveness of Community law, as contended for by the applicants.

6.3 Thirdly, can the fact that the M.F.V. Castletown operated for a period of some twenty seven years before any issue as to standards of competency of the officers on board was raised be taken as conferring a substantive legitimate expectation on the applicants that the Manning Regulations of 1988 would not be enforced against them in the manner now challenged in these proceedings? Are the requirements of an action for legitimate expectation, as set out in *Glencar Explorations p.l.c. v. Mayo County Council (No. 2)* [2002] 1 I.R. 84 and reiterated in *Power v. The Minister for Social and Family Affairs* [2007] 1 I.L.R.M. 109, satisfied in this case?

6.4 Fourthly, the issue of delay must be addressed.

7. Article 2 of the Merchant Shipping (Recognition of British Certificates of Competency) Order 1995 (S.I. No. 228 of 1995)

7.1 At present there is no international framework dealing with the mutual recognition of standards of training, certification and watch keeping for fishing vessels. It is for a national authority to regulate these matters. Article 2 of the Order of 1995 provides for the recognition in Ireland of certificates of competency, issued by the competent authority in the U.K. The Order of 1995 was made by the Minister for the Marine pursuant to s.7 of the Merchant Shipping Act 1947, as amended by s. 28 of the Merchant Shipping Act 1992. Article 2 states as follows:-

"2. Certificates of competency as deck officers or engineer officers on board ship or as skippers, second hands or engineer officers on board fishing boats for the grant of which provision is made by the Government of the United Kingdom of Great Britain and Northern Ireland shall be of the same force within the State as if they had been granted by the Minister under (as may be appropriate) Part II or section 414 of the Merchant Shipping Act, 1894, or section 3 or 8 of the Merchant Shipping (Certification of Seamen) Act, 1979 (No. 37 of 1979)."

7.2 There is no reference made to certificates of equivalent competency in Article 2. Indeed it is to be observed that there is no reference to such certificates in the title or throughout the remainder of the Order of 1995. Article 2 provides for the recognition of British certificates of competency in this jurisdiction. The underlying basis for this can be gleaned from the preamble which states:-

"WHEREAS the Government of the United Kingdom of Great Britain and Northern Ireland provides for the holding of examinations for the grant of certificates of competency as deck officers or engineer officers on board ship or as skippers, second hands or engineer officers on board fishing boats;

AND WHEREAS the Minister for the Marine is satisfied that the certificates so granted are granted on such principles as to show qualifications of competency which are adequate qualifications for service in Irish-registered ships or Irish-registered fishing boats, as may be appropriate:"

Therefore, it is apparent that the U.K. holds examinations for the grant of certificates of competency and the Minister for Marine is satisfied that such certificates, as granted, demonstrate sufficient proficiency to serve aboard Irish registered merchant ships or fishing boats. For these reasons they are recognised as having the same force in this jurisdiction as if they had been granted by the Minister for the Marine.

7.3 The affidavit of laws of Mr. Davey B.L. of the Quadrant Chambers sworn on the 28th April, 2008, outlines in para. 3 that the provisions of English law governing certificates of competency and certificates of equivalent competency are those contained in the Fishing Vessels (Certification of Deck Officers and Engineer Officers) Regulations 1984 (S.I. No. 115 of 1984) ("the Regulations of 1984") as amended by S.I. No. 1428 of 1995 and S.I. No. 1013 of 1998. It is to be observed that regulation 6A, which provides for the issuing of U.K. certificates of equivalent competency in respect of foreign certificates, was added on to the original Regulations of 1984 by S.I. No. 1428 of 1995 which entered into force on the 1st August, 1995. The Irish Order of 1995 is dated the 25th August, 1995. Notwithstanding the existence of regulation 6A, there is no mention of the recognition of U.K. certificates of equivalent competency in the Order of 1995. That order was concerned solely with British certificates of competency.

7.4 The means of obtaining a certificate of equivalent competency in the U.K. is set out by Mr. Davey at para. 9 of his affidavit. A holder of a certificate of competency from a specified foreign country, of which Spain is one, is entitled to a British certificate of competency if they pass an aptitude test or in the case of an EEA national choose to undergo an adaptation period. This is in contrast to the process, as described in the preamble to the Order of 1995, to obtain a British certificate of competency i.e. by way of examination in the U.K.

7.5 At para. 14 Mr. Davey considers whether there is any practical difference between a person who holds a certificate of competency vis-à-vis a certificate of equivalent competency in the U.K. and he concludes as follows:-

"Although a different procedure is involved in the grant of the two certificates, it is clear that once issued each certificate grants equal entitlements to its respective holder. Both are equally entitled to serve on United Kingdom fishing vessels and both are subject to the same statutory controls. There is no basis in law for any difference in treatment between them. Indeed, the MGN [Maritime and Coastguard Agency's Marine Guidance Note] states... that 'The CEC [certificate of equivalent competency] will carry identical rights and obligations as a CoC [certificate of competency]'. I consider that to be an accurate statement of English law."

7.6 It may be the case that a certificate of competency and a certificate of equivalent competency have the same

practical effect or enjoy the same status in the U.K. once issued. However, it does not necessarily follow that the same automatic recognition occurs in this jurisdiction. Clearly, the obtaining of certificate of competency and the certificate of equivalent competency in the U.K. is by way of two entirely different processes. Thus the fact that both have the same or similar legal status once granted is irrelevant for the purposes of recognition under Article 2 and the plain language of the Order of 1995 provides only for recognition of British certificates of competency.

7.7 I am satisfied that there is no "knock on" consequence from obtaining a U.K. certificate of equivalent competency which would entitle the holder of a U.K. certificate of equivalent competency to recognition under Article 2 of the Order of 1995. Under the S.T.C.W. Convention there is an express exclusion of such a knock on effect in the sphere of merchant shipping in the following terms:

"6. Certificates and endorsements issued by an Administration under the provisions of this regulation in recognition of, or attesting the recognition of, a certificate issued by another Party, shall not be used as the basis for further recognition by another Administration".

No doubt the rationale for such an exclusion would appear to be the prevention of the mutual recognition process being used to drag standards down to the lowest common denominator and, as such, would be an essential part of any such mutual recognition code.

7.8 Although this Convention does not apply to fishing vessels, the same rationale applies, and, in my opinion, justifies an interpretation of Article 2 which excludes recognition of the a U.K. certificate of equivalent competency. Such an interpretation, in any event, flows from the natural and ordinary meaning of the language used in Article 2.

7.9 The applicant makes the case that the non-recognition of a certificate of equivalent competency as the same as a certificate of competency fails to respect the principle of effectiveness in Community law, in that, the first named respondent is making it excessively difficult for the applicant's skippers to satisfy its requirements. This argument is unsustainable given the existence of a specific regime which provides for the mutual recognition of qualifications pursuant to Directive 92/51/EEC, under which the applicants in this case submitted applications which they did not pursue.

7.10 There is no dispute in these proceedings as to what the meaning of a certificate of competency is or as to what it entitles a holder of such a certificate to do. Thus the judgment of O'Sullivan P. in *Attorney General (Butler) v. Sheehan* [1927] I.R. 546 where the learned Judge considers the meaning of the word "licence" is not of assistance.

8. The Fishing Vessels (Certification of Deck Officers and Engineer Officers) Regulations 1988 (S.I. No. 289 of 1988), as amended by the Fishing Vessels (Certification of Deck Officers and Engineer Officers) Regulations 2000 (S.I. 192 of 2000)

8.1 The Manning Regulations of 1988 were introduced pursuant to ss.3 and 8 of the Merchant Shipping (Certification of Seamen) Act 1979. They require officers to be qualified by holding an appropriate certificate of competency. Regulation 10 (1) (a) gives the Minister power to recognise a foreign certificate of competency as equivalent to the requisite Irish standard. It states:-

"10 (1) (a) The Minister may specify that the standard of competency to be attained by officers of any description may be the standard of competence required for the issue of a certificate of competency by an authority empowered in that behalf by the laws of another country and that a certificate issued by any such authority shall be treated as evidence of the attainment of a standard of competency equivalent to the standard required for the issue of a specified class of certificate under these Regulations."

8.2 The applicant contends that the Minister for the Marine interpreted the above provision for a period of more than twenty years as accepting that Spanish certificates of competency were of an equivalent standard to the Irish certificate of competency and that this is in line with E.U. law principles. However, this proposition overlooks the fact that regulation 10 (1) (a) expressly requires that the Minister for the Marine actually "specify" that the standard of competence required for the issue of a foreign certificate of competency by the specified country shall be treated as evidence of an equivalent standard of competence required for the issue of an Irish certificate of competency. This specification has only been done in relation to the recognition of certificates of competency emanating from the U.K. and not in respect of other countries.

8.3 The evidence in this case establishes to my satisfaction that for upwards of twenty years the applicants' fishing vessels fished in the waters of this State with Spanish crews, including officers, and that no query was ever raised until 2006 concerning the qualifications of the crews or their officers. There is no doubt that these persons had only Spanish qualifications and certainly did not have Irish certificates of competence. Having regard to the fact that regulation 10(1) (a) requires an express specification by the Minister, which clearly did not happen, in my opinion, the applicants cannot now say that such a specification was, by implication, made in their favour, in circumstances where no application was ever made to the Minister for such a relief or benefit. Manifestly, it was open to the applicants or their predecessor since 1988 to have regulated their position by making such an application or applications. In my view, the status of the applicants or their crews or officers during that time is to be regarded as one in which they had the benefit of a lax application or enforcement on the part of the first named respondent of the relevant regulatory regime, a laxity which has now come to an end.

8.4 In light of the fact that it was open to the applicants to seek recognition of their Spanish qualifications under the Order of 1996, a process they commenced but did not conclude, they cannot now say that insofar as the application of the Manning Regulations of 1988 in this case is concerned, that they have any grievance in respect of the non-application of the principles of equality or effectiveness under E.U. law.

9. Legitimate Expectation

9.1 Fennelly J. in *Glencar Exploration p.l.c. v. Mayo County Council* (No. 2) [2002] 1 I.R. 84 set out the criteria to establish a legitimate expectation at pp.162-163:-

"In order to succeed in a claim based on failure of a public authority to respect legitimate expectations, it seems

to me to be necessary to establish three matters. Because of the essentially provisional nature of these remarks, I would emphasise that these propositions cannot be regarded as definitive. Firstly, the public authority must have made a statement or adopted a position amounting to a promise or representation, express or implied as to how it will act in respect of an identifiable area of its activity. I will call this the representation. Secondly, the representation must be addressed or conveyed either directly or indirectly to an identifiable person or group of persons affected actually or potentially, in such a way that it forms part of a transaction definitively entered into or a relationship between that person or group and the public authority or that the person or group has acted on the faith of the representation. Thirdly, it must be such as to create an expectation reasonably entertained by the person or group that the public authority will abide by the representation to the extent that it would be unjust to permit the public authority to resile from it. Refinements or extensions of these propositions are obviously possible. Equally, they are qualified by considerations of the public interest including the principle that freedom to exercise properly a statutory power is to be respected. However, the propositions I have endeavoured to formulate seem to me to be preconditions for the right to invoke the doctrine."

9.2 The applicant argues that as no issue as to manning was raised in the survey / inspection of the *M.F.V. Castletown* in 2004 and because no issue was ever raised as to its manning for the period when Eiranova Fisheries operated it, when it was apparent that the crew and officers were working on Spanish qualifications that the conduct of the first named respondent in acquiescing in this amounted to a representation upon which the applicants relied.

9.3 Even if it could be accepted (and I am not satisfied that it could), that the conduct of the respondents constituted a representation upon which the applicants relied, I am satisfied in this case that the doctrine of legitimate expectations cannot operate to prevent the first named respondent, a public authority, exercising his statutory powers and discharging his statutory function. This and the public interest were acknowledged by Fennelly J. in the above passage in *Glencar Exploration p.l.c. v. Mayo County Council (No.2)* as factors which defeat reliance on a legitimate expectation. Woolf M.R. in *R v. North and East Devon Health Authority, Ex parte Coughlan* [2001] Q.B. 213 noted that a change of policy could defeat a legitimate expectation in the interests of fairness.

9.4 Given, as said above, that what the applicants now put forward as the representation which is the basis of their legitimate expectation was no more than the lax application or enforcement of the relevant statutory regulation, in my opinion, no person can have an expectation legitimate or otherwise to the continuation of a lax or non-enforcement of the law. Thus, in my opinion, this state of affairs in the past could not amount to a representation that it would continue into the future and, as such, cannot be the basis of a legitimate expectation to that effect.

9.5 Given that professional standards are of crucial importance to safety on board ships, I am satisfied that the first named respondent's decision of the 5th November, 2007, was in the public interest.

10. Delay

10.1 These proceedings were instituted on the 28th April, 2008. The applicants first learned of that the first named respondent would not recognise U.K. certificates of equivalent competency on the 5th November, 2007. The applications under the mutual recognition regime were submitted in January 2008. The applicants' solicitor requested a meeting to discuss the qualifications of the crew on the 11th April, 2008, and this meeting took place five days later on the 16th April, 2008. Whilst the first named respondent indicated on the 5th November, 2007, his position on Article 2 of the Order of 1995, I am satisfied that the applicants entertained the prospect of getting the first named respondent to change his mind. In addition, probably as a fall back position the applications were made under the Order of 1996. The time limit in respect of the application for the order of certiorari expired on the 5th May, 2008. Thus, the application to this Court was brought within that time limit if one takes it that time ran from the 5th November, 2007. In my view, in light of the efforts of the applicants to address their problem by initiating the applications under the Order of 1996 and having regard to their attempts to persuade the first named respondent to a change of mind on the Article 2 question, it cannot be said that they failed to act promptly. Thus, in my opinion, these proceedings should not be shut out on the ground of delay.

Conclusion

11.1 For the reasons set out above, however, I must refuse the reliefs sought in these proceedings.